

Pajić v. Croatia: The European Court of Human Rights Continues the Incremental Trend Towards Equal Legal Recognition of Same-Sex Couples

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I. OVERVIEW

The European Court of Human Rights (ECtHR) incrementally increased the amount of legal recognition of same-sex couples by bridging the gap between rights afforded to same-sex couples and to different-sex couples, as can be seen in the noted case.¹ The applicant, Danka Pajić, a citizen of Bosnia and Herzegovina, applied for a Croatian residence permit on the grounds of family reunification in order to live with her partner, D.B., in Sisak, Croatia.² The applicant had lived in Zagreb, Croatia, for seven years and had been educated in Croatia.³ She wanted to move back to Croatia to live and start a business with D.B., who had been her partner for two years.⁴ D.B. owned a home in Sisak and both wanted to live there to eliminate the travel time it took to see each other.⁵ Upon the applicant’s initial complaint, the Sisak Police Department investigated Pajić and D.B.’s relationship and found that the

1. Pajić v. Croatia, App. No. 68453/13 Eur. Ct. H.R. paras. 64, 67, HUDOC (Feb. 23, 2016), <http://hudoc.echr.coe.int/eng?i=001-161061>.

2. *Id.* paras. 6-7.

3. *Id.* para. 7.

4. *Id.*

5. *Id.* para. 8.

two had been involved since October of 2009.⁶ They also found that the two regularly visited one another to maintain their relationship and that the applicant had resided with D.B. in D.B.'s house in Croatia from September 16, 2011, through December 4, 2011.⁷

The Sisak Police Department subsequently dismissed the applicant's request for residence because she did not fulfill the necessary requirements of the Aliens Act, which grants residence to the "immediate family members" of Croatian citizens, a definition that was limited to a spouse or partner of the opposite sex.⁸ The applicant appealed the rejection of her request to the Ministry of the Interior, pointing to the Alien Act's discriminatory definition of "immediate family member" and argued that there was no valid reason to treat couples differently based on sexual orientation.⁹ The Ministry dismissed the applicant's claim on the ground that the Same-Sex Union Act does not define a same-sex partner as a family member, and therefore excludes same-sex couples from the benefits of family reunification.¹⁰

The applicant then filed an action with the Zagreb Administrative Court, relying on domestic antidiscrimination legislation to argue that differential treatment for extramarital relationship partners based on sexual orientation is discriminatory.¹¹ The Zagreb Administrative Court dismissed the applicant's claim, holding that a same-sex union is legally equivalent to a marriage under the Aliens Act reasoning that the Aliens Act applies to immediate family members, including only heterosexual spouses or significant others according to the Family Act's definition.¹² Further, the court held that, although the Same-Sex Union Act provides some legal benefits to same-sex couples, it does not provide a valid basis for family reunification under the Aliens Act.¹³ The applicant then filed a complaint with the Constitutional Court, without meeting the requirement that an applicant exhaust her legal remedy under the Prohibition of Discrimination Act before asking the Constitutional Court to rightfully consider a case.¹⁴ The Constitutional Court dismissed her claim, upholding the reasoning of the lower courts, and holding that the applicant failed to make a claim under the Prohibition of Discrimination

6. *Id.* para. 9.

7. *Id.*

8. *Id.* paras. 10, 19-20.

9. *Id.* para. 11.

10. *Id.* para. 12.

11. *Id.* para. 13.

12. *Id.* para. 14.

13. *Id.*

14. *Id.* paras. 15-16.

Act before filing her claim in the Constitutional Court.¹⁵ Finally, the applicant filed the present complaint with the ECtHR.¹⁶ The ECtHR *held* that the Croatian courts discriminated against the applicant solely based on sexual orientation and that the Croatian government failed to justify this discrimination, amounting to a violation of Article 8 and Article 14 of the European Convention of Human Rights. *Pajić v. Croat*, App. No. 68453/13 Eur. Ct. H.R. paras. 77, 82, 85 HUDOC (May 23, 2016), <http://hudoc.echr.coe.int/eng?i=001-161061>.

II. BACKGROUND

A. *The European Court of Human Rights' Analysis of Discrimination Based on Sexual Orientation*

Over the past thirty years, the rights of same-sex couples evolved and expanded in the ECtHR.¹⁷ The Court analyzed the rights of same-sex couples through the lens of both Article 8 and Article 14 of the European Convention of Human Rights (Convention) since the 1950s.¹⁸ Article 8 states that all member States' citizens have a right to freedom from undue government intrusion on their private and family lives, their homes, and correspondence.¹⁹ Article 14 protects citizens from being denied the rights set out in the Convention on the basis of sex, race, color, and language.²⁰

When an applicant alleges discrimination based on sexual orientation, the ECtHR generally begins its analysis by determining whether same-sex relationships fall under the purview of Article 8 as a matter of private life or family life.²¹ If the Court finds that the relationship forming the basis of the applicant's claim falls within Article 8's scope, it then determines whether the alleged discrimination amounts to a denial of Convention rights under Article 14.²² This inquiry first assesses whether, in the case at bar, there is a difference in treatment of

15. *Id.*

16. *Id.* para. 1.

17. Massimo Fichera, *Same-Sex Marriage and the Role of Transnational Law: Changes in the European Landscape*, 17 GER. L.J. 383, 389 (2016); Emmanuelle Bribosia et al., *Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience*, 32 BERKELEY J. INT'L L. 1, 4 (2014).

18. Fichera, *supra* note 17, at 389.

19. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

20. *Id.* art. 14.

21. *Karner v. Austria*, 2003-IX Eur. Ct. H.R. 199, 211.

22. *X v. Austria*, 2013-II Eur. Ct. H.R. 1, 41.

people among groups in reasonably similar situations.²³ In determining what constitutes such similar situations, States are given what is referred to by the ECtHR as a “margin of appreciation,” but if the discrimination is based on sexual orientation, the margin is then narrowed.²⁴ If the Court finds a difference in treatment exists, it requires the member State to give a justification based on a legitimate aim for the different treatment.²⁵ If the government fails to prove that the adopted means were necessary to achieve a legitimate aim, the Court will likely find a violation of Articles 8 and 14.²⁶

However, the ECtHR also takes the consensus of its member States into account when determining whether a violation of the Convention has occurred, and more specifically, in determining the appropriate margin of appreciation to give to the government in question.²⁷ The less unanimity that exists among the member States, the more likely it is that the ECtHR will afford a member State a wider margin of appreciation.²⁸ Over time, the Court has recognized the shift towards legal recognition and social acceptance of same-sex couples both in European courts as well as globally and has limited the level of discretion that the Court gives to its member States.²⁹

B. The Court's Consideration of Same-Sex Relationships as Private or Family Life

One of the first cases in which the ECtHR dealt with the issue of sexual orientation discrimination was *S v. United Kingdom*.³⁰ There, the applicant shared a home with her partner, Mrs. R.³¹ The couple lived together in their home that they rented under Mrs. R's name since 1981 and shared all expenses.³² Mrs. R dressed as a man and the applicant dressed as a woman; they were known, accepted, and well-liked as a couple within their community.³³ On February 8, 1984, Mrs. R passed

23. *Vallianatos v. Greece*, 2013-VI Eur. Ct. H.R. 125, 141-42.

24. *Oliari v. Italy*, App. Nos. 18766 & 36030/11 Eur. Ct. H.R. paras. 135, 162, HUDOC (July 21, 2015), <http://hudoc.echr.coe.int/eng?i=001-156265>.

25. *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409, 436-37.

26. *See X*, 2003-II Eur. Ct. H.R. at 55.

27. *Oliari*, App. Nos. 18766 & 36030/11, para. 162; *Mata Estevez v. Spain*, App. No. 56501/00, 2001-VI Eur. Ct. H.R. 300, 319-20.

28. *Oliari*, App. Nos. 18766 & 36330/11, para. 162.

29. *Id.* paras. 135, 162.

30. *Fichera*, *supra* note 17, at 390.

31. *S v. United Kingdom*, App. No. 11716/85 Eur. Ct. H.R. 1, HUDOC (May 14, 1986), <http://hudoc.echr.coe.int/eng?i=001-596>.

32. *Id.*

33. *See id.*

away, and the housing council of the town began repossession proceedings of Mrs. R's home and attempted to evict the applicant from the house.³⁴

The applicant filed a complaint in the Court of Appeal to challenge the proceedings under the Housing Act 1980.³⁵ The Housing Act states that upon the death of a tenant, the tenancy vests in a person "qualified" to succeed the tenant.³⁶ A qualified person is defined as either a spouse or a family member that has lived with the tenant prior to their death for at least twelve months.³⁷ The Court of Appeal did not consider this applicant as the tenant's spouse or family member, and thus she had no legal authority to remain on the tenant's property as a qualified successor.³⁸ The Court of Appeals further reasoned that if Parliament intended to include same-sex couples under the umbrella of legally recognized relationships, it would have done so explicitly.³⁹

The applicant then appealed to the ECtHR on the grounds that she was denied respect for her private and family life, violating her rights under Article 8, and that she was denied respect of her house when she was not allowed to remain in the home that she lived in for the past three years.⁴⁰ The Court determined that this applicant's claim did not fall under private life, because although her *relationship* with Mrs. R fell under private life, the claim arose out of the incident of Mrs. R's death, not the relationship that had now ended, so there was no interference with the applicant's private life.⁴¹ The Court also rejected the applicant's claim that her right to respect for family life was violated, because despite the change in attitudes towards same-sex couples seen in the Court's previous holdings, homosexual relationships did not fall under the purview of family life that Article 8 protects.⁴² Next, the Court rejected the applicant's third argument, that her right to respect of her home was violated because she had no legal title to the property, holding that the repossession proceedings depriving her of title were fully within the scope of the local authority's power.⁴³ Lastly, the Court held that the State's justification for the difference in treatment between same-sex

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* para. 2.

42. *Id.*

43. *Id.* para. 4.

couples and different-sex couples under the Housing Act, to protect the traditional family, was legitimate and, accordingly, the Court found against the applicant.⁴⁴

C. The Court Begins To View Discrimination Based on Sexual Orientation as a Violation of Articles 8 and 14 of the Convention

Apart from the Court's initial shift to view same-sex relationships under the purview of Article 8's concept of private life in *Mata Estevez v. Spain*, it was not until the seminal 2003 case *Karner v. Austria*, that the ECtHR broadened its legal recognition of same-sex couples.⁴⁵ In *Karner*, the applicant lived with his partner, Mr. W, in an apartment in Vienna that Mr. W. rented from the landlord starting in 1989.⁴⁶ In 1991, Mr. W contracted the AIDS virus, and the applicant cared for him until he passed away in 1994.⁴⁷ Before his death, Mr. W named the applicant as his heir, which included the inheritance of Mr. W's apartment lease.⁴⁸ However, upon Mr. W's death, the landlord brought eviction proceedings attempting to remove the applicant from the apartment that he had been living in for the past five years, claiming that the applicant's tenancy was terminated upon Mr. W's death.⁴⁹ The landlord argued that the Rent Act, designed to grant successive tenancy rights to family members, did not apply to homosexual couples, and therefore the apartment did not pass to the applicant after Mr. W's death.⁵⁰ The district court rejected the landlord's argument and dismissed the case, holding that the Rent Act did apply to same-sex couples.⁵¹ The Vienna Regional Civil Court upheld the district court's decision, stating that the purpose of the Rent Act is to protect long-term cohabitants against sudden homelessness upon one partner's death, and then explicitly extended this protection to same-sex couples.⁵² The Supreme Court overturned the decision to extend the protection because the Rent Act ought to be interpreted as it was

44. *Id.* para. 7.

45. *Karner v. Austria*, 2003-IX Eur. Ct. H.R. 199, 211, 213; *Mata Estevez v. Spain*, App. No. 56501/00, 2001-VI Eur. Ct. H.R. 300, 320; JUDY WALSH & FERGUS RYAN, IRISH HUMAN RIGHTS COMM'N, THE RIGHTS OF *DE FACTO* COUPLES 50 (March 2006), <http://www.ucd.ie/esc/research/defacto.pdf>.

46. *Karner*, 2003-IX Eur. Ct. H.R. at 206.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

intended at the time of its enactment, which was to exclude same-sex couples.⁵³ The applicant then appealed to the ECtHR.⁵⁴

The applicant argued that his right to respect of his home under Article 8 was violated, therefore the Court was not forced to decide whether Article 8's purview included same-sex couples' relationship, because the applicant's claim solely focused on respect for his home.⁵⁵ The Government argued that the purpose of the Rent Act is to protect the family in the traditional sense, and the Court accepted that as a legitimate aim to justify a discriminatory act.⁵⁶ However, the Court noted that when there is an allegation of discrimination based on sexual orientation, even if it seeks a legitimate aim, a government must prove that the discriminatory act is not only an appropriate means, but a necessary means to achieve that end.⁵⁷ The Court ultimately held that the Austrian government's aim of protecting the traditional family was problematically vague. Since the margin of appreciation is lower in these cases, the discriminatory practice was not a necessary means to protect the traditional family, and therefore, the Court held that Articles 8 and 14 of the Convention were violated.⁵⁸

D. Same-Sex Couples Fall Within the Purview of "Family Life" Under Article 8 of the Convention

In *Schalk & Kopf v. Austria*, the ECtHR once again addressed the issue of whether same-sex couples fall within Article 8's scope of protection for family rights.⁵⁹ In this case, the Court came to a different conclusion than it had previously in *S v. United Kingdom* and held that Article 8's provision regarding family life protects same-sex couples.⁶⁰ The applicants in this case, a same-sex couple living in Vienna, requested that the Government begin proceedings that would allow them to marry.⁶¹ The Government refused the applicants' request, contending that only heterosexual couples could enter into a marriage contract.⁶² The couple then filed a complaint with the Constitutional Court of Austria, alleging

53. *Id.*

54. *Id.* at 207.

55. *Id.* at 211.

56. *Id.* at 212.

57. *Id.* at 213.

58. *Id.*

59. *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409, 435.

60. *Id.* at 436; *S v. United Kingdom*, App. No. 11716/85 Eur. Ct. H.R. para. 2, HUDOC (May 14, 1986), <http://hudoc.echr.coe.int/eng?i=001-596>.

61. *Schalk & Kopf*, 2010-IV Eur. Ct. H.R. at 416.

62. *Id.* at 416-17.

that the Austrian government violated their rights under Articles 8 and 14 because it had no legitimate reason justifying the differential treatment of same-sex couples based solely on their sexual orientation.⁶³ They noted that the concept of marriage has evolved immensely since the Civil Code was adopted by Vienna in 1812, specifically arguing that the main tenets of marriage are no longer procreation and the education of children.⁶⁴ However, the Constitutional Court dismissed the applicants' case on the grounds that neither the Convention nor the Austrian Federal Constitution requires that the concept of marriage, regardless of its evolution, be extended to include same-sex couples.⁶⁵

The applicants then appealed to the ECtHR, where the Austrian government claimed that the applicants failed to exhaust their domestic remedies, a requirement under Article 35 of the Convention, because the applicants' complaint in the domestic courts pertained only to their inability to marry.⁶⁶ The Government argued that the applicants failed to raise the additional claim that advocated for alternative legal recognition of same-sex couples and had only advocated for marriage.⁶⁷ However, the Court rejected the Government's argument, because the option of same-sex couples to enter into a registered partnership was unavailable to the applicants until after they filed their complaint, reasoning that the only way for the applicants to pursue legal recognition of same-sex couples was to request the right to marry, thus fulfilling the exhaustion of domestic remedies requirement as the issue was raised in the lower court.⁶⁸ The applicants also relied on Articles 8 and 14 of the Convention in their complaint in domestic court and did not solely rely on Article 12, which grants only men and women the right to marry each other.⁶⁹

The Court noted that Article 14 does not stand independently, so any complaint that alleges an Article 14 violation must also state the Convention right being denied to the applicant.⁷⁰ As such, the Court needed to first determine whether the applicants' relationship fell under the Article 8 purview of family life.⁷¹ Up until this point, the ECtHR held that the relationship of a same-sex couple only falls under the concept of private life if the couple has been cohabitating for an extended period of

63. *Id.* at 417.

64. *Id.*

65. *Id.* at 417-18.

66. *Id.* at 430-31.

67. *Id.*

68. *Id.* at 431.

69. *Id.* at 426, 430.

70. *Id.* at 435.

71. *Id.*

time.⁷² Here, the Court noted the stark increase among member States regarding both legal and social acceptance of same-sex couples.⁷³ Given this shift, the Court no longer saw the purpose in excluding same-sex couples living in a “stable *de facto* partnership” from the protection of family life under Article 8, as it saw no substantive difference between a stable same-sex *de facto* partnership and a stable different-sex *de facto* couple.⁷⁴

After finding that the applicants’ relationship fell within the scope of Article 8, the ECtHR then sought to determine whether the unjustified differential treatment among citizens in relatively similar situations based solely on sexual orientation violated the applicants’ Article 14 rights.⁷⁵ The Court held that because both same-sex couples and different-sex couples are equally capable of establishing stable committed relationships, the same-sex couple applicants were in a sufficiently similar situation to a different-sex couple. Therefore, same-sex couples were entitled to the same right to protection of their relationship.⁷⁶

However, despite noting the shift in attitude among member States, and its determination that same-sex couples are in a similar situation to heterosexual couples, the Court found in favor of the Austrian government.⁷⁷ The Court held that, despite a growing consensus among member States, since a majority of States had still not granted same-sex couples the right to marry, the level of deference to States’ legislation should remain high.⁷⁸ Further, the Court held that Article 12 did not impose an obligation on States to allow same-sex marriage.⁷⁹ The Court lastly held that because the applicants argued for either the right to marry or for an alternative type of legal recognition, and that during the litigation, Austria had passed legislation allowing for a registered partnership between same-sex couples, there was no violation of Article 8 in conjunction with Article 14.⁸⁰ Had the applicants argued that the difference in legal status between marriage and a registered partnership adversely affected them, the Court may have delved deeper into the

72. *Id.* at 436.

73. *Id.*

74. *Id.*

75. *See id.* at 436-37.

76. *Id.* at 437.

77. *Id.* at 439.

78. *Id.* at 438.

79. *Id.* at 439.

80. *Id.*

issue.⁸¹ Since the applicants failed to make such a claim, the ECtHR found no violation of their rights.⁸²

The ECtHR's trend toward legal recognition of same-sex couples continued in *X v. Austria*.⁸³ Here, the ECtHR held that a provision in the Austrian Civil Code stating that the parental rights of one biological parent would be severed if parental rights were granted to the same-sex partner of a biological parent violated Articles 8 and 14 of the Convention.⁸⁴ The first and third applicants were two women who lived together in a stable, committed relationship.⁸⁵ The second applicant was the son of the third applicant; the couple sought to form an additional legal relationship between the second applicant and the first applicant without severing the relationship between the second applicant and his mother, the third applicant.⁸⁶ However, Article 182 § 2 of the Civil Code prevented this arrangement because in order to create a relationship between the first and the second applicant, the parental rights of the third applicant, his mother, must be severed.⁸⁷ The applicants filed a complaint in the district court seeking legal recognition of their de facto family, proposing that the first applicant replaced the child's father, despite the father's lack of acquiescence to the arrangement.⁸⁸

The district court dismissed the complaint, holding that a determination of the legal rights afforded to same-sex couples was left to the member States' discretion.⁸⁹ The applicants then appealed to the Regional Court, which upheld the district court's ruling, reasoning that when both the child's biological parents are present, contact with both parents of the opposite sex is in the child's best interest, and any additional parental relationship (i.e., a relationship with the mother's same-sex partner) is unnecessary.⁹⁰ The Regional Court also held that the purpose of the Civil Code provision to uphold and protect the traditional family was a legitimate aim.⁹¹ The applicants then appealed to the Supreme Court, which also dismissed the case stating that the aim of adoption is to provide the child with a family that recreates a biological

81. *Id.*

82. *See id.*

83. *X v. Austria*, 2013-II Eur. Ct. H.R. 1, 11, 55-56.

84. *Id.*

85. *Id.* at 11.

86. *Id.*

87. *Id.*

88. *Id.* at 12.

89. *Id.* at 12-14.

90. *Id.* at 14-17.

91. *Id.*

family as closely as possible, not to provide a family with a child.⁹² The Supreme Court noted that there were more families seeking adoption than children in need of adoption, and as a result, even the potential of negative consequences from a homosexual couple's adoption of a child was a legitimate reason to prevent them from adoption.⁹³ As such, the Supreme Court reasoned that the applicants failed to show that the State abused the discretion afforded to it by the European Court in matters such as these.⁹⁴

On appeal, the applicants noted that second-parent adoption was available to married couples, while same-sex couples were not allowed to marry under Austrian law, amounting to a violation of the Article 14 right to equal treatment.⁹⁵ The Government conceded that the applicants' relationship fell within the purview of family life under Article 8 but that the Austrian Civil Code's goal to protect the child justified the provision.⁹⁶ The Government further argued that the provision was not discriminatory to same-sex couples because it would also prevent a same-sex relative, not just a partner, from adopting the child.⁹⁷ The Government's final argument was that the States should be given a wide margin of appreciation in the matter of same-sex couples' ability to partake in second-parent adoptions, citing the lack of consensus among member States.⁹⁸

The Court found that the applicants were in a similar situation to heterosexual couples who have the ability to partake in second-parent adoption, so there was a difference in treatment based solely on sexual orientation.⁹⁹ It further held that the Government's claimed justification, that the provision was created in the best interest of the child, held no weight because this reasoning focused solely on the legal impossibility of second-parent adoption among same-sex couples, failing to consider the actual best interest of the child.¹⁰⁰ The difference in treatment led the lower courts to dismiss the case, not on its merits, but as a matter of law, and the ECtHR held that the lower court's lack of factual inquiry violated Article 8 and Article 14.¹⁰¹ The Court lastly held that, although the

92. *Id.* at 18-21.

93. *Id.*

94. *Id.*

95. *Id.* at 32-33.

96. *Id.* at 34-35.

97. *Id.* at 35.

98. *Id.* at 36.

99. *Id.* at 45-46, 49.

100. *Id.* at 48.

101. *Id.* at 48, 55-56.

Government's aim to protect the child and the traditional family were legitimate, the Government failed to meet its burden of proof because it did not establish that a same-sex couple would provide inferior care to a child than a different-sex couple would provide. Thus, the Court found in favor of the applicants.¹⁰²

Lastly, the ECtHR ruled similarly in *Vallianatos v. Greece*, holding that failing to legally recognize same-sex relationships was in fact a violation of Articles 8 and 14 of the Convention.¹⁰³ In 2008, Greece passed a law that legally recognized a separate form of partnership outside traditional marriage, a civil union, which gave citizens living in a de facto partnership a wider range of legal rights, especially those in partnerships involving children.¹⁰⁴ However, same-sex couples, like the applicants, could not enter into a civil union.¹⁰⁵ The Court found that the applicants suffered direct harm because they could not obtain legal recognition of their stable relationship, whereas heterosexual couples in a similar situation enjoyed that ability.¹⁰⁶ As such, the Court rejected the Government's contention that the discrimination was necessary to uphold the traditional family structure and to protect children, since the main goal of the legislation was to provide an alternative form of legal recognition aside from marriage, not to further the aim of protecting children or the family, and did not justify the difference in treatment.¹⁰⁷

III. THE COURT'S DECISION

In the noted case, the ECtHR continued its trend of granting legal recognition to same-sex couples, holding that the Croatian government violated Articles 8 and 14 of the Convention because it was legally impossible for same-sex couples to gain a residence permit on the grounds of family reunification.¹⁰⁸ The Court first determined that the applicant's case was admissible because she had exhausted all domestic remedies under Croatia's Prevention of Discrimination Act.¹⁰⁹ It then

102. *Id.* at 51, 52, 55-56.

103. *Vallianatos v. Greece*, 2013-VI Eur. Ct. H.R. 125, 146-47.

104. *Id.* at 133-34.

105. *Id.* at 133.

106. *Vallianatos v. Greece*, App. Nos. 29381 & 32684/09 Eur. Ct. H.R. para. 49, HUDOC (Nov. 7, 2013), <http://hudoc.echr.coe.int/eng?i=001-128294>.

107. *Vallianatos*, 2013-VI Eur. Ct. H.R. at 142, 145; *see also* *Oliari v. Italy*, App. Nos. 18766 & 36030/11 Eur. Ct. H.R. paras. 162, 185, HUDOC (Oct. 21, 2015), <http://hudoc.echr.coe.int/eng?i=001-156265> (holding that same-sex applicants were privy to legal recognition of their same-sex relationship as such recognition is integral to an individual's identity).

108. *Pajić v. Croatia*, App. No. 68453/13 Eur. Ct. H.R. paras. 85-86, HUDOC (Feb. 23, 2016), <http://hudoc.echr.coe.int/eng?i=001-161061>.

109. *Id.* paras. 46, 48.

established that Article 8 applied to the applicant's claim, both in the sense that her relationship with her partner was considered private life, and that, given the rapid change in member States' attitudes towards same-sex couples, her relationship fell under family life as a de facto family.¹¹⁰ The Court then determined that the applicant's situation was similar to that of a heterosexual couple attempting to gain a residence permit on the grounds of family reunification and that her experience of differential treatment derived solely from her sexual orientation.¹¹¹ Lastly, the Court held that the Government failed to put forth any argument that the Aliens Act's exclusion of same-sex couples' opportunity for family reunification had a legitimate aim, and that, given States' lowered margin of appreciation in allegations of sexual orientation discrimination, the differential treatment was not justified.¹¹²

The Court first addressed the issue of whether the applicant's case could be heard in the ECtHR by determining whether she had exhausted all of her domestic remedies under the Prevention of Discrimination Act, the relevant statute of Croatian law.¹¹³ Under Article 35 of the Convention, the Court only addresses cases when the applicant has exhausted all domestic remedies.¹¹⁴ The Court discussed that the purpose of this requirement is to allow member States the opportunity to remedy a violation before the applicant brings it to the ECtHR.¹¹⁵ The complaint needs to be brought before domestic courts in substance and in compliance with relevant domestic requirements in order to be admissible before the ECtHR.¹¹⁶ The Government argued that under the Prevention of Discrimination Act, the applicant had two available routes to pursue in terms of remedy.¹¹⁷ The Court noted she could have either raised her discrimination claims in the same proceeding regarding her request for family reunification or she could have pursued separate proceedings for the discrimination allegation.¹¹⁸ The applicant chose the first option, raising these allegations during her administrative proceeding pertaining to her residence permit.¹¹⁹ The Government contended that because she did not pursue both potential avenues of

110. *Id.* paras. 63-64.

111. *Id.* para. 77.

112. *Id.* para. 84.

113. *Id.* para. 41.

114. *Id.*

115. *Id.*

116. *Id.* para. 42.

117. *Id.* para. 39.

118. *Id.* para. 44.

119. *Id.* para. 45.

domestic remedy, her case was not admissible before this Court.¹²⁰ However, the Court rejected the Government's argument on the grounds that once an applicant has pursued one remedy, the applicant need not pursue a second remedy with the same aim and effectively the same procedure.¹²¹

After determining the case's admissibility, the Court then turned to determine whether the applicant's same-sex relationship was privy to the protection of Article 8 of the Convention under the conception of private and family life.¹²² The applicant argued that, given the Court's prior holdings, and that she had a stable and committed *de facto* relationship with her partner, the claim fell under Article 8's scope.¹²³ The Government argued that the applicant was not in a *de facto* relationship with D.B. because they did not live together, nor did they exhibit any type of "commitment to . . . family life," and so did not fall under the umbrella of family life under Article 8.¹²⁴

The Court determined that questions of same-sex relationships unquestionably fall under the concept of private life as the concept includes sexual life.¹²⁵ The Court noted that, despite past determinations that same-sex relationships fall outside the purview of family life as a result of diverse attitudes among member States, these attitudes are rapidly shifting towards acceptance, and the Court determined it would be frivolous for it not to do the same.¹²⁶ It further upheld the *Vallianatos v. Greece* holding by rejecting the Government's argument that cohabitation is necessary to create a *de facto* family.¹²⁷ The applicant and D.B. maintained a stable and committed relationship in which they traveled to visit each other frequently, and the applicant would remain on these visits to Croatia as long as she legally could.¹²⁸ The Court noted that the sole reason for this arrangement was that they were unable to live together because the applicant was denied a residence permit.¹²⁹ The Court thus held that their relationship did fall under Article 8's umbrella of family life, as cohabitation was not a requirement of a *de facto*

120. *Id.* para. 39.

121. *Id.* para. 43.

122. *Id.* paras. 61-63.

123. *Id.* para. 49.

124. *Id.* para. 51.

125. *Id.* para. 61.

126. *Id.* para. 64.

127. *Id.* para. 65.

128. *Id.* para. 66.

129. *Id.* paras. 66-67.

relationship, and had the applicant been granted residency for purposes of family reunification, the couple would be cohabitating.¹³⁰

The Court next considered whether the applicant's situation was relatively similar to that of an unmarried heterosexual couple and, if so, whether the Government's discrimination pursued a legitimate aim.¹³¹ The applicant argued that her relationship was comparable to that of a heterosexual couple, and that the discrimination she experienced based on her sexual orientation was not necessary because the Government could achieve its aim to protect the traditional family by other non-discriminatory methods.¹³² The Government argued that member States are given a wide margin of appreciation in matters both of family and private life and also in immigration matters.¹³³ The Government further contended that the applicant's situation was not similar to that of a heterosexual unmarried couple because Croatian law defines extramarital relationships and same-sex relationships differently, a distinction that precludes a consideration of the applicant's situation as relatively similar to that of a heterosexual unmarried couple's relationship.¹³⁴

The Court noted that the Aliens Act only references extramarital relationships, defined as a relationship between a man and a woman that has lasted for at least three years, or less if the couple had a child together.¹³⁵ The Aliens Act, however, does not include a same-sex union, which is defined under Croatian law, for all intents and purposes, as an extramarital relationship between two people of the same-sex.¹³⁶ The Court reasoned that by providing legal recognition both for extramarital relationships and same-sex unions, the Croatian government acknowledges that same-sex couples are capable of establishing stable and committed relationships worthy of legal recognition.¹³⁷ Therefore, by excluding same-sex couples from the Aliens Act, the Government is purposefully excluding same-sex couples solely based on their sexual orientation.¹³⁸ Further, the Administrative Court did not look at the facts of the applicant's case and dismissed the case solely on the legal impossibility of family reunification of a same-sex couple under the

130. *Id.*

131. *Id.* paras. 71, 80.

132. *Id.* para. 50.

133. *Id.* para. 51.

134. *Id.* para. 52.

135. *Id.* para. 72.

136. *Id.*

137. *Id.* para. 73.

138. *Id.* para. 74.

Aliens Act, so the Court determined that the applicant was adversely affected by the difference in treatment based on her sexual orientation.¹³⁹

Lastly, the Court determined whether the difference in treatment was justified by being necessary to achieve a legitimate aim of the Government.¹⁴⁰ At the outset of this determination, the Court noted that it gives member States a wide margin of appreciation in terms of immigration, and that the Convention does not guarantee an alien the right to enter or reside in a member State.¹⁴¹ Nonetheless, when the claim pertains to discrimination in immigration law based on sexual orientation, the Government has the burden to prove that the means of discrimination reasonably justify the ends of the Government's legitimate goal.¹⁴² However, the Court lowered the State's margin of appreciation in this case, since it involved discrimination based on sexual orientation, so the Government had the loftier burden of proving that the means were *necessary* to achieve its legitimate aim.¹⁴³ The Court held that the Government did not put forth any legitimate justification for the discrimination.¹⁴⁴ Instead, it focused on the legal impossibility of the applicant's request, based on the fact that the Aliens Act does not mention same-sex unions.¹⁴⁵ Therefore, the Court found a violation of Articles 8 and 14 of the Convention because there was no legitimate justification for the Government's discrimination based solely on the applicant's sexual orientation.¹⁴⁶

IV. ANALYSIS

In finding the Aliens Act's exclusion of same-sex couples discriminatory under Article 8 and 14 of the Convention, the ECtHR continued the push toward equal legal recognition of same-sex couples.¹⁴⁷ Interestingly, in the noted case, the ECtHR did not have the opportunity to apply the full test in analyzing whether there was a violation of Articles 8 and 14 because it found a violation solely based on the existence of differential treatment based on sexual orientation.¹⁴⁸ Had the Government contended that the discrimination was furthering a

139. *Id.* paras. 76-77.

140. *Id.* para. 78.

141. *Id.* para. 79.

142. *Id.* para. 82.

143. *Id.*

144. *Id.* para. 83.

145. *Id.* para. 84.

146. *See id.* para. 85.

147. *See id.*

148. *Id.* paras. 74, 83.

legitimate State interest and that the discriminatory method was necessary to achieve its goal, the Court would have had to analyze the merit of the State's argument.¹⁴⁹ However, the government of Croatia did not provide any type of justification for the discrimination, but instead, simply argued that equal treatment was legally impossible under the current laws.¹⁵⁰

The fact that the Court did not accept the State's argument is a testament of its shift towards providing the same type of legal safeguards to same-sex couples as it does to different-sex couples.¹⁵¹ In prior years, the Court has accepted the member States' wide margin of appreciation to determine what falls under Article 8's protection of family life and private life, but the trend towards legal recognition has become increasingly difficult for the Court to ignore.¹⁵² The noted case shows that the Court embraces the notion that a modern day family may take on diverse forms other than the traditional heterosexual married couple.¹⁵³

This change in attitude is most visible when compared to *Karner v. Austria*, where the applicant was evicted from his home after his partner passed away of the AIDS virus.¹⁵⁴ Both the applicant in the noted case and the applicant in *Karner* were fighting not for the right of same-sex couples to marry but rather for legal recognition of their relationship and to have the same rights as heterosexual non-married couples.¹⁵⁵ However, the Court in *Karner* was able to avoid deciding the controversial question of whether same-sex couples fell under the purview of family life because the applicant adeptly framed his argument as a violation of the right to respect for his home rather than a violation of his right to respect for family life.¹⁵⁶ The fact that the applicant in *Karner* framed his case under the guise of a violation of his right to respect for his home, but the applicant in the noted case was able to persuade the Court to view her relationship with her partner under the legal protection of family life, is a notable shift towards legal equality for same-sex couples in member States.¹⁵⁷

149. *See id.* para. 83.

150. *Id.* paras. 83-85.

151. *See* Bribosia et al., *supra* note 17, at 4-5.

152. Mata Estevez v. Spain, App. No. 56501/00, 2001-VI Eur. Ct. H.R. 300, 319-20; *see Pajić*, App. No. 68453/13, para. 73.

153. *See Pajić*, App. No. 68453/13, para. 73; *Mata Estevez*, App. No. 56501/00, paras. 319-20.

154. *Karner v. Austria*, 2003-IX Eur. Ct. H.R. 199, 206; *see Pajić*, App. No. 68453/13, para. 73.

155. *See Pajić*, App. No. 68453/13, para. 49, 64; *Karner*, 2003-IX Eur. Ct. H.R. at 211.

156. *Karner*, 2003-IX Eur. Ct. H.R. at 211.

157. *Pajić*, App. No. 68453/13, paras. 64, 85-86; *Karner*, 2003-IX Eur. Ct. H.R. at 211.

However, despite the victories in terms of rights given to same-sex couples, same-sex couples' rights will not be fully realized until they are able to marry.¹⁵⁸ The ECtHR still maintains that the Convention will not force member States to grant marriage rights to same-sex couples.¹⁵⁹ Although the Court is progressively more willing to find that statutes discriminating against same-sex couples violate the Convention, there will always be a discrepancy in rights granted to same-sex and different-sex couples until the ECtHR obligates its member States to allow same-sex couples to marry.¹⁶⁰

Further, although the noted case is clearly a step towards equality for same-sex couples, it still does not remedy the fact that if there is some type of legal recognition for same-sex couples, the Court will not rule that a lesser amount of rights given to same-sex couples violates the Convention given its determination that the Convention does not obligate member States to grant same-sex couples the right to marry.¹⁶¹ The fact that the Court determined that the denial of the applicants' right to marry in *Oliari v. Italy* violated the Convention was an outcome solely due to the absence of any other formal or legal recognition for same-sex couples in Italy.¹⁶² The Court would likely have found no violation if there were some type of same-sex union as in *Schalk & Kopf v. Austria*.¹⁶³ The Court in the noted case held that the rights of same-sex couples should be equal to the rights of unmarried heterosexual couples but not necessarily to those of married heterosexual couples.¹⁶⁴ This holding demonstrates that the Court still applies a balancing test, allowing States a larger margin of appreciation when there is no universal consensus among member States, as opposed to finding that the Convention obligates member States to provide the right to marry to its citizens regardless of sexual orientation.¹⁶⁵

158. Bribosia et al., *supra* note 17, at 5.

159. *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409, 429.

160. Bribosia et al., *supra* note 17, at 5; *see Pajić*, App. No. 68453/13, paras. 84-85; X v. Austria, App. No. 19010/07 Eur. Ct. H.R. paras. 151-53, HUDOC (Feb. 19, 2013), <http://hudoc.echr.coe.int/fre?i=001-116735>. [55-56].

161. *See Schalk & Kopf*, 2010-IV Eur. Ct. H.R. at 429, 439.

162. *Id.*; *see Oliari v. Italy*, App. Nos. 18766 & 36030/11 Eur. Ct. H.R. paras. 172, 185, HUDOC (July 21, 2015), <http://hudoc.echr.coe.int/eng?i=001-156265>.

163. *Id.* paras. 172, 185; *Schalk & Kopf*, 2010-IV Eur. Ct. H.R. at 429, 439.

164. *See Pajić*, App. No. 68453/13, paras. 64-65, 67.

165. *See id.* paras. 56-59; Bribosia et al., *supra* note 17, at 5.

V. CONCLUSION

The noted case aligns with the growing social trend of increasing legal recognition of same-sex couples. However, it is proving to be more difficult to garner long-standing equality for same-sex couples rather than to simply achieve small victories by finding very specific domestic laws in violation of the Convention. Given the fact that the reach of the ECtHR is not as extensive as the reach of the Supreme Court of the United States, the ECtHR must constantly contend with and adhere to the States' margin of appreciation.¹⁶⁶ As such, until there is an overwhelming majority of member States that legalize same-sex marriage, the ECtHR will have to continue using the same legal framework to take incremental steps in the advancement of the rights of same-sex couples.¹⁶⁷

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166. Fichera, *supra* note 17, at 395.

167. *Id.*

* © 2017 Danielle Teutonico. J.D. candidate 2018, Tulane University Law School; Honor Board Justice; B.A. 2013, Tufts University. I would like to thank all the members of the *Tulane University Journal of International and Comparative Law* for their continued support, with a special thanks to the 2016-2017 Senior Board for their immeasurable dedication. I would like to dedicate my Case Note to my mother who has always encouraged and inspired me.