

June 2010

---

## ***Schalk and Kopf v. Austria* - 30141/04**

Judgment 24.6.2010 [Section I]

### **Article 14**

#### **Discrimination**

Inability of same-sex couple to marry: *no violation*

### **Article 8**

#### **Article 8-1**

#### **Respect for family life**

Cohabiting same-sex couple living in a stable relationship constitute "family life":  
*article 8 applicable*

### **Article 12**

#### **Marry**

Inability of same-sex couple to marry: *no violation*

*Facts* – In 2002 the applicants, a same-sex couple, requested the competent authorities permission to get married. Under domestic law a marriage could only be concluded between persons of opposite sex and the applicants' request was consequently dismissed. Following their subsequent constitutional complaint, the Constitutional Court held that neither the Austrian Constitution nor the European Convention required that the concept of marriage, which was geared to the possibility of parenthood, should be extended to relationships of a different kind and that the protection of same-sex relationships under the Convention did not give rise to an obligation to change the law on marriage. On 1 January 2010 the Registered Partnership Act entered into force in Austria, aiming to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships. While the Act provided registered partners with many of the same rights and obligations as spouses, some differences remained, in particular registered partners were unable to adopt or undergo artificial insemination.

*Law* – Article 12: The Court first examined whether the right to marry granted to "men and women" under the Convention could be applied to the applicants' situation. Even though only six of the Council of Europe member States allowed same-sex marriages, the provision of the Charter of Fundamental Rights of the European Union granting the right to marry did not include a reference to men and women, so allowing the conclusion that the right to marry must not in all circumstances be limited to marriage between two persons of the opposite sex. It could, therefore, not be concluded that Article 12 did not apply to the applicants' complaint. At the same time the Charter left the decision whether or not to allow

same-sex marriages to regulation by member States' national law. The Court underlined that national authorities were best placed to assess and respond to the needs of society in this field, given that marriage had deep-rooted social and cultural connotations differing largely from one society to another. In conclusion, Article 12 did not impose an obligation on the respondent State to grant same-sex couples access to marriage.

*Conclusion:* no violation (unanimously).

Article 14 in conjunction with Article 8: Given the rapid evolution of social attitudes in Europe towards same-sex couples over the past decade, it would have been artificial for the Court to maintain the view that such couples could not enjoy "family life". It therefore concluded that the relationship of the applicants, a cohabiting same-sex couple living in a stable partnership, fell within the notion of "family life", just as the relationship of a different-sex couple in the same situation did. The Court had repeatedly held that different treatment based on sexual orientation required particularly serious reasons by way of justification. It had to be assumed that same-sex couples were just as capable as different-sex couples of entering into stable committed relationships; they were consequently in a relevantly similar situation as regards the need for legal recognition of their relationship. However, given that the Convention was to be read as a whole, having regard to the conclusion reached that Article 12 did not impose an obligation on States to grant same-sex couples access to marriage, the Court was unable to share the applicants' view that such an obligation could be derived from Article 14 taken in conjunction with Article 8. What remained to be examined was whether the State should have provided the applicants with an alternative means of legal recognition of their partnership any earlier than 2010. Despite the emerging tendency to legally recognise same-sex partnerships, this area should still be regarded as one of evolving rights with no established consensus, where States enjoyed a margin of appreciation in the timing of the introduction of legislative changes. The Austrian law reflected this evolution; though not in the vanguard, the Austrian legislature could not be reproached for not having introduced the Registered Partnership Act any earlier. Finally, the fact that the Registered Partnership Act retained some substantial differences compared to marriage in respect of parental rights corresponded largely to the trend in other member States adopting similar legislation. Moreover, since the applicants did not claim that they were directly affected by any restrictions concerning parental rights, the Court did not have to examine every one of those differences in detail as that was beyond the scope of the case.

*Conclusion:* no violation (four votes to three).