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Chamber judgment
Not Final¹

Schalk and Kopf v. Austria (application no. 30141/04)

**THE EUROPEAN CONVENTION OF HUMAN RIGHTS DOES NOT OBLIGE STATES TO
ENSURE THE RIGHT TO MARRY TO HOMOSEXUAL COUPLES**

No violation of Article 12 (right to marry)
No violation of Article 14 (prohibition of discrimination)
in conjunction with Article 8 (right to respect for private and family life)
of the European Convention on Human Rights

Principal facts

The applicants, Horst Michael Schalk and Johann Franz Kopf, are Austrian nationals who were born in 1962 and 1960 respectively and live in Vienna. They are a same-sex couple.

In September 2002 the applicants asked the competent authorities to allow them to contract marriage. Their request was refused by the Vienna Municipal Office on the grounds that marriage could only be contracted between two persons of opposite sex. The applicants lodged an appeal with the Vienna Regional Governor, who confirmed the Municipal Office's view in April 2003.

In a subsequent constitutional complaint, the applicants alleged in particular that the legal impossibility for them to get married constituted a violation of their right to respect for private and family life and of the principle of non-discrimination. The Constitutional Court dismissed their complaint in December 2003, holding in particular that neither the Austrian Constitution nor the European Convention on Human Rights required that the concept of marriage, as being 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 of 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 provides for many of the same rights and obligations for

¹ Under Article 43 of the Convention, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

registered partners as for spouses, some difference remain, in particular registered partners are not allowed to adopt a child, nor are step-child adoption or artificial insemination allowed.

Complaints, procedure and composition of the Court

Relying on Article 12, the applicants complained of the authorities' refusal to allow them to contract marriage. Relying further on Article 14 in conjunction with Article 8 they complained that they were discriminated against on account of their sexual orientation since they were denied the right to marry and did not have any other possibility to have their relationship recognised by law before the entry into force of the Registered Partnership Act.

The application was lodged with the European Court of Human Rights on 5 August 2004. On 25 February 2010, a hearing was held in public in the Human Rights Building in Strasbourg.

Judgment was given by a Chamber of seven judges, composed as follows:

Christos **Rozakis** (Greece), **President**,
Anatoly **Kovler** (Russia),
Elisabeth **Steiner** (Austria),
Dean **Spielmann** (Luxembourg),
Sverre Erik **Jebens** (Norway),
Giorgio **Malinverni** (Switzerland),
George **Nicolaou** (Cyprus), **judges**,

and also André Wampach, **Deputy Section Registrar**.

Decision of the Court

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. As regards their argument that in today's society the procreation of children was no longer a decisive element in a civil marriage, the Court considered that in another case it had held that the inability to conceive a child could not be regarded in itself as removing the right to marry.² However, this finding and the Court's case-law according to which the Convention had to be interpreted in present-day conditions did not allow the conclusion, drawn by the applicants, that Article 12 should be read as obliging member States to provide for access to marriage for same-sex couples.

The Court observed that among Council of Europe member States there was no consensus regarding same-sex marriage. Having regard to the Charter of Fundamental Rights of the European Union, to which the Austrian Government had referred in their pleadings, the Court noted that the relevant Article, granting the right to marry, did not include a reference to men and women, which allowed the conclusion that the right to marry must not in all circumstances be limited to marriage between two persons of the opposite sex. At the same time the Charter left the decision whether or not to allow same-sex marriage 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.

² *Christine Goodwin v. the United Kingdom* [GC] (no. 28957/95, ECHR 2002 VI)

In conclusion, the Court found that Article 12 did not impose an obligation on the Austrian Government to grant a same-sex couple like the applicants access to marriage. It therefore unanimously held that there had been no violation of that Article.

Article 14 in conjunction with Article 8

The Court first addressed the issue whether the relationship of a same-sex couple like the applicants' fell not only within the notion of "private life" but also constituted "family life" within the meaning of Article 8. Over the last decade, a rapid evolution of social attitudes towards same-sex couples had taken place in many member States and a considerable number of States had afforded them legal recognition. The Court 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 would.

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 their 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.

Given that with the entry into force of the Registered Partnership Act in Austria it was open to the applicants to have their relationship formally recognised, it was not the Court's task to establish whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8 if this situation still persisted. It remained to be examined whether Austria should have provided the applicants with an alternative means of legal recognition of their partnership any earlier than it did. The Court observed that while there was an emerging European consensus towards legal recognition of same-sex couples, there was not yet a majority of States providing for it. The Austrian law reflected this evolution; though not in the vanguard, the Austrian legislator could not be reproached for not having introduced the Registered Partnership Act any earlier.

The Court was not convinced by the argument that if a State chose to provide same-sex couples with an alternative means of recognition, it was obliged to confer a status on them which corresponded to marriage in every respect. 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. Moreover, in the present case the Court did not have to examine every one of these differences in detail. As the applicants did not claim that they were directly affected by the remaining restrictions concerning parental rights, it would have gone beyond the scope of the case to establish whether these differences were justified.

In the light of these findings, the Court concluded, by four votes to three, that there had been no violation of Article 14 in conjunction with Article 8.

Judges Rozakis, Spielmann and Jebens expressed a dissenting opinion; Judges Kovler and Malinverni expressed a concurring opinion. The separate opinions are annexed to the judgment.

The judgment is available only in English. This press release is a document produced by the Registry. It does not bind the Court. The judgments are available on its website (<http://www.echr.coe.int>).

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.