

ECHR, human rights – rights of same-sex couples:

ECtHR, *Schalk and Kopf v Austria* (24 June 2010, appl no 30141/04)

Context

Schalk and Kopf are an Austrian same-sex couple. In 2002 they asked the competent authorities to allow them to contract marriage, but their request was refused on the grounds that under Austrian law marriage could only be contracted between two persons of opposite sex. The applicants subsequently lodged a constitutional complaint, but to no avail. On 1 January 2010, the Registered Partnership Act entered into force in Austria, providing for a registered partnership for same-sex couples. The main differences in rights and obligations for spouses and those for registered partners concern rules on the choice of name and parental rights.

The legal issue

The applicants primarily argue that the authorities' refusal to allow them to contract marriage violates Art. 12 of the Convention (ECHR). They furthermore invoke Art. 14 in conjunction with Art. 8 complaining that they are discriminated against on account of their sexual orientation since they are denied the right to marry and did not have any other possibility to have their relationship recognized by law before the entry into force of the Registered Partnership Act.

The judgment

The Court first examines whether the right to marry granted to 'men and women' in Art. 12 of Convention could be applied to the applicants' situation. In order to answer that question, the Court resorts to textual, historical (teleological) and contextual interpretation methods and derives certain principles from its case-law relating to transsexuals. It repeats that the inability to conceive a child cannot be regarded in itself as removing the right to marry. This finding does not, however, allow any conclusion regarding the same-sex marriage, the Court considers. It notes that amongst the Contracting Parties there is no consensus regarding same-sex marriage. The Court refers to the right to marry as provided for in Art. 9 of the EU Charter of Fundamental Rights, which contains no reference to 'men and women', and which leaves the decision whether or not to allow same-sex marriage to regulation by Member States' national law. The Court therefore 'would no longer consider that the right to marry enshrined in Art. 12 must in all circumstances be limited to marriage between two persons of the opposite sex' and declares Art. 12 ECHR applicable to the applicants' complaint. However, because marriage has 'deep-rooted social and cultural connotations differing largely from one society to another', the Court holds that national authorities are best placed to assess and respond to the needs of society in this field. The Court concludes that Art. 12 ECHR does not impose an obligation on States to grant same-sex couples access to marriage and unanimously holds that there had been no violation of that provision.

The Court has previously held that the relationship of a same-sex couple enjoys protection under the notion of 'private life' within the meaning of Art. 8 ECHR, however it had thus far held that there was too little common ground within the Council of Europe to hold that it constitutes 'family life' within the meaning of that provision. In the present judgment, the Court notes 'a rapid evolution of social attitudes towards same-sex couples' since 2001, resulting in a considerable number of States having afforded them legal recognition. The Court therefore considers that the relationship of the applicants, 'a cohabiting same-sex couple living in a stable partnership', falls within the notion of 'family life'.

Because ‘same-sex couples are just as capable as different-sex couples of entering into stable committed relationships’, the Court holds that the applicants are in a relevantly similar situation as opposite sex couples as regards their need for legal recognition of their relationship. The Court makes a distinction between three limbs of the applicants’ complaint under Art. 14 juncto 8 ECHR: (1) that they still did not have access to marriage; (2), that no alternative means of legal recognition were available to them until the entry into force of the Registered Partnership Act and (3) that certain differences existed in rights and obligations for spouses and those for registered partners under Austrian law. As regards the first limb, the Court is brief: now that the Court has just concluded that Art. 12 ECHR does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Art. 14 ECHR taken in conjunction with Art. 8 ECHR, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either. As regards the second limb, the Court considers it not its task to establish whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Art. 14 taken in conjunction with Art. 8 if this situation still persisted, now that the Registered Partnership Act had entered into force in Austria.

The Court next examines whether Austria should have provided the applicants with an alternative means of legal recognition of their partnership any earlier than it did. The Court notes an emerging European consensus towards legal recognition of same-sex couples, but concludes that there is not yet a majority of States providing for it. The Court concludes that ‘though not in the vanguard, the Austrian legislator could not be reproached for not having introduced the Registered Partnership Act any earlier.’ Finally, in its examination of the third limb of the complaint, the Court finds that it does not have to examine every one of these differences in detail, as the applicants did not claim that they were directly affected by any of these differences. In conclusion, the Court finds, by four votes to three, that there has been no violation of Art. 14 in conjunction with Art. 8.