# ■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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## Cross-border same-sex marriage

Austrian Constitutional Court
Judgement of October 16th, 2004 (VfSlg. 17.337/2004)

### Circumstances of the Case

The claimant is a US citizen. He married a German national in Delft (Netherlands) in 2001. In August 2002 he applied for permanent residency in Austria. The application was rejected by the district administration authorities Moedling (Lower Austria) on the grounds that a same sex union partner as the applicant was no 'spouse' in terms of § 44 Austrian Civil Code (*ABGB*), hence no favoured third-country citizen in terms of § 47 para 3 Aliens' Act *(Fremdengesetz)*. According to this only the Governor of the *Land* would be competent to grant (possible) permanent residency. The claimant appealed the ruling of the district administration authorities Moedling; the security directorate Lower Austria dismissed the appeal with the proviso that the application had to be rejected due to the lack of the jurisdiction of the district administration authorities in the subject matter.

Against the decision of the security directorate the claimant filed a complaint with the Austrian Constitutional Court alleging an infringement of the constitutionally guaranteed rights of equal treatment of aliens among each other, of fair trial and the violation of the constitutional commandment of determinateness (Art 18 Federal Constitutional Law [*B-VG*]). Furthermore he claimed a violation of freedom of movement (Art 9 and 51 Charter of fundamental rights of the European Union) and suggested proceedings for a preliminary ruling at the European Court of Justice with regard to the question whether the understanding of the term 'spouse' as a person of the opposite sex has to be seen as a violation of Community Law.

### Relevant Law at the point of the judgement

- The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has the rank of an Austrian federal constitutional law.

Article 12 reads:

"Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

Article 8 reads:

"Right to respect for private and family life

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."

- Art 18 para 1 Federal Constitutional Law *(B-VG)* reads:

"The entire public administration shall be based on law."

According to the Constitutional Court's judicature a commandment of determinateness addressed to the legislator derives from this provision (cf inter alia VfSlg. 14.715/1996).

- § 44 Austrian Civil Code *(ABGB)* reads:

"Family relations are established by matrimonial agreement. In the matrimonial agreement two persons of the opposite sex legally declare their will to live in inseparable alliance, to procreate children, to parent them and to stand by each other. "

- § 47 para 2 Aliens' Act *(Fremdengesetz)* grants freedom of establishment to favoured third country citizens (family members of EEA-citizens) provided that the EEA-citizen is authorized to establishment, permanent residency has to be granted, unless residence endangers public policy or public security.

According to para 3 favoured third-country-citizens are

1. the spouse,
2. the descendants who are under the age of 21 or are dependants,
3. the dependent direct relatives in the ascending line and those of the spouse.

The provisions of § 47 para 2 and 3 have to be seen against the background of Article 10 para 1 and 2 Regulation (EEC) No 1612/68 of the council of 15 October 1968 on freedom of movement for workers within the Community that read:

"1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

(a) his spouse and their descendants who are under the age of 21 years or are dependants;

(b) dependent relatives in the ascending line of the worker and his spouse.

2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes."

## The Court's assessment

The Court did not find any violation as alleged above by stating the following reasons:

Apparently the administrative authorities determined that the view that the term "spouse" of an EEA-citizen in terms of § 47 para 2 Aliens' Act indicates (notwithstanding the family law to be applied) a person of the opposite sex only. It is not up to the Court to judge whether this view is accurate as another assessment is not commanded by constitutional grounds.

According to the Court's judgement of Dec 12th 2003, B 777/03 neither the Austrian constitution's principle of equality nor the ECHR (arg "men and women" in Art 12) demand an extension of marriage (that as a matter of principle is geared to the possibility of parenthood) into relationships of different nature. The fact that such relationships are legally equated to or recognized as marriage in other countries does not shorten the legislators basic freedom to have the legal consequences provided applied on alliances of persons of opposite sex only.

Legal consequences that tie in with a marriage are not based on unreasonable grounds just because they are not provided for other relationships if there is a connection between these legal consequences and the marriage. This connection can be found in the legislator's intention to facilitate and to patronize the cohabitation of spouses as of parents and children. By the means of § 47 para 2 and 3 of the Aliens' Act, the possibility of close relatives that typically live in a common household and married-couples to remain within the family association shall be assured under the conditions of free movement. With regard to other (same or opposite sex) associations, the general provisions of the Aliens' Act apply, which (taking into account the character of marriage between man and woman) has not to be regarded as a discrimination of those relationships. By meeting the standards as constituted in Article 10 para 1 and 2 of the regulation with such provisions the legislator does not act on the basis of unreasonable grounds and also does not disadvantage relationships that are conceptually denied common descendants.

According to these findings the provision also is unobjectionable against the background of the principle of equality.

It is not within the Court's purview to scrutinize whether the authorities' interpretation complies with Community law in all respects. Accordingly, the claimant's suggestion to initiate proceedings for a preliminary ruling by the ECJ has not to be taken into account. The Court cannot find that the administrative authorities acted arbitrarily by discounting Community law. The claimant himself does not assert Community Law (in conjunction with the relative's right to settle within the territory of a member state) would necessitate the legal equality of the relationships mentioned above and marriage neither does he allege such judicature of the ECJ or the ECtHR. Quite the contrary, the claimant's reference to a draft of a directive (which has meanwhile been enacted but has not to be considered due to the fact that is has not to be enforced) mirroring the current state of discussion on European Union level and an assessment of the ECJ to be expected (different ECJ Case 59/85 *Reed* [1986] E.C.R. 1283 and ECJ Case C-122/99 and C-125/99 [2001] I-4319) displays that also from this angle no infringement of the principle of equality is apparent.

The further assertions of the complaint are likewise unsubstantiated:

With regard to § 44 Austrian Civil Code (ABGB) no indeterminateness of the term "spouse" is evident. Therefore also a change of the public view cannot cause the term's indeterminateness.

Inasmuch as the legislator (out of reasonable grounds) sets a focus on the existence of a marriage, no infringement of Art 8 ECHR (Right to respect for private and family life) can be found; out of the command to treat extra-marital cohabitations disregarding the sex equally, no argument results for the equal treatment of these cohabitations and marriage.

## Apostil

The Court's assessment in the present case is keen to express an impartial view of socio-political issues. As welcome as this fact may be in general, by underlining the legislator's margin of appreciation the Court also to a large extent evades a more substantial assessment. In doing so it seems as if questions come to the fore that have not be asked predominantly. Unlike in case B 777/03, VfSlg. 17.098 (cf article in this issue) it has not been called in to question whether or not the introduction of homosexual marriage in Austria is commanded by the means of the constitution. Albeit the Court at first refers to its case law as cited above, stating the lacking requirement of such an extension whereas the right to marry according to Article 12 ECHR ("arg. men and women") rather appears as a barrier than a fundamental right. In accordance with the Court's assessment it has to be conceded that the legislator (basically) is free to tie certain legal consequences to a marriage and to determine that within the Austrian legal system this legal institution is only available to opposite-sex-unions. Since the premises of the marriage as entered in the present case are not subject to the Austrian legislator's demands, it has to be challenged whether these arguments are substantial.

As a starting point it has to be considered that marriages in terms of § 47 para 3 Aliens' Act[1] are not subject to Austrian legal provisions. As a consequence of that, the Austrian legislator obviously approves marriages entered on different conditions as provided by Austrian marriage-law. The fact that other countries are free to determine these conditions and to open the institution of marriage to opposite-sex-unions as well as to same-sex-unions is self-evident. In such a way it is not primarily the Austrian legislator's understanding of marriage that is essential for such a relationship to come into existence but the understanding of the country that gives legal effect to this alliance. Therefore the Court's argument that the legislator based on reasonable grounds intends to facilitate the cohabitation of spouses (which itself has a pleonastic touch) seems misplaced. Instead of asking whether a marriage came into existence, it has to be looked at the consequences that are associated *with this* marriage in the view of the Austrian legislator. To put it bluntly: In this perception, any marriage had to be examined whether it has to be seen as equivalent to the legal provisions of the host country (Austria). Despite this, the authorities' attention only had been paid to the criterion of the spouse's sex.

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1 Cf for the current legal situation (which is unmodified to a large extent) §§ 52 to 56 Settlement and Residence Act *(Niederlassungs- und Aufenthaltsgesetz)* and § 85 Aliens' Police Act 2005 *(Fremdenpolizeigesetz 2005)*.

Against this background also the conception of marriage as an institution enabling parenthood has to be doubted. With regard to the fact that the rights that are tied to a marriage in first instance are subject to the discretion of the legislator of the country where the marriage was entered, the grounds to focus the institution of marriage onto heterosexual relationships may miss the mark. If a married homosexual couple was allowed to adopt children the intention of furthering the cohabitation of parents and children would be frustrated by excluding a child's parents other than parents that entered marriage on the exact same legal provisions because of their sex. This problem – as the question of approval of same-sex-marriages as a whole– should have been given scrutiny under the aspect of the Right to respect for private and family life (Article 8 ECHR); it is regrettable the Court did not do so in a sufficient way.


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