Austria, Austrian Constitutional Court, Case B166/2013, 13 March 2014

Deciding bodies and decisions

Austrian Constitutional Court VfSlg 19.492 / 2011
Landeshauptmann of Tyrol, 13 December 2012
Austrian Constitutional Court, Case B166/2013, 13 March 2014

Area of law

Non-discrimination

Subject matter

Homosexual marriage
Recognition in a different country

Summary Facts Of The Case

On 18 August 1998, the complainants, two male Dutch nationals, entered into a registered partnership in the Netherlands, which was converted into a marriage by law on 11 June 2002. For several years the two complainants lived in Tyrol. Since they were constantly confronted with doubts as to whether their marriage, which was concluded under Dutch law, was valid in Austria, the complainants requested the repetition of their marriage in Austria. With a final decision of the last instance of the court of 13 December 2012, this application was refused (admission to) the repetition of the closure by the Landeshauptmann of Tyrol.

The Landeshauptmann of Tyrol stated that, according to Austrian law, living communities of heterosexual and homosexual couples insisted on different legal institutions, as a registered partnership could be justified by homosexual couples and a marriage was possible only to heterosexual couples. Pursuant to Section 16 of the Federal Law of 15 June 1978 on Private International Law, BGBl 34/1978, as amended by the Federal Law, the formal requirements for the conclusion of Austrian law were laid down in Austria. With regard to the grounds of appeal, rejection of the applicants' request for repetition of their marriage in the Netherlands constitutes. The Authority refers to the judgment of the European Court of Human Rights of 24 June 2010 *Schalk and Kopf*, as well as the findings of the Constitutional Court VfSlg 19.492 / 2011. In the light of those decisions, it is not apparent that the applicants' rights are infringed.

The appeal to the Constitutional Court, based on Art. 144 B-VG, is directed against the Constitutional Court, in which the two complainants argue that the contested decision infringes

them in their constitutionally guaranteed rights to equal treatment and non-discrimination on grounds of sex and sexual orientation. In summary, the appellants based their arguments on the fact that, pursuant to Article 13 of the Ordinance on the Implementation and Completion of the Law for the Unification of the Law of Entitlement and the Arbitration in the Land of Austria and the Kingdom of the Reich (Matrimonial Law) of 27 July 1938 , DRGBl. 1938, 923 (DVOEheG), the right to repeat the marriage in accordance with the rules applicable to a marriage (and not merely to a registered partnership) in case of doubts about the validity of its marriage in the Netherlands. By rejecting the complainant, the complainant discriminated between the sexes and the sexual orientation, pointing out that marriage was open only to couples of different sexes in Austria. In particular, this violates the rights of the complainants arising from the relevant prohibitions of discrimination, in particular Art7 B-VG, Art. 14 in conjunction with 8 ECHR, and Art21. The decision of the authority concerned also limits the complainant in the exercise of his rights as a citizen of the Union and of his right of free movement within the European Union. The complainants therefore also suggest that the question of unacceptable discrimination, in particular Article 21 (1), should be submitted to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU.

Austrian authorities did not allow for the repetition of the marriage in Tyrol and the couple claimed that their constitutional rights as guaranteed by Articles 8 and 14 of the ECHR and Article 21 of the Charter were violated by this decision. With regard to its previous judgment , in which the Constitutional Court ruled that the rights enshrined in the Charter can be brought to the Constitutional Court as constitutionally guaranteed rights and are to be used as suitable scales in the area of competence of the Charter, the Court raised the question whether Article 21 of the Charter was applicable in the case at hand. The Court found that the national provisions of marital law do not aim at implementing EU law. Therefore, the Court ruled that the Charter was not applicable.

In the decision - regarding the applicability of the principle of non-discrimination (Article 21) of the Charter - the Constitutional Court concludes with a hypothetical statement. Building on the case law of the ECtHR, the Constitutional Court states that, even if the Charter were applied in the given case, it would not make any difference to its outcome. As the ECtHR has shown in Schalk and Kopf (Case 30141/04) – so the Constitutional Court emphasises – the decision on the question of whether or not homosexual couples have to have the same access to marriage as heterosexual couples presupposes the assessment of societal developments, which might be different in the different Member States of the EU. Returning to the law of the EU, the Court states: “Regarding the question of access to marriage of same sex couples a competence for the Union is missing, therefore [Article 21 of the Charter] is not opposed to the fact that the requirements stemming from the prohibition of discrimination diverge amongst member states, as long was – which is true for the case in question as the quoted jurisprudence of the ECtHR shows – the understanding and scope of the prohibition of discrimination corresponds to Art. 14 ECHR [...].”

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[1] Constitutional Court Austria (Verfassungsgerichtshof Österreich), joined cases U 466/11-18 U 1836/11-13, VfSlg 19.632/2012, 14.3.2012 available at: https://www.vfgh.gv.at/cms/vfghsite/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_e 11.pdf .

[2] Constitutional Court Austria (Verfassungsgerichtshof Österreich), case B166/2013, 13.3.2014, available at: www.ris.bka.gv.at/Dokument.wxe?Abfrage=Gesamtabfrage&Dokumentnummer=JFT_20140312_13 &ResultFunctionToken=4d6a6c54-02c0-443e-990d-5bdfadfd80bb&SearchInAsylGH=&SearchInBegut=&SearchInBgblAlt=&SearchInBgblAuth=&Search SearchInBks=&SearchInBundesnormen=&SearchInDok=&SearchInDsk=&SearchInErlaesse=&Sea rchInGemeinderecht=&SearchInJustiz=&SearchInBvwg=&SearchInLvwg=&SearchInLgbl=&SearchI earchInLrBgld=&SearchInLrK=&SearchInLrNo=&SearchInLrOO=&SearchInLrSbg=&SearchInLrStm =&SearchInLrVbg=&SearchInLrW=&SearchInNormenliste=&SearchInPvak=&SearchInRegV=&Sea archInUmse=&SearchInUvs=&SearchInVerg=&SearchInVfgh=&SearchInVwgh=&ImRisSeit=Undefi geSize=100&Suchworte=GRC.

Relation to the scope of the Charter

The couple's claim, based on the non-discrimination clause (Article 21) of the Charter, was rejected with the argument that the national non-discrimination provision in question does not have to be in compliance with Article 21 of the Charter, as it does not aim to implement any Union law. Moreover, the national provisions are outside the scope of application of the EU equality directives, so that "there is no provision of Union law which is specific to this area or might influence it". Therefore, the Constitutional Court continued, the Union rules in the present case do not formulate obligations of the Member States and the fundamental rights of the Charter are not applicable regarding the national rules which determine this case.

Sources - ECtHR Case Law

Schalk and Kopf (Case 30141/04)

Comments

Note that the CJEU is not used to granting a proper margin of appreciation like the ECtHR did in Schalk and Kopf. Since the CJEU has jurisdiction on EU law, it usually has to rule on the reach and effects of EU legislation, and can afford less leeway to Member States, to preserve the uniform application of EU law. For instance, it held in Römer that a domestic statute entailing a preferential pension treatment for married pensioners over pensioners who had registered their same-sex life partnership constituted 'direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension.' Note that, however, this conclusion was premised on the existence of the register of life partnerships in Germany, which rendered the situation of life-partners and married couples comparable, and the CJEU did not go as far as to compel under EU law all States to ensure that comparability. To the contrary, the CJEU considers it a task for domestic court to ascertain whether the situation is comparable (see Maruko) and only regulates the legal effect if the answer is in the positive (no discrimination).
In other countries, similar exercises have taken place.

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[1] Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, judgment of 26 February 2013.

[2] Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg*[2011] ECR I-3591.

[3] Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Btihnen* [2008] ECR I-1757. The CJEU found it discriminatory to treat persons in comparable situations differently (in the specific case, a man sought to obtain survival benefits granted under the contributory scheme subscribed to by his male partner, after the dead of the latter), but ultimately left it to national courts to decide whether the situation of a survivor in a same-sex couple was comparable to a widower in a married couple.