

**EUROPEAN COURT OF HUMAN RIGHTS
First Section**

**Application No. 30141/04
Horst SCHALK & Johann KOPF v. Austria**

Hearing of 25 February 2010, Strasbourg, France

**Oral submissions on behalf of the third-party interveners,
the FIDH, the ICJ, the AIRE Centre, and ILGA-Europe**

[AS DELIVERED] = 1613 words = 10 minutes at 160 words per minute]

Mister President of the Chamber, Judges and Registrars of the Court,

Today's hearing is the first in the Court's history, dealing with the Convention rights of a same-sex couple (where neither partner is transsexual) to enjoy equal access to the public institution of civil or legal marriage (as opposed to religious marriage), or to an alternative registration system conferring some, most, or all of the rights, benefits, and duties attached to marriage. This question arises as part of an historical, social, and legal evolution in the treatment of Europe's lesbian, gay, and bisexual minority, by Europe's heterosexual majority.

The starting point of this evolution, in the case of same-sex couples consisting of two men, was the death penalty for sexual intercourse. Until 1787, Austria imposed the penalty of death by decapitation for the crime of "carnal knowledge" involving two men. In England, the penalty of hanging for the crime of "buggery" was not converted to life imprisonment until 1861. During World War II, "Homosexual" was a category of prisoner in Nazi concentration camps, alongside "Jew", "Roma", "Jehovah's Witness" and "Communist".

Fortunately, since the Convention was opened for signature in 1950, legal reforms intended to eliminate discrimination based on sexual orientation have accelerated. Sixty years later, in 2010, same-sex couples in nearly the majority of Council of Europe member states, far from risking criminal sanctions for their private sexual activity, may request public recognition of their love for each other, and their commitment to each other, by registering their relationships, either as marriages, or under an alternative name.

Since *Dudgeon v. United Kingdom* in 1981, the Court's case law has played an important role in this evolution. As a result of the Court's judgments in *Smith & Grady v. United Kingdom* and *Mouta v. Portugal* in 1999, *S.L. v. Austria* in 2003, and *E.B. v. France* in 2008, it is fair to say that the Convention does not permit any Council of Europe member state to discriminate on grounds of sexual orientation against lesbian, gay, and bisexual individuals, including in criminal, employment, and family law, with regard to any opportunity that is open to heterosexual individuals, so long as the opportunity falls within the ambit of a Convention right (if the member state has yet to ratify Protocol No. 12).

The only issue as to which there is still room for debate, under the Convention, is the legal treatment of same-sex couples compared with different-sex couples. In *Karner v. Austria* in 2003, the Court made it clear that, if a government decides voluntarily to recognise unmarried couples in a particular area, that government must provide "particularly serious reasons" to justify limiting that recognition to unmarried different-sex couples. Indeed, the Court stated that it must be shown that it is "necessary" to exclude same-sex couples from a particular right, benefit, or duty, to

achieve the aim of "protecting the family in the traditional sense". This test is very hard to satisfy. It will rarely, if ever, be possible to show that punishing same-sex couples, through exclusion from a particular, right, benefit, or duty, will protect married or unmarried different-sex couples in any way.

In view of the principle in *Karner*, the only remaining questions, under the Convention, are: (a) whether or not a government may exclude same-sex couples from particular rights, benefits, or duties attached to marriage; (b) whether or not a government must create an alternative registration system allowing same-sex couples to gain access to some, most, or all of the rights, benefits, or duties attached to marriage; and (c) whether or not a government must grant to same-sex couples the same access to marriage that different-sex couples enjoy. The pending Second Section case of *Taddeucci & McCall v. Italy*, concerning a residence permit, is an example of question (a). This case mainly concerns questions (b) and (c). What is the state of legislation and case law relating to these questions, in the Council of Europe member states and in other democratic societies?

The Written Comments submitted by the Third-Party Interveners in June 2007, have been updated in their Written Comments in the pending Fifth Section case of *Chapin & Charpentier v. France*, a copy of which was sent to the First Section's Registrar on 1 November 2009. With regard to question (b), the 2009 Written Comments, combined with developments since then, show that 18 of 47 member states have legislation allowing same-sex couples to register their relationships, either as marriages, or under an alternative name. These 18 member states are: Andorra, Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany,

Hungary, Iceland, Luxembourg, the Netherlands, Norway, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. By the end of 2010, this number should rise to 21 out of 47 member states, or 45%, because of pending or planned government bills in the parliaments of Ireland, Liechtenstein, and Portugal. In addition, Croatia has a Law on Same-Sex Civil Unions, which recognises cohabiting same-sex couples for limited purposes, but does not yet offer them the possibility of registration.

With regard to question (c), the 2009 Written Comments, combined with developments since then, show that 5 of 47 member states grant equal access to marriage to same-sex couples. These 5 member states are: Belgium, the Netherlands, Norway, Spain, and Sweden. By the end of 2010, this number should rise to 9 member states, or nearly 20%, because of pending or planned government bills in the parliaments of Iceland, Luxembourg, Portugal, and Slovenia. In other democratic societies, same-sex couples enjoy equal access to marriage in Canada and South Africa, and in 5 states of the United States: Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont. In March 2010, legislation allowing same-sex couples to marry is expected to enter into force in the Federal District in Mexico, and in the District of Columbia in the United States.

To date, the opening up of marriage to same-sex couples in Europe has been the result of action by national legislatures, rather than by national courts interpreting the national constitution or the Convention. This is the case even though there are no rational arguments against allowing same-sex couples to marry. The possible desires of the heterosexual majority to maintain a tradition that favours it, or to impose dominant religious beliefs on the lesbian, gay and bisexual minority, cannot be valid

justifications. As for the fact that a same-sex couple cannot procreate without the assistance of a third party, the Court said very clearly, in *Christine Goodwin v. United Kingdom* in 2002, that "the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to [marry]".

In other democratic societies, 7 appellate courts have concluded that governments must allow same-sex couples to marry. These courts are the Constitutional Court of South Africa, the Courts of Appeal of Ontario and British Columbia in Canada, and the Supreme Courts of California, Connecticut, Iowa, and Massachusetts in the United States. All 7 courts concluded expressly or impliedly that providing an alternative registration system with a different name is still direct discrimination on grounds of sexual orientation. It is a form of segregation, similar to "separate but equal" racial segregation, even if the alternative registration results in rights, benefits, and duties that are identical to those attached to marriage. The judgments of the courts in South Africa, Ontario, British Columbia, and Iowa were unanimous.

The Third-Party Intervenors believe that, in appropriate cases, combining a particular situation in national legislation and sufficient European consensus, the Court will reach two conclusions. The first conclusion is that failing to provide an alternative registration system for same-sex couples, or providing a system that leaves a substantial gap between the rights of registered same-sex couples and married different-sex couples, is a violation of the right to respect for family life in Article 8, or is discrimination directly or indirectly based on sexual orientation, violating Article 14 combined with Article 8.

The first conclusion is supported by developments in national legislation, and by recommendations and resolutions of the Council of Europe's Parliamentary Assembly, and the European Union's European Parliament, calling on member states to pass registered partnership legislation for same-sex couples. It is also supported by the legal report on homophobia, published by the European Union's Fundamental Rights Agency in June 2008. The report concluded (at pp. 60 and 61) that "any measures denying to same-sex couples benefits ... available to opposite-sex married couples, where marriage is not open to same-sex couples, should be treated presumptively as a form of indirect discrimination on grounds of sexual orientation", and that "international human rights law complements EU law, by requiring that same-sex couples either have access to an institution such as ... registered partnership[,] that would provide them with the same advantages ... [as] marriage, or ... that their *de facto* durable relationships extend[] such advantages to them". This principle is reflected in the Staff Regulations of the Council of Europe and of the European Union, both of which extend benefits to non-marital partners who have no access to legal marriage in a member state.

The second conclusion is that excluding same-sex couples from the public institution of marriage is a violation of the right to marry in Article 12, or is discrimination directly based on sexual orientation, violating Article 14 combined with Article 12. When the Court reaches this second conclusion, it will probably represent the final step in the evolution of the legal status of same-sex couples in Europe, from criminals risking death or imprisonment for their private same-sex sexual activity, to fully equal citizens entitled to marry, and to enjoy the full protection of the rights, benefits, and duties attached to marriage. Thank you.