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A Marriage by Any Other Name? *Schalk and Kopf v Austria*

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1. Introduction

In *Schalk and Kopf v Austria*¹ the First Section of the European Court of Human Rights (ECtHR or ‘the Court’) had the opportunity to reflect upon the impact of recent developments across Europe extending marriage rights to same-sex couples and/or granting them some other form of legal recognition on its interpretation of the European Convention of Human Rights (ECHR or ‘the Convention’). The Court rejected the applicants’ argument that Austria was obliged to provide their same-sex relationship with legal recognition, whether through marriage or some other institution. Nevertheless, as it made a number of important observations concerning the nature of States’ obligation in this regard, this case is a significant milestone in the Court’s jurisprudence. In fact, *Schalk and Kopf* raises so many important issues that, as Thienel observes, it is surprising that the Chamber did not relinquish its jurisdiction in favour of the Grand Chamber.² It is equally surprising and disappointing that the Grand Chamber recently rejected the applicants’ request for a referral. Nevertheless, this judgment undoubtedly heralds the—somewhat faltering—start of a more robust engagement by the Court with the increasingly pressing issue of same-sex relationships.

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1 *Schalk and Kopf v Austria*, Application No 30141/04, Merits, 24 June 2010.

2 Thienel, ‘Gay Marriage and the ECHR’, *Invisible College Blog*, available at: <http://invisiblecollege weblog.leidenuniv.nl/2010/03/02/gay-marriage-and-the-echr> [last accessed 23 November 2010].

2. Facts

The two male applicants were in a committed and long-term relationship which, in 2002, they sought to formalise through marriage. Their initial request was rejected on the grounds that Austrian law recognises marriages contracted between couples of opposite sex only.³ A subsequent administrative appeal and complaint to the Constitutional Court to challenge that decision were unsuccessful. At the time that their application to the ECtHR was lodged, there was no form of legal recognition for same-sex partnerships in Austria. However, in January 2010, the Registered Partnership Act came into force,⁴ which gives legal effect to same-sex relationships but does not provide civil partners with the same status and rights as married couples. The applicants complained to the ECtHR of a violation of their right to marry (Article 12) and the right to respect for their private and family life (Article 8) in conjunction with Article 14 (non-discrimination).⁵

The application was introduced at a time of rapid change across Europe. In August 2004, when this application was submitted, only two Member States⁶ of the Council of Europe recognised same-sex marriage; yet by the time judgment was delivered that number had risen to six,⁷ and just three days after that Iceland became the seventh member of the Council of Europe to recognise same-sex marriage. At the time of writing, Slovenia and Luxembourg seem poised to pass similar legislation. Aside from those already recognising same-sex marriage, a further 12 European States currently recognise same-sex registered partnerships. This application thus offered a timely opportunity for the Court to reflect on the impact of those recent developments on its case law.

3. Issues

A. Article 12

The first question addressed by the Court was relatively straightforward: in light of Article 12, was Austria entitled to refuse the applicants access to marriage? The applicants' argument here faced a number of difficulties. The right of same-sex couples to marry had not previously been addressed by the Court. It was uncertain whether Article 12 would be found applicable to the applicants' complaint and, even if it were, whether the Court would be willing to

3 The relevant law is Article 44 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*).

4 *Eingetragene Partnerschaft-Gesetz*, Federal Law Gazette (*Bundesgesetzblatt*), Vol 1, No 135/2009.

5 The applicants also argued that the fiscal discrimination they faced as a non-married couple violated their right to property, a claim which the Court found to be unsubstantiated and therefore inadmissible: see *Schalk and Kopf*, supra n 1 at paras 111–5.

6 The Netherlands (2001) and Belgium (2003).

7 Spain (2005), Norway (2009), Sweden (2009) and Portugal (2010).

interfere with the State's margin of appreciation in regulating marriage. The drafters of the Convention—a treaty that secures in Article 12 the right of 'men and women of marriageable age' to marry—clearly would not have had same-sex marriage in their thoughts. Furthermore, the Court had held on a number of occasions that Article 12 'refers to the traditional marriage between persons of opposite biological sex'.⁸

Nevertheless, and despite the gender-specificity of Article 12, the ECHR's drafters famously do not have the last word under the Court's interpretive principles, which breathe life into the text of the ECHR by treating it as a 'living instrument'.⁹ Using this approach, the Court has performed a number of quite dramatic resuscitations. In *Christine Goodwin v United Kingdom*,¹⁰ the Court was able to depart from its previous line of case-law¹¹ and uphold the right of transpersons (in their own gender) to marry a person of the opposite gender. In that case, the Court circumvented the apparent rigidity of Article 12's language and also incontrovertibly broke the connection between the right to marry and the capacity to found a (genetically related) family. Moreover, in arguing for a forward-looking interpretation of Article 12, the applicants in *Schalk and Kopf* could point to the increasing numbers of same-sex couples in Europe granted access to marriage.

While the applicants had some grounds for cautious optimism, the Court was in no mood for innovation on this point. Although the Court rejected the argument that Article 12 was inapplicable in all circumstances to same-sex couples, thereby opening up discussion about the scope of States' obligations under it, the Court ultimately preferred to leave it to Member States to regulate marriage between same-sex couples. Despite noting the recent developments in national laws, it concluded unanimously that there was, as yet, insufficient consensus among Member States and thus no obligation on State Parties to extend marriage to same-sex couples.¹² It also emphasised that the gender-specific language of Article 12 was a deliberate choice on the part of the drafters of the Convention, thereby retreating somewhat from the bolder teleological assertions made in its cases on the marriage rights of transmen and transwomen.¹³ It is clear that a broader European consensus is needed

8 See, for example, *Rees v United Kingdom* A 106 (1986); 9 EHRR 56 at para 49; *Cossey v United Kingdom* A 184 (1990); 13 EHRR 622 at paras 43 and 46; and *Sheffield and Horsham v United Kingdom* 1998-V; 27 EHRR 163 at para 66.

9 *Tyrer v United Kingdom* A 26 (1978); 2 EHRR 1 at para 31.

10 *Christine Goodwin v United Kingdom* 2002-VI; 35 EHRR 18.

11 See, for example, *Rees v United Kingdom* A 106 (1986); 9 EHRR 56; *Cossey v United Kingdom*, supra n 6; and *Sheffield and Horsham v United Kingdom* 1998-V; 27 EHRR 163.

12 *Schalk and Kopf*, supra n 1 at para 58.

13 *Ibid.* at para 55. The Court did not consider Article 12 in conjunction with Article 14, and it is not clear what the outcome would have been had it done so.

before a right to marry for same-sex couples will be recognised in Strasbourg, the Court preferring to be led by States in this area.

While the first part of the Court's judgment was clearly disappointing for the applicants, the Court's rejection of the argument that Article 12 was inapplicable to their case was nonetheless highly significant. The majority of the Court held (with two judges¹⁴ issuing a separate opinion on this point) that the right to marry is not restricted 'in all circumstances' to opposite-sex couples.¹⁵ In bringing same-sex relationships within the ambit of Article 12, the Court had regard to the more generous language found in Article 9 of the Charter of Fundamental Rights of the European Union,¹⁶ which, without requiring States to extend marriage to same-sex couples, is gender-neutral in its reference to that status. This is a very useful elucidation of the Convention's scope, although the Court did not give any indication of the 'circumstances' in which Article 12 would extend to a same-sex couple. Not least, it leaves open the possibility of challenging, where relevant, distinctions made in national law between the status and rights of same-sex and opposite-sex married couples.

Although the Court's decision on Article 12 contains progressive elements and hints at a future in which the right to marry is extended to same-sex couples, we are left with the unsatisfactory—although hardly unique—situation in which a Convention right is currently enjoyed by a particular category of persons only with the say-so of States themselves. It is questionable whether one can talk coherently and meaningfully about a fundamental right in such conditional terms. For a regional human rights tribunal of the Court's stature to look for State consensus when faced with a situation of acknowledged discrimination is unsatisfactory, to say the least, and it is regrettable that Austria was not asked to provide good reasons for excluding same-sex couples from marriage. If marriage is not inevitably an institution for opposite-sex couples, as the Court has now acknowledged, then the exclusion of a particular group from it requires explanation. The applicants' complaint was not accorded the high-level of scrutiny that the Court has promised those complaining of sexual-orientation discrimination.¹⁷ The Court observed 'that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another'.¹⁸ While this may be the case, the Convention's view of 'marriage' is normally broad and pluralist. Such deference to States' margin of appreciation leaves the Court devoid of much to say about the nature of recent developments concerning that institution, thereby leaving same-sex

14 Ibid. at concurring opinion of Judge Malinverni and Judge Kovler.

15 *Schalk and Kopf*, supra n 1 at para 61.

16 [2000/C] OJEC C 364/1.

17 *Smith and Grady v United Kingdom* 1999-VI; 29 EHRR 493 at para 90.

18 *Schalk and Kopf*, supra n 1 at para 62.

couples out in the cold. It seems to go without saying that the Court will be asked to revisit this issue before long.

B. Articles 14 and 8

In the absence of a general obligation on Council of Europe States to recognise same-sex marriage, the Court next turned to consider whether Austria had violated the applicants' Article 8 rights in conjunction with Article 14. In order to answer that question, it was required to say whether the applicants, as a same-sex couple, were capable of establishing 'family life'. This was not a straightforward matter. The ECtHR has long recognised *de facto* family ties in its case law and has extended the meaning of 'family life' under the ECHR beyond marriage and relationships of blood to certain long-term committed relationships.¹⁹ Hence, the definition of 'family' under the ECHR is inclusive and based on the social and emotional realities of family ties and does not rely upon definitions of the family found in national laws. However, the Court's approach to non-traditional families has been uneven, and men and women in same-sex relationships have traditionally been excluded from equal enjoyment of their family rights.²⁰ This approach dates back to a 1983 decision of the European Commission on Human Rights, *X and Y v United Kingdom*, which concerned a bi-national same-sex couple who had made their home in the UK.²¹ The applicants complained that a deportation order made against 'Mr X' interfered with their Article 8 rights. The Commission found, 'despite the modern evolution of attitudes towards homosexuality', that the applicants' relationship 'did not fall within the scope of the right to respect for family life'.²² That decision set a precedent that proved fatal to the family rights claims of all same-sex couples before the Commission,²³ even where they were raising a child together.²⁴ Once the Commission was abolished, the ECtHR adopted the same approach towards same-sex relationships. In a 2001 admissibility decision, *Mata Estevez v Spain*, the Court held that 'despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which

19 *Marckx v Belgium* A 31 (1979); 2 EHRR 330; *Keegan v Ireland* A 290 (1994); 18 EHRR 342; and *Lebbink v The Netherlands* 2004-IV; 40 EHRR 18.

20 Matters concerning same-sex relationships have traditionally been dealt with by the Court as a matter of private life. For a discussion of the Court's association of homosexuality with privacy, see Johnson, '“An Essentially Private Manifestation of Human Personality”: Constructions of Homosexuality in the European Court of Human Rights' (2010) 10 *Human Rights Law Review* 67.

21 *X and Y v United Kingdom* (1983) 32 DR 220.

22 *Ibid.*, at para 221.

23 See, for example, *S v United Kingdom* (1986) 47 DR 274; and *Röösli v Germany* Application No 28318/95, Admissibility, 15 May 1996.

24 *C & L. M. v United Kingdom* Application No 14753/89, Admissibility, 9 October 1989.

they still enjoy a wide margin of appreciation.’²⁵ Prior to the *Schalk and Kopf* judgment, then, men and women in same-sex relationships were excluded from the full protection of Article 8.

Another remarkable aspect of the *Schalk and Kopf* judgment, therefore, is that the Court chose to depart from its earlier case law and to recognise that people in same-sex relationships can establish family life for the purposes of Article 8. Referring to the ‘rapid evolution of social attitudes towards same-sex couples’ across Europe, it concluded that it would be ‘artificial’ to maintain its previous position.²⁶ Consequently, the Court has now established that same-sex and opposite-sex couples are similarly situated with regard to their capacity to establish family life.

Article 8 places States under a positive obligation to establish frameworks enabling family life to be enjoyed. Having established that the applicants did enjoy family life, the Court examined whether their inability to marry or enter into a registered partnership (at least until January 2010) discriminated against them in their enjoyment of it. In relation to the specific question of whether access to marriage was necessary for the applicants to fully and equally enjoy their family rights, the Court’s response was hasty and unsatisfactory for its lack of reasoning. Despite recalling that ‘differences based on sexual orientation require particularly serious reasons by way of justification’,²⁷ without hearing any justification from the respondent State for the exclusion, the Court simply referred to the conclusion it had reached regarding Article 12 and stated that there could be no back door obligation imposed on Austria to extend marriage rights to same-sex couples derived from Article 14 in conjunction with Article 8.²⁸

As for the broader question of whether Austria was required to offer the applicants’ relationship *some* form of legal recognition, the judgment is less clear. As noted above, legislation introduced in Austria in January 2010 meant that the applicants no longer faced a total absence of legal recognition. Noting how recently and rapidly developments in national laws across Europe occurred, the majority of the Court found that it had been within Austria’s margin of appreciation not to recognise same-sex relationships sooner than it had done so.²⁹ Three dissenting judges, however, strongly disagreed with the majority’s approach and argued that the pre-2010 situation, in which the applicants’ relationship could not be recognised, had not been justified by the Austrian State and amounted to a violation of the applicants’ rights.³⁰

25 *Mata Estevez v Spain* 2001-VI at para 4.

26 *Schalk and Kopf*, supra n 1 at paras 93–4.

27 *Ibid.* at para 97.

28 *Ibid.* at para 101.

29 *Ibid.* at para 105–6.

30 *Ibid.* at Joint Dissenting Opinion of Judges Rozakis, Spielmann and Jebens.

Schalk and Kopf is thus ambiguous on the question of whether States must provide same-sex relationships with some form of legal recognition. Significantly, however, the Court acknowledged an emerging European consensus towards recognition and indicated that its case law would be responsive to it. It referred to the recognition of same-sex relationships as an area of 'evolving rights'.³¹ Most tellingly, it referred to States' margin of appreciation in relation to 'the timing of the introduction of any legislative changes',³² rather than whether to introduce such changes: Austria, it noted, could not be 'reproached for not having introduced' legislation any earlier.³³ The judgment thus indicates that Member States will be bound to recognise same-sex relationships in some form in the near future. Indeed, it is hard to see how family life can be fully enjoyed without some form of legal recognition being offered to those in same-sex relationships.

The final major question for the Court was whether, in the absence of extending marriage rights to same-sex couples, the Convention tolerates distinctions between registered partnerships and marriage. In fact, the Court avoided addressing that question in detail because the applicants had not complained of any specific discrimination affecting registered partners. However, it noted in passing that States 'enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition'.³⁴ This implies that States can justify—at least for now—differences in treatment between civil partnership and marriage, even where same-sex couples are excluded from the latter status. If that is the correct understanding of what the Court is saying here, most same-sex couples in Europe—as well as any children they are raising together—will continue to experience discrimination of the most fundamental kind for the foreseeable future.

4. Further Comment

Schalk and Kopf develops the Court's case law in three important respects. First, marriage rights contained in Article 12 are now clearly not restricted to opposite-sex couples 'in all circumstances'. Second, the Court now recognises that same-sex couples can establish family life. Third, the Court indicated that it is poised on the brink of obliging States to provide same-sex relationships with some form of legal recognition. However, the Court behaved rather like a lurching ship entering choppy uncharted waters, failing to ensure that the important family rights it recognised were given meaningful content for same-sex couples. The dissenting judges were correct: failing to specify the

31 *Schalk and Kopf*, supra n 1 at para 105.

32 *Ibid.*

33 *Ibid.* at para 106.

34 *Ibid.* at para 108.

nature of the obligations entailed in protecting the family rights of same-sex couples has left a considerable vacuum in the Convention's machinery of protection.

This judgment leaves those in same-sex relationships with several areas of uncertainty. Although the Court will almost certainly find in the near future that offering same-sex relationships no legal recognition violates the Convention, it also seems likely that the Court will tolerate a degree of differentiation between marriage and registered partnership for some time to come. Significantly, the Court has referred a number of times to the protection of the 'traditional' family as a 'weighty and legitimate reason which might justify a difference in treatment'.³⁵ The practical implications of this are considerable. For example, in *Schalk and Kopf* the Court noted that the lack of 'parental rights' in Austrian registered partnerships corresponded to the European trend and was therefore acceptable.³⁶ While this is factually correct, it was nonetheless an unhelpful way of framing the issue: asking for good reasons why children raised in alternative families should enjoy lesser protection of their family rights, for example, seems a more pertinent approach for a human rights tribunal to adopt.

This case also raises questions about the extent to which the Court defers to Member States when shaping their obligations under the Convention. The Court treated marriage largely as a matter for States to regulate and define, subject to a certain minimum standard reflected in consensus. Where discrimination is acknowledged to have taken place, this is clearly an unsatisfactory approach that leaves minorities vulnerable to majoritarian domination. The Court is in danger of treating marriage as an untouchable, almost sacred, category. The Court, which is founded on the principles of equality and dignity, might reasonably be expected to be making a vital contribution to the difficult process of challenging entrenched ideas about the nature of marriage and negotiating new understandings that accommodate a plurality of relationships, free from any discrimination based on sexual orientation. As the Canadian Supreme Court so eloquently explained, not recognising same-sex relationships 'perpetuates disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence'.³⁷ The perpetration of any distinction or difference in treatment only reiterates the belief that one form of family is superior to the others and is thus worthy of more protection. Until the various gaps in the recognition of non-traditional families are addressed, the ECHR will fall short of its promise to deliver rights on the basis of equality and respect for human dignity for all.

35 *Karner v Austria* 2003-IX; 38 EHRR 24 at para 40.

36 *Supra* n 1 at paras 105–6.

37 *M v H* [1999] 2 SCR 3, at para 73.

In interpreting Article 12 restrictively, the Court referred to the drafters' intention ('the choice of wording . . . must thus be regarded as deliberate') and to the historical context in which the Convention was drafted.³⁸ Thienel has consequently questioned whether the Convention is currently less 'alive' than it once was.³⁹ He refers to the recent *Quark Fishing*⁴⁰ and *Bayatyan*⁴¹ cases in which the Court has declined to 'unwrite' provisions in the Convention in order to render enjoyment of Convention rights more practical and effective, and suggests that the signs for bold interpretations of the Convention are not positive. It would seem, however, that reports of the Convention's death have been greatly exaggerated: in *Schalk and Kopf*, for example, the Court made important strides in its interpretation both of Article 8 and Article 12 without reference to the drafters' intentions. This case does not mark a return to 'original intent' interpretation: rather, the Court's reference to that interpretive rule seems to have been a smokescreen through which to conceal present day prejudice. It is the current struggle that Europe still faces to overcome preconceived ideas about marriage and the family to the exclusion of same-sex couples that is the real story in *Schalk and Kopf*. Given the importance of the issues raised in this judgment and the division among the judges, it is certain that these issues will find their way to the Grand Chamber imminently. This will depend on other applications, however, as the applicants' request for a referral to the Grand Chamber was rejected on 22 November 2010.

Another point worthy of mention is the distance this judgment places between the jurisprudence of the ECtHR and that of the highest courts in a number of major liberal democracies. In 2005, following a number of federal⁴² and provincial⁴³ judgments which held that excluding same-sex couples from marriage (or the benefits of marriage) was discriminatory, the federal Canadian Parliament passed the Civil Marriage Act which made marriage by same-sex couples legal throughout that country. South Africa followed suit with the Civil Unions Act 2006, which was passed as a result of a decision by the Constitutional Court declaring that the exclusion of same-sex couples from the institution of marriage was a form of sexual orientation discrimination and therefore unconstitutional.⁴⁴ Although the issue continues to be extremely divisive in the US for the legislature and judiciary alike, a number of state Supreme Courts have nonetheless held that denying same-sex couples

38 *Schalk and Kopf*, supra n 1 at para 55.

39 Thienel, supra n 2.

40 *Quark Fishing Ltd v United Kingdom* 44 EHRR SE4.

41 *Bayatyan v Armenia* Application No 23459/03, Merits, 27 October 2009, which has been referred to the Grand Chamber.

42 *M v H*, supra n 37.

43 *Halpern et al v Canada* 95 CRR (2d) 1 (Ontario Superior Court, 12 July 2002); *Hendricks v Quebec* [2002] RJQ 2506 (Quebec Superior Court, 6 September 2002); and *Barbeau v British Columbia* 2003 BCCA 251 (Court of Appeal for BC, 1 May 2003).

44 *Minister for Home Affairs v Fourie* Case CCT 60/04, 1 December 2005.

access to marriage is unconstitutional.⁴⁵ In August 2010, the Supreme Court of Mexico ruled that marriages of same-sex couples performed in the Federal District are valid in all the Mexican states.⁴⁶ While the ECtHR has taken a step forward in relation to same-sex couples in this judgment, it is in no sense a global leader on this issue. It is disappointing that such a widely-respected international tribunal finds itself unable to offer clearer guidance on a matter of such pressing fundamental rights.

As a final matter, it is interesting to note the surprising role played by the UK in this case. In an intervention dated 4 October 2007, the UK government argued both that Article 12 did not require States to extend marriage to same-sex couples and that Article 8 together with Article 14 did not compel States to grant legal recognition to same-sex couples.⁴⁷ It is mystifying why the UK Government chose to intervene on these issues. Given the power imbalance at play in litigation before the Court in which the applicant is almost invariably the weaker and less well-resourced party, given the clear competence Austria displayed in arguing its case, and the Court's primary role in interpreting the Convention, and given the UK recognition of same-sex civil partnerships, it was a strange and unnecessary course of action. Worryingly for its international standing, this is the second intervention that the UK has submitted in recent years arguing for a restrictive interpretation of the Convention.⁴⁸ I am not aware of any intervention in which the UK Government has intervened to argue for a broad interpretation of Convention rights. In the event, its intervention in *Schalk and Kopf* was clearly not well thought-out: after Lord Lester raised a question in the House of Lords concerning this intervention,⁴⁹ the UK Government altered its position on the ambit of 'family life' and wrote to the Court clarifying this.⁵⁰ Nonetheless, one wonders how far the Court's rather faltering approach to Article 12 was influenced by this warning shot from one of the Council of Europe's most powerful Member States.

45 *Baehr v Lewin* 852 P.2d 44 (Haw 1993), revised by a revisionist state constitutional amendment; *Baker v State* 744 A.2d 864 (Vt. 1999); *Goodridge v Department of Public Health* 798 N.E.2d 941 (MA, 2003); *Lewis v Harris* 908 A.2d 196 (N.J. 2006), compelling the State to recognise marriage or to create a 'parallel structure'; *Re Marriage Cases* 183 P.3d 384 (Cal. 2008), revised by Proposition 8 - the constitutionality of which is currently under appeal; and *Varnum v Brien* 763 N.W.2d 862 (IA, 2009).

46 BBC News Report, 'Supreme Court Rules Gay Weddings Valid in all Mexico', 10 August 2010, available at: <http://www.bbc.co.uk/news/world-latin-america-10932748> [last accessed 23 November 2010].

47 *Schalk and Kopf v Austria*, Submissions on Behalf of the Government of the United Kingdom, 4 October 2007 (on file with the author).

48 See also *Saadi v Italy* 49 EHRR 30.

49 HL Deb, Vol 703, col 843-4 (10 July 2008).

50 Letter to ECtHR Registry from the Foreign and Commonwealth Office, 15 January 2009 (on file with the author).