

## ■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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### **No discrimination of same-sex partners in insurance matters without special justification**

Austrian Constitutional Court  
Judgement of 10 October 2005  
(case G 87/05, V 65/05 and others – VfSlg. 17.659/2005)  
Judgement of 27 September 2007 (case B 1829/06)

#### **1. Judgement of 10 October 2005**

In this judgement the Austrian Constitutional Court found that a legal provision which provided for the co-insurance of a person living in the same household as the insurant and keeping the common household without receiving remuneration for it violated the constitutional right to equal treatment because it excluded from its ambit persons of the same sex as the insurant.

#### ***Circumstances of the case***

The applicant of the originating case was an employee and therefore legally insured according to the General Social Insurance Act (*Allgemeines Sozialversicherungsgesetz – ASVG*). He applied for co-insurance of his same-sex partner under § 123 ASVG (a parallel procedure concerned an application for co-insurance under a very similar provision of another insurance act, which will not be discussed in the following; the Courts decision concerns this provision as well.)

§ 123 ASVG provided that the statutory insurers could decide to extend co-insurance to one non-related (by blood or marriage) person of a different sex to the main insurant provided that this person had been living in the same household as the main insurant for at least ten months and that this person kept the common household without receiving remuneration for it. The statutory insurer in question had made use of this legal possibility.

However, the competent authorities rejected the application because the legal provision did not provide for co-insurance of same-sex partners.

The applicant then complained against the decision to the Constitutional Court. The Court decided to open an interim procedure to assess the

constitutionality of § 123 ASVG, stating doubts on whether the exclusion of same-sex partners was compatible with the right to equal treatment before the law. The Court stated that it could not follow one of its previous decisions in which it had rejected a complaint concerning a legal regulation that excluded co-insurance for same-sex persons. It gave the following reasons for not keeping to its previous decision:

"If one follows the legal view of the European Court of Human Rights expressed in its judgement in the case of 'Karner vs Austria' (ECtHR, 24 July 2003, Appl N° 40016/98) – a case which unlike the present one was within the ambit of Art 8 ECHR but which seems to be of general importance on the subject of discrimination –, it seems that when a legal provision that does not only apply to cases of marriage or blood-relationship but also extends to cohabitation differentiates according to sex or sexual orientation and when there are not serious reasons for this differentiation, this constitutes a violation of Art 14 ECHR and is also a discrimination with respect to the Constitutional Right to equal treatment. In the present case, the Constitutional Court can not – provisionally – find any such reasons. The present case does not concern a 'genuine cohabitation' ('*umfassende Lebensgemeinschaft*'; note: this term seems to relate to a cohabitation that is also of sexual nature and geared towards procreating and raising children); the law only requires that two persons live in the same household for a specified period of time and that the co-insured person keeps the household without getting paid for it. This seems to be an indication that serious reasons that could justify such discrimination as provided by the law in question do not exist."

The Federal Government defended the legal provision stating that it pursued the aim of supporting families and that in general, no children will be born and raised in same-sex partnerships, this being a serious reason for excluding such partnerships from co-insurance.

### ***Relevant Constitutional Law***

#### *Art 7 subsection 1 Austrian Constitution:*

All nationals (Austrian citizens) are equal before the law. Privileges based upon birth, sex, estate, class or religion are excluded. No one shall be discriminated against because of his disability. The Republic (Federation, *Laender* and municipalities) commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of every-day life.

#### *Art 2 of the Basic Law on Fundamental Rights of Citizens:*

All nationals (Austrian citizens) are equal before the law.

*Art 14 ECHR – Prohibition of Discrimination  
(the ECHR enjoys constitutional status in Austria and can thus  
be invoked in proceedings before the Constitutional Court):*

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

### **The Court's assessment**

The court found its original doubts about the constitutionality of the legal provision confirmed during the proceeding and accordingly declared it unconstitutional. It stated the following reasons:

"The proceedings did not show that the Courts conclusion from the ECtHR's *Karner* case were unfounded. In that case as in the present one, what is at stake is the ambit of the prohibition to differentiate according to sex and according to related beliefs under Art 14 ECHR applied to the clause of 'different sex' contained in the legal provision being examined in this proceeding. In both cases, this differentiation relates to a right that as such is not provided for in the Convention.

It is correct that in each individual case there has to be an individual assessment of whether valid reasons exist for a differentiation according to sex or sexual orientation, taking into account the case's respective background. However – and this is the important point – the ECHR seems to require especially weighty reasons for such a differentiation.

In its preliminary assessment the Court did not see such reasons. A differentiation according to sex seemed to it especially unwarranted because the legal provision only required a common household for a specified period of time and an unremunerated taking care of the household.

The Federal Government stated that the differentiation was justified because the aim of the regulation is to promote families with children, something which could not apply to same-sex relationships. This argument, however, cannot be accepted since the legal provision does not take into account whether there are children living in the household or not, nor can it be said that the co-insurance of a household-keeping person would or could provide an incentive to give birth to children. Rather, the main point of the provision is the unremunerated taking care of a joint household. If the legislator had wanted to pursue family-policy goals, he could have done so by limiting the ambit of the provision to joint households with in-living children. Even assuming the provision might have a side-effect of this kind, this does not suffice to justify the differentiation. The differentiation can also not be justified by the fact that the law takes account of whether a co-insurant has dedicated him- or herself to the raising of children when defining the amount of insurance contributions.

[...] Even though the Legislator might only have wanted to consider 'genuine' cohabitations, the legal provision does not limit its ambit to them. In its application, there is no need to differentiate between 'genuine' cohabitation and mere apartment-sharing; rather, it suffices that apart from a joint household, the co-insured partner takes care of it without being remunerated for this task.

There are also no other reasons for the legal precondition of 'persons of different sex'. The legal provisions therefore are discriminatory and against the constitutional Right to Equal Treatment. They are thus unconstitutional."

## 2. Judgement of 27 September 2007

### *Circumstances of the case*

This judgement relates to similar legal provisions as the judgement discussed above. After the Court had annulled the provisions for being unconstitutional, the Legislator reformed the system of co-insurance outlined above. In particular, the renewed legal provisions relied on two principles:

- The co-insurance extends to the spouse of the insurant (something which was also the case in the previous version of the law);
- The co-insurance also extends to a person living in a joint household with the insurant and taking care of it without remuneration (provided that there is not spouse living in the joint household), under the condition that this person is raising children living in the common household or has done so for a period of four years.

The legal provision thus does not differentiate any more between same-sex or different-sex persons sharing a household. However – and unlike the case of married couples – it restricts co-insurance to cases where the person is taking care of the household is also raising children living there or has done so for an extended period of time.

### *The Court's assessment*

The Court decided that this renewed provision was not unconstitutional. It stated:

"The previous judgement obliged the Legislator to provide for a non-discriminating provision. [...] The renewed provision is not-discriminating in the sense that it also applies to co-habiting persons of the same sex.[...] The Court can also not see an 'indirect' discrimination due to the fact that the conditions for co-insurance for spouses are less strict, even taking into account that same-sex couples cannot legally marry. As the Court has decided in its previous judgement VfSlg. 17.089/2003, there is no constitutional mandate – whether grounded on the Right to Equal Treatment of the Austrian Constitution or in the ECHR – that would require the Legislator to extend the possibility of marriage, which is geared towards the possibility of parenthood, to same-sex couples. In its judgement VfSlg. 17.337/2004 the Court decided that legal consequences that require the

existence of a marriage are not unconstitutional only because these consequences do not apply to other forms of relationships. However, there needs to be a material relation between the marriage and these legal consequences. The justification for such a differentiation between married and non-married couples varies according to the kind and content of the legal provision and its respective circumstances.

In the present case, the Court cannot find an unjustified discrimination, taking into account that unlike spouses, non-married partners are not legally required to provide subsistence to each other and therefore not obliged to provide specific benefits such as insurance to a partner that has fallen sick."

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