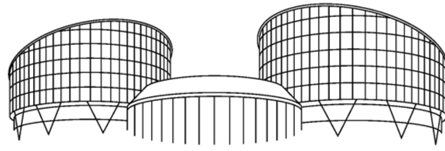

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF RATZENBÖCK AND SEYDL v. AUSTRIA

(Application no. 28475/12)

JUDGMENT

STRASBOURG

26 October 2017

FINAL

09/04/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Ratzenböck and Seydl v. Austria,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President,*
Nona Tsotsoria,
André Potocki,
Yonko Grozev,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 19 September 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 28475/12) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Austrian nationals, Ms Helga Ratzenböck and Mr Martin Seydl, on 11 May 2012.

2. The applicants were represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for Europe, Integration and Foreign Affairs.

3. The applicants alleged, relying on Article 14 of the Convention taken in conjunction with Article 8, that they had been discriminated against on the basis of their sex and sexual orientation because they had been denied access to a registered partnership (*eingetragene Partnerschaft*), a legal institution exclusively reserved for same-sex couples.

4. On 3 March 2015 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1966 and 1964 respectively and live in Linz. They have been living in a stable relationship for many years.

6. On 21 February 2010 the applicants lodged an application to enter into a registered partnership under the Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*).

7. On 17 March 2010 the Mayor of Linz dismissed their application in accordance with sections 1, 2 and 5(1)(1) of the Registered Partnership Act, finding that the applicants did not meet the legal requirements, as the registered partnership was exclusively reserved for same-sex couples.

8. The applicants appealed. Citing, *inter alia*, Articles 8 and 14 of the Convention, they complained of discrimination based on their sex and their sexual orientation. The Upper Austrian Regional Governor (*Oberösterreichischer Landeshauptmann*) dismissed the appeal on 18 August 2010, arguing with reference to *Schalk and Kopf v. Austria* (no. 30141/04, ECHR 2010) that as the Contracting States were allowed to restrict access to marriage to different-sex couples, it would appear unreasonable not to allow them to reserve access to registered partnerships exclusively for same-sex couples.

9. The applicants subsequently lodged complaints with both the Administrative Court and the Constitutional Court, arguing that marriage was not a suitable option for them, as it was substantially different from a registered partnership. In their view, a registered partnership was in many ways more modern and “lighter” than marriage. The applicants put forward several examples: the different statutory time-limit for divorce versus the time-limit for dissolution of a registered partnership in the event of an irretrievable breakdown (*unheilbare Zerrüttung*) of the relationship; the alimony payment obligations following a divorce/dissolution where blame could be placed on one spouse/partner; the obligations conferred by the respective legal institutions, in particular as regards trust, faithfulness and contributions to the household; and the consequences of a declaration of the death of a spouse/partner. The applicants argued that the Court’s considerations in *Schalk and Kopf* in respect of marriage were not applicable to the registered partnership, which was a new legal institution, introduced in the twenty-first century. It was therefore neither based on a long-standing discriminatory tradition and deep-rooted social connotations, nor aimed at possible procreation.

10. On 22 September 2011 the Constitutional Court dismissed the applicants’ complaint. The relevant parts of its judgment read as follows:

> “Article 12 of the [Convention] only applies to the traditional civil marriage ..., which has ‘deep-rooted social and cultural connotations’ and was, in the historical

context, clearly understood 'in its traditional sense' (ECHR, case of *Schalk and Kopf*, §§ 55, 62). If the Court, in its judgment in the case of *Schalk and Kopf*, considers that the national provisions in the Council of Europe member States are diverse and range from allowing same-sex marriage to explicitly forbidding it, and concludes from this that, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by domestic law (ECHR, case of *Schalk and Kopf*, §§ 60f), this must, in view of the small number of States providing for a registered partnership for different-sex couples in addition to marriage, be even more valid for this question.

As the [Convention] has to be read as a whole and its Articles have to be construed in harmony with one another, and as Article 12 of the [Convention] does not grant different-sex couples, in addition to the right to marry, a right to enter into a registered partnership, the prohibition of discrimination pursuant to Article 14 taken in conjunction with Article 8 of the [Convention], a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation beyond the scope of Article 12 of the [Convention] either (see, concerning the correlating question of the right of same-sex couples to marry, which cannot be derived from Article 14 of the [Convention] either, ECHR, case of *Schalk and Kopf*, § 101).

...

[A]s the Austrian legislator has provided for the possibility of legal recognition for same-sex couples by introducing the registered partnership, people may rely on the prohibition of discrimination provided for by Article 14 of the [Convention] ...

The Court has also stated, however, in the case of *Schalk and Kopf*, that the legislator may restrict access to marriage to different-sex couples because it has a certain margin of appreciation as regards the exact status conferred by alternative means of recognition. Moreover, the Court assumes that the Registered Partnership Act allows couples to obtain, in many aspects, a legal status that is equal or comparable to marriage; apart from parental rights, there were only slight differences (see ECHR, case of *Schalk and Kopf*, §§ 108 et seq.).

Given that persons of different sex have access to marriage (see the [explanatory report on the draft law]); the registered partnership was introduced only to counter discrimination against same-sex couples; [the registered partnership] should, in substance, have the same effects as marriage; different-sex couples are not a group (historically) discriminated against; and there is no European consensus on this matter, it does not amount to a violation of Article 14 taken in conjunction with Article 8 of the [Convention] if the Austrian legislator does not grant different-sex couples access to the registered partnership.

...

The Constitutional Court is not called upon to examine whether the particular differences between these legal institutions, as regards the legal consequences and dissolution options, comply with the principle of equality [*Gleichheitssatz*] and the prohibition of discrimination pursuant to Article 14 taken in conjunction with Article 8 of the [Convention], since the only question to be examined is whether different-sex couples have a constitutional right to access to the registered partnership."

11. On 27 February 2013 the Administrative Court dismissed the applicants' complaint (see paragraph 9 above) as unfounded. That decision was served on the applicants' counsel on 25 March 2013.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Civil Code

12. Under Article 44 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), family relationships are based on the marriage contract, in which two individuals of opposite sex lawfully declare their intention to live together in indissoluble matrimony, to beget and raise children, and to support each other.

B. Registered Partnership Act

13. The Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*) entered into force on 1 January 2010 (Federal Law Gazette (*Bundesgesetzblatt*) I no. 135/2009). It was introduced in order to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships. In introducing the Act, the legislator had particular regard to developments in other European States (see the explanatory report on the draft law (*Erläuterungen zur Regierungsvorlage*, 485 *der Beilagen* XXIV GP)).

14. According to its section 1, the Registered Partnership Act governs the conclusion, effects and dissolution of a registered partnership between two persons of the same sex. Pursuant to section 2, only two persons of the same sex can conclude a registered partnership. By doing so, they commit themselves to a long-term relationship involving mutual rights and obligations. Section 5(1)(1) provides that a registered partnership may not be concluded between persons of the opposite sex.

15. The rules on the establishment of a registered partnership, its effects and its dissolution resemble those governing marriage. An overview of those rules, as in force at the relevant time, has been set out in the Court's judgment in the case of *Schalk and Kopf* (cited above, §§ 19-22).

16. After the Registered Partnership Act entered into force, legal amendments were adopted by means of the Adoption Law Amendment Act 2013 (*Adoptionsrechts-Änderungsgesetz 2013*), Federal Law Gazette I no. 179/2013; the Deregulation and Harmonisation Act 2016 – Interior (*Deregulierungs- und Anpassungsgesetz 2016 – Inneres*), Federal Law Gazette I no. 120/2016, concerning family names and competent authorities), as well as decisions of the Constitutional Court (G 16/2013 and others, VfSlg. 19.824/2013, concerning artificial insemination, and G 119/2014 and others, VfSlg. 19.942/2014, concerning stepchild adoption). The amendments resulted in further harmonisation of the legal frameworks governing marriage and the registered partnership, *inter alia* in respect of parental rights, an area in which the Court had previously identified substantial differences (see *Schalk and Kopf*, cited above, § 23).

The remaining legal differences that cannot be abrogated by mutual consent are the maximum statutory periods for divorce of a married couple versus those for the dissolution of a registered partnership, as well as the legal consequences of a declaration of the death of one spouse/partner.

THE LAW

ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

17. The applicants complained, under Article 14 of the Convention taken in conjunction with Article 8, of discrimination based on their sex and sexual orientation on account of their exclusion from the registered partnership, claiming that marriage was not a suitable alternative for them. They did not rely on Article 8 taken alone, so the Court considers that there is no need for it to examine this issue of its own motion.

The relevant parts of Article 8 read as follows:

Article 8 (right to respect for private and family life)

"1. Everyone has the right to respect for his private and family life ....

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."

Article 14 provides as follows:

Article 14 (prohibition of discrimination)

"The enjoyment of the rights and freedoms set forth in [the] 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."

A. Admissibility

1. The parties' submissions

18. The Government argued that the domestic authorities' and courts' decisions denying the applicants the right to enter into a registered partnership had been based only on section 2 of the Registered Partnership Act, which excluded different-sex couples from registered partnerships. The different legal consequences of marriage and the registered partnership

which the applicants complained about were – in so far as they actually existed – based on provisions which had not been the subject matter of the domestic proceedings, such as those relating to divorce and the declaration of death of a spouse. Referring to *Schalk and Kopf v. Austria* (cited above, § 109), the Government argued that the question whether those provisions might have an effect on the applicants in the future was merely hypothetical. Contesting in substance the applicants' victim status, the Government claimed that the application was inadmissible in so far as it sought an *in abstracto* review of legal provisions which did not directly concern the applicants.

19. The applicants contended in reply that they had only ever challenged their exclusion from the registered partnership, and had referred to the other provisions of the Registered Partnership Act merely to demonstrate why they preferred that institution to marriage. Maintaining their wish to organise their relationship in accordance with the legal arrangements laid down by the Registered Partnership Act, the applicants claimed that they were victims of the alleged violation.

2. The Court's assessment

20. As regards the Government's argument concerning the applicants' status as victims, the Court notes that they are a man and a woman who have been living together in a stable relationship for many years, and the domestic proceedings in the present case related to the authorities' refusal to allow them to enter into a registered partnership. The Court thus considers that the applicants were directly concerned by the situation whereby they had been denied access to the registered partnership, including its legal consequences, and had been referred instead to the institution of marriage. They therefore have a legitimate personal interest in seeing that situation brought to an end (see, *mutatis mutandis*, *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 49, ECHR 2013 (extracts); *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, §§ 70-72, 21 July 2015; and, by implication, *Schalk and Kopf*, cited above).

21. Accordingly, the Court concludes that the applicants should be considered "victims" of the alleged violation within the meaning of Article 34 of the Convention.

22. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

23. The applicants complained of discrimination based on their sex and sexual orientation because of their permanent exclusion from the legal institution of a registered partnership. Maintaining the arguments they had already raised in the domestic proceedings (see paragraph 9 above), they argued that marriage was not a suitable alternative for them because of the differences between the legal frameworks governing marriage and the registered partnership. In their view, Article 8 of the Convention did not oblige the Contracting States to introduce a registered partnership as such; however, if a State decided to do so, it was barred from excluding couples from this new partnership institution solely on the basis of their sex and sexual orientation. Moreover, the applicants argued that the Court's conclusions in the case of *Schalk and Kopf*, which had concerned the opposite situation (namely a same-sex couple being denied access to marriage), could not be applied in the present case.

24. The Government contested that argument, claiming that the Convention required States to provide for only one institution for the legal recognition of a stable relationship. A positive obligation under Article 8 of the Convention to provide for such an institution could only arise in so far as couples had no access to marriage within the sense of Article 12.

25. As regards the complaint relating to discrimination, the Government argued that the exclusion of different-sex couples from the registered partnership, with the result that they could only enter into marriage, pursued the aim of supporting and promoting the traditional family model and the full development opportunities of the traditional family as safeguarded by Article 12 of the Convention.

26. Moreover, the Government pointed out that the Convention allowed the Contracting States to create separate partnership institutions for different-sex and same-sex couples, and that there was no European consensus on the question whether such institutions should be made available also to different-sex couples, in addition to marriage. They argued that the assumption that the right to family life also entailed a right for different-sex couples to enter into a registered partnership would lead to an imbalance where same-sex couples – in line with the Convention and the Court's case-law – had access to only one legal institution, namely the registered partnership. The restriction of registered partnerships to same-sex couples in Austria therefore struck a balance between the partnership institutions available to different-sex and same-sex couples, based on the restriction of marriage to different-sex couples expressly authorised by the Convention, and did not exceed the margin of appreciation available to States for establishing a legal framework in sensitive socio-political areas.

27. As regards the complaint relating to the different consequences of marriage and the registered partnership, the Government, referring to *Schalk and Kopf*, § 108, and *Oliari and Others*, § 162 (both cited above), claimed that Article 14 of the Convention taken in conjunction with Article 8 did not require that partnership institutions available to different-sex couples and to same-sex couples corresponded in each and every respect. If differences in the legal treatment of the two groups were admissible from the point of view of one group, they must necessarily also be admissible from the point of view of the other group. Despite the existence of separate provisions for marriage and registered partnerships, there were hardly any differences in the legal consequences: it was the express intention of the legislator that the effects of registered partnerships should in substance be the same as the rights and obligations of married persons, which was in fact the case. The Court had already confirmed in *Schalk and Kopf* that the existing differences were in compliance with the trend in other States, and legal amendments introduced after the entry into force of the Registered Partnership Act had led to further harmonisation. The remaining legal differences that cannot be abrogated by mutual consent are the maximum statutory periods for divorce of a married couple versus those for the dissolution of a registered partnership, as well as the legal consequences of a declaration of the death of one spouse/partner. This, however, did not concern the applicants.

2. *The Court’s assessment*

(a) Applicability

28. The Court has consistently held that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, with further references, *Vallianatos and Others* [GC], cited above, § 72).

29. The Court reiterates its established case-law in respect of different-sex couples, namely that the notion of “family” under Article 8 of the Convention is not confined to marriage-based relationships and may encompass other *de facto* “family” ties where the parties are living together out of wedlock (see, among many other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII).

30. It follows that the facts of the present application fall within the notion of “family life” within the meaning of Article 8. Consequently, both

Article 8 taken alone and Article 14 taken in conjunction with Article 8 of the Convention apply.

(b) Compliance with Article 14 of the Convention read in conjunction with Article 8

(i) General principles

31. In order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. In other words, the requirement to demonstrate an analogous position does not require that the comparator groups be identical. An applicant must demonstrate that, having regard to the particular nature of his or her complaint, he or she was in a relevantly similar situation to others treated differently. However, not every difference in treatment will amount to a violation of Article 14. Firstly, the Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14. Secondly, a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 September 2017 with further references). In examining whether persons subject to different treatment are in a relevantly similar situation, the Court takes into account the elements that characterise their circumstances in the particular context. The elements which characterise different situations, and determine their comparability, must be assessed in the light of the subject-matter and purpose of the measure which makes the distinction in question (*Fábián v. Hungary* [GC], cited above, § 121). The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see, with further references, *Vallianatos and Others* [GC], cited above, § 76).

32. Sexual orientation is a concept covered by Article 14. The Court has repeatedly held that, just like differences based on sex, differences based on sexual orientation require "particularly convincing and weighty reasons" by way of justification (see *Vallianatos and Others* [GC], cited above, § 77, and *X and Others v. Austria* [GC], no. 19010/07, § 99, ECHR 2013). Where a difference in treatment is based on sex or sexual orientation, the State's margin of appreciation is narrow (see *Karner v. Austria*, no. 40016/98, § 41, ECHR 2003-IX, and *Kozak v. Poland*, no. 13102/02, § 92, 2 March 2010). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see *Schalk and Kopf*,

cited above, § 98, and *Petrovic v. Austria*, 27 March 1998, § 38, *Reports of Judgments and Decisions* 1998-II). Differences based solely on considerations of sexual orientation are unacceptable under the Convention (see *Vallianatos and Others* [GC], cited above, § 77; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 36, ECHR 1999-IX; *E.B. v. France* [GC], no. 43546/02, §§ 93 and 96, 22 January 2008; and *X and Others v. Austria*, cited above, § 99).

(ii) Recent relevant case-law and the scope of the present case

33. The Court has not yet had an opportunity to examine the question of differences in treatment based on sex and sexual orientation relating to the exclusion from a legal institution for recognition of a relationship from the viewpoint of a different-sex couple. So far, the Court's relevant case-law in such matters has originated from applications lodged by same-sex couples (see *Schalk and Kopf*; *Vallianatos and Others* [GC]; and *Oliari and Others*, all cited above), whose complaints concerned the lack of access to marriage and lack of alternative means of legal recognition. The Court's examination of alleged discriminatory treatment in such matters was thus conducted from the standpoint of a minority group whose access to legal recognition was still an area of evolving rights with no established consensus among the Council of Europe member States (see *Schalk and Kopf*, cited above, § 105). The Court will thus have to examine the extent to which the principles established in its case-law relating to same-sex couples can be applied to the present case.

34. Same-sex couples and different-sex couples are in principle in a relevantly similar or comparable situation as regards their general need for legal recognition and protection of their relationship (see *Vallianatos and Others* [GC], § 78; *Oliari and Others*, § 165; and *Schalk and Kopf*, § 99, all cited above).

35. In the case of *Schalk and Kopf,* the Court examined the situation of legal recognition of same-sex couples in Austria, in particular their exclusion from marriage and their access to the registered partnership as an alternative form of legal recognition, within the very same legal framework as that on which the domestic proceedings in the present case were based. Observing that marriage had deep-rooted social and cultural connotations which may differ widely from one society to another, the Court held that neither Article 12 of the Convention nor Article 14 taken in conjunction with Article 8 imposed an obligation on the Contracting States to grant same-sex couples access to marriage (see *Schalk and Kopf*, cited above, §§ 62-63 and 101). As regards the applicants' complaint regarding differences between the status of marriage and that of registered partnerships, the Court considered that the States enjoyed a certain margin of appreciation as regards the exact status conferred by alternative means of recognition (ibid., § 108). Moreover, the Court noted that the Registered

Partnership Act gave same-sex couples the possibility to obtain a legal status equal or similar to marriage in many respects. Whereas substantial differences remained in respect of parental rights, there were only slight differences in respect of material consequences (ibid., § 109).

36. In the case of *Vallianatos and Others* ([GC], cited above, §§ 78-92) the Court found that the exclusion of same-sex couples from entering into a civil union constituted a violation of Article 14 of the Convention taken in conjunction with Article 8. In particular, the Court observed in that case that different-sex couples, unlike same-sex couples, could have their relationship legally recognised even before the enactment of the law governing the civil union, whether fully on the basis of the institution of marriage or in a more limited form under the provisions of the Civil Code dealing with *de facto* partnerships. Consequently, the Court concluded that same-sex couples would have a particular interest in entering into a civil union, since it would afford them, unlike different-sex couples, the sole basis in domestic law on which to have their relationship legally recognised (ibid., § 90).

37. In the case of *Oliari and Others* (cited above, § 185), the Court examined the complaint of a same-sex couple that they had had no opportunity to enter into a civil union or registered partnership (in the absence of marriage). It found a violation of Article 8 on account of the Government's failure to fulfil their positive obligation to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions.

(iii) Application of the general principles to the present case

38. The applicants claimed that they had been discriminated against as a different-sex couple, as they had no possibility of entering into a registered partnership, an institution they preferred to marriage. The Court therefore has to examine first whether, for the purpose of Article 14 of the Convention, the applicants were in a comparable situation to same-sex couples who have access to registered partnerships and, if so, whether any difference in treatment was justified.

39. The Court accepts that different-sex couples are in principle in a relevantly similar or comparable position to same-sex couples as regards their general need for legal recognition and protection of their relationship (see paragraph 35 above).

40. The Court observes that the exclusion of different-sex couples from the registered partnership has to be examined in the light of the overall legal framework governing the legal recognition of relationships. The registered partnership was introduced as an alternative to marriage in order to make available to same-sex couples, who remain excluded from marriage, a substantially similar institution for legal recognition (see paragraph 13 above). Thus, the Registered Partnership Act (see paragraphs 13-16 above) in fact counterbalances the exclusion of same-sex couples in terms of access

to legal recognition of their relationships which existed before the Act entered into force in 2010. In the case of *Schalk and Kopf* the Court found that the Registered Partnership Act gave the applicants, a same-sex couple, the possibility of obtaining a legal status equal or similar to marriage in many respects. The Court concluded that there was no indication that the respondent State had exceeded its margin of appreciation in its choice of rights and obligations conferred by the registered partnership (see *Schalk and Kopf*, cited above, § 109). Thus, the institutions of marriage and the registered partnership are essentially complementary in Austrian law. In this connection, the Court observes further that, as has already been pointed out in *Schalk and Kopf*, the legal status initially provided for by the Registered Partnership Act was equal or similar to marriage in many respects, and there were only slight differences in terms of material consequences (ibid., § 109). Moreover, the Court observes that the legal frameworks governing marriage and the registered partnership were further harmonised after the Court had adopted its judgment in the case of *Schalk and Kopf* and also after the applicants had lodged the present application, and that to date no substantial differences remain (see paragraph 16 above).

41. The applicants, as a different-sex couple, have access to marriage. This satisfies – contrary to same-sex couples before the enactment of the Registered Partnership Act – their principal need for legal recognition. They have not argued for a more specific need. Their opposition to marriage is based on their view that a registered partnership is a more modern and lighter institution. However, they have not claimed to have been specifically affected by any difference in law between those institutions.

42. This being so, the Court considers that the applicants, being a different-sex couple to which the institution of marriage is open while being excluded from concluding a registered partnership, are not in a relevantly similar or comparable situation to same-sex couples who, under the current legislation, have no right to marry and need the registered partnership as an alternative means of providing legal recognition to their relationship. There has therefore been no violation of Article 14 taken in conjunction with Article 8 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by five votes to two, that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

Done in English, and notified in writing on 26 October 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Angelika Nußberger
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge M. Mits;

(b) joint dissenting opinion of Judges N. Tsotsoria and Y. Grozev.

A.N.
M.B.

CONCURRING OPINION OF JUDGE MITS

The applicants complained, under Article 14 taken in conjunction with Article 8, that they had been discriminated against on the basis of their sex and sexual orientation because they had been denied access to the institution of registered partnerships. In essence, though, they imply that the State has a positive obligation to make the institution of registered partnerships available to different-sex couples, if such institution has been introduced to cater for the rights of same-sex couples.

I agree with the outcome in this case. However, it was the first time that the Court was called upon to address the question, arguably of a higher importance than just for the respondent country, of access to registered partnerships from the perspective of different-sex couples. Establishing whether persons are in analogous or relevantly similar situations is a necessary precondition for the application of Article 14 read in conjunction with another Convention Article (see, as an early authority, *Rasmussen v. Denmark*, 28 November 1984, §§ 29-42, Series A no. 87). This step has decisive consequences for the case, since a finding that there is no comparator precludes the Court from entering into an assessment on the merits. As it has been critically noted in the scholarly writings, the use of comparators may in effect convert a potentially challengeable ground of discrimination into one that is immune from judicial scrutiny[1]. The above reasons call for an expansion of the reasoning in the judgment.

The Court has recently provided guidance on how to assess "relevantly similar situations". In *Fábián v. Hungary* ([GC], no. 78117/13, § 121, 5 September 2017 – see paragraph 31 of the present judgment) it stated that "the elements which characterise different situations, and determine their comparability, must be assessed in the light of the subject-matter and purpose of the measure which makes the distinction in question."

Turning to the present case, the institution of registered partnerships was introduced in Austria in 2010 in order to recognise relationships of same-sex couples and to give them legal effect. This was done with particular regard to developments in other European States (see paragraph 13 of the judgment). Therefore, Austria was part of an emerging trend in Europe, as observed by the Court in 2013, with regard to the introduction of forms of legal recognition of same-sex relationships (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 91, ECHR 2013 (extracts)).

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[1] See, for example, Aileen McColgan, "Cracking the Comparator Problem: Discrimination, 'Equal' Treatment and the Role of Comparisons", *European Human Rights Law Review*, 2006, vol. 6, 666; and Charilaos Nikolaidis, "Equality and non-discrimination in Europe: the shortcomings of Article 14 of the European Convention on Human Rights and the new Protocol 12", *Annuaire international des droits de l'homme*, vol. 7, 2012-2013, 824.

According to the information available to the Court at the time of deciding the *Vallianatos* case, nineteen out of the forty-seven Council of Europe member States at that time offered registration of partnerships as an alternative to, or in addition to, marriage. Nine out of those nineteen States provided such registration schemes only to same-sex couples, eight States made them open to both same-sex and different-sex couples, while two States restricted them to different-sex couples (one of the two – Greece – was found to be in breach of Article 14 taken in conjunction with Article 8 in that respect).

The situation in the Council of Europe member States confirms the Court's conclusion in the present case that different-sex couples are not in a comparable situation to same-sex couples. In all Council of Europe member States, different-sex couples have their relationships and legal interests protected through the institution of marriage. Only in eight out of the nineteen States providing for alternative registration schemes are such schemes also open to different-sex couples. Thus, the European States predominantly rely on the institution of marriage for different-sex couples while increasingly acknowledging and legally protecting the relationships of same-sex couples.

The situation is not static. In 2010 already the Court concluded that the right to marry under Article 12 of the Convention was not in all circumstances limited to marriage between two persons of the opposite sex, but that the recognition of same-sex marriages should be left to regulation by domestic law (see *Schalk and Kopf v. Austria*, no. 30141/04, § 61, ECHR 2010). In 2015 the Court observed that the movement towards legal recognition of same-sex couples continued to develop rapidly, with twenty-four of the Council of Europe member States providing such recognition (see *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 178, 21 July 2015). The international movement towards recognition of same-sex couples, by implication, may bring further changes to the availability of alternative mechanisms of registration also for same-sex couples.

However, as matters stand now, even if there has been some development since 2013, there would not be a sufficient basis for establishing a positive obligation on the part of the Government to make available the institution of registered partnerships to different-sex couples under Article 8 taken alone. It should be noted that the applicants sought examination of their case only through the lens of discrimination.

In view of the above and, in particular, as the purpose of the introduction of the institution of registered partnerships in Austria was to recognise and give legal effect to the relationships of same-sex couples, and since different sex-couples already enjoyed recognition and legal effects of their relationships to an even greater extent through the institution of marriage, there is currently no basis for concluding that different-sex couples are in a

comparable situation to same-sex couples with respect to the need for (less stringent) recognition and legal regulation of their relationships by the State.

JOINT DISSENTING OPINION OF JUDGES TSOTSORIA AND GROZEV

The present case concerns a different-sex couple who, unlike a same-sex couple, could not register their relationship as a civil union under the applicable domestic legislation. The majority rejected the applicants' complaint that they had been discriminated against, holding that the applicants, as a different-sex couple, were not in comparable position to a stable same-sex couple. We are unable to follow the majority in this conclusion. We are of the view that for the purposes of the Convention, a same-sex couple and a different-sex couple are in an analogous situation and that any difference in the treatment of these two groups needs to be justified. Consequently, in our view, an analysis was required as to the necessity of the different treatment, namely whether it was objectively and reasonably justified. The respondent Government having presented no sufficiently strong justification in support of the different treatment, we voted for a finding of a violation of Article 14 taken in conjunction with Article 8.

An analysis under Article 14 should address two distinct issues. First, whether the applicant was in an analogous situation to the suggested comparator group, which was treated differently. If this was indeed the case, the second issue to be addressed is whether the difference in treatment was justified. In the present case, the majority already rejected the applicant's complaint when answering the first question. They held that the applicants, as a stable different-sex couple, were not in an analogous situation to a stable same-sex couple. The basis on which the majority reached that conclusion was that the applicants already had access to an institutional arrangement that would provide legal recognition of their relationship, namely marriage. Thus, they were not in a comparable situation to same-sex couples, who did not have the right to marry and thus no access to another form of legal recognition of their relationship.

We find this analysis unconvincing. In our view it confuses the two distinct issues under Article 14 in a way that hollows out the protection provided by this Article. This analysis refuses to compare different-sex couples and same-sex couples as a social reality, but rather sees them as groups created by the legislature, which the legislature may choose to treat differently simply because it sees fit to do so. Different-sex couples and same-sex couples are not groups of individuals which have been created by regulatory choices. They are social groups which exist irrespective of regulatory choices and, more importantly, social groups with regard to which the Court has recognised that they "are in principle in a relatively similar or comparable situation as regards their general need for legal recognition and protection of their relationship" (see paragraph 34 of the judgment; see also *Schalk and Kopf v. Austria*, no. 30141/04, § 99,

ECHR 2010, and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, §§ 78 and 81, ECHR 2013 (extracts)). The fact that there is no right to marriage for a same-sex couple under the Convention, and that marriage confers a special status on those who enter into it, cannot and should not change this conclusion.

The Court has previously held that the exclusion of same-sex couples from marriage is compatible with the Convention because it is justified, and not because same-sex couples are not in an analogous situation to different-sex couples. As mentioned above, in *Schalk and Kopf* the Court explicitly stated that these two groups were in an analogous situation. After reaching this conclusion, the Court then looked into whether the refusal to provide access to marriage was justified, and it agreed that for reasons of history and tradition, it was. The same approach, in our view, should have been followed in the present case. The alternative takes the Court down a road that justifies in perpetuity a separate but equal approach, one for which we see no justification in the Convention and the case-law of the Court. And it is a risky course, as any justification not rooted in hundreds of years of history and tradition, but rather in fresh legislative choices made today, inevitably runs the risk of sliding into stereotypes about the “different” nature of a heterosexual and a homosexual relationship.