

Austria - Constitutional Court case of 17 June 2019

The applicant was born in 1974 to an Iranian father and Austrian mother, and by virtue of the laws applicable at the time only acquired Iranian nationality. Austrian nationality was granted to him by a court decision in 1981. He later moved to the US where he wishes to naturalise, and requested permission from Austria to retain Austrian nationality. Such permission, however, can only be granted to nationals by birth. The Court found a violation of the principle of equality of treatment among nationals.

Case name (in original language) : E1832/2019

Case status: Decided

Case number: E1832/2019

Citation:

https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_20190617_19E01832_00/JFT_20190617_19E01832_00

Date of decision: 17/06/2019

State: Austria

Court / UN Treaty Body: Constitutional Court of Austria (Verfassungsgerichtshof)

Language(s) the decision is available in: German

Applicant's country of birth: Unknown

Applicant's country of residence: United States

Legal instruments: European Convention on Human Rights (ECHR), European Union law

Key aspects: Acquisition of nationality, Discrimination, Gender, Respect for private and family life

Facts

The applicant was born in 1974 and had an Iranian nationality from birth, derived from his father. His mother was Austrian at the time of his birth, but he did not originally inherit her nationality due to Austrian laws in force at the time. He was awarded Austrian nationality in 1981 by a court decision. The applicant later moved

to the US and lived there for 17 years. He wanted to acquire US nationality, and in 2017 requested permission from Austrian authorities to retain his Austrian nationality for reasons of private and family life. In 2018 the authorities rejected this request, on the basis that retention of nationality for reasons of private and family is reserved for nationals who are Austrian by descent. If nationality was granted later in life, even if it happened at a very young age, the provision on permission to retain Austrian nationality when acquiring another nationality does not apply.

Legal arguments by the applicant

The applicant argued that his constitutionally guaranteed right to equality among all nationals has been violated, as well as his Article 8 ECHR right to private and family life. The law currently allows for retention of Austrian nationality only by those who acquired it by descent if they have private and family life reasons that are worthy of consideration. When determining descent, the lower instance court relied on the law from 1965 which was applicable at the time of the applicant's birth, and which allowed for discrimination against children born out of wedlock, as well as for gender discrimination. Gender discrimination is currently prohibited by Austrian as well as international laws, and that should imply that discriminatory legislation from the past should not be applied. In order to accommodate the changed norms on gender discrimination, the provisions on retention of Austrian nationality should apply at least to everyone who would have acquired Austrian nationality at birth if the contemporary laws had been in force at the time of their birth.

Decision & Reasoning

The Court has ruled that the complaint is admissible and well-founded. It reasoned as follows:

“According to the consistent case law of the Constitutional Court [...], a violation of the constitutionally guaranteed right to equality among all nationals before the law takes place when, among other things, an administrative court erroneously applies a legal provision that is contrary to equality.”

“Article 28 of the StbG regulates the retention of Austrian nationality when a foreign nationality is acquired, which as a rule leads to the loss of Austrian nationality *ex lege*, without a decision of an authority required, under Article 27(1) StbG [...]. In this system the procedure for granting permission for the retention of Austrian nationality in accordance with Section 28 StbG is fundamentally important, as the

authority can and must examine the consequences of loss of nationality with regard to Article 8 ECHR wherever an application for the retention of nationality is made [...]. If necessity exists, there is a legal right to retain nationality in accordance with Article 28 StbG.”

“[...] Retention of nationality “for reasons particularly worthy of consideration” is in the interests of Austria, as otherwise the automatic loss of nationality would result in violation of the right to respect for private and family life guaranteed by Art 8 ECHR, and thus in Austria’s failure to fulfil its obligations under this Convention right. There are no objective adequately weighty reasons related to private and family life capable of justifying that retention of nationality in the event of acquiring a foreign nationality is reserved only to situations if [Austrian] nationality was acquired by descent, but not if it was acquired differently [...].”

“Since the [lower instance court] precludes an examination of the circumstances of the applicant’s private and family life from the onset because he did not acquire Austrian nationality through descent at birth, but through conferment, the content of Article 28 StbG was presumed to be contrary to the principle of equality.”

Decision documents

[Verfassungsgerichtshof_17Jun2019.pdf](#)

Outcome

The Court ruled that the applicant's right to equal treatment has been violated.