



## [Austria - Constitutional Court case of 3 December 1997](#)

The applicant was born in Austria to an Austrian mother and a father who was a refugee from Poland. The applicant argued that his father was stateless at the time of his birth (as this would lead to applicant being recognised as Austrian), and requested the authorities to accept his father's testimony as proof. The authorities concluded that the applicant's father was a Polish national solely on the basis of the Polish legislation, without evaluating the content of the testimony. The decision was declared unlawful on procedural grounds, as the testimony should have been taken into account.

**Case name (in original language) :** 96/01/0511

**Case status:** Decided

**Case number:** 96/01/0511

**Citation:**

[https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vwgh&Dokumentnummer=JWT\\_19960105](https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vwgh&Dokumentnummer=JWT_19960105)

**Date of decision:** 03/12/1997

**State:** Austria

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

**Language(s) the decision is available in:** German

**Applicant's country of birth:** Austria

**Applicant's country of residence:** Austria

**Key aspects:** Burden of proof, Determination/confirmation of nationality, Standard of proof, Statelessness determination

**Facts**

The applicant was born in Austria on 26 May 1963. His mother was an Austrian national. His father fled Poland to Austria in 1961, received refugee status, and subsequently acquired Austrian nationality on 20 November 1984. His parents were

married at the time of his birth.

According to the relevant nationality law, the applicant would have acquired Austrian nationality if his father at the time of his birth was Austrian, or alternatively if his father was stateless or a foreigner, he could acquire the Austrian nationality from his mother in case he would otherwise be stateless.

In 1994 the applicant requested the authorities to confirm that he is an Austrian national. By decision of 14 March 1996 the authorities found that the applicant neither acquired Austrian nationality by descent nor later in life, and was therefore not an Austrian national.

### **Legal arguments by the applicant**

The applicant initially argued that his father was a Polish national at the time of the applicant's birth, but later submitted that his father has already lost Polish nationality at the relevant time. As proof of the latter, he requested to allow his father to testify about his nationality status.

### **Legal arguments by the opposing party**

The authorities argued that at the time of the applicant's birth, his father was a Polish national. The applicant therefore acquired Polish nationality in accordance with the Polish law, and could not have acquired the Austrian nationality. According to Art. 6 Para. 1 of the law on Polish Citizenship dated February 15, 1962, a child of parents, one of whom is a Polish national while the other is a national of another country, acquires Polish nationality by birth. Parents can opt for the nationality of the foreign state of the non-Polish parent by making a declaration to the competent authority within three months of the child's birth, provided that the child acquires that other nationality under the law of that state.

According to that provision, if his father had had Polish nationality at the time of the applicant's birth, the applicant would have acquired Polish nationality too.

Submitting a declaration in accordance with the second sentence of this legislative passage would have been out of the question, because the applicant would not have acquired Austrian nationality from his mother according to the Austrian Citizenship Act of 1949, which was applicable in Austria at the relevant time.

The authority in question gave the applicant an opportunity to comment on the outcome of the investigation of the Polish law, but the applicant did not make any

relevant submissions. The authority did not see the need to listen to the testimony of the applicant's father, as all the issues could be resolved by reference to the Polish nationality law. The applicant should have substantiated his claim about his father's release from the Polish nationality with a document.

### **Decision & Reasoning**

The Court reasoned as follows:

“Whether a certain piece of evidence is [...] capable of demonstrating the validity of a concrete fact that is disputed in the proceedings, can only be assessed after the evidence has been assessed. The authority may therefore not reject evidence that is objectively suitable for being considered, because of its anticipated evidential value.”

“In order to verify the allegation that the applicant's father was stateless at the time of the applicant's birth as a result of the father's loss of Polish nationality, the questioning of the applicant's father undoubtedly constitutes evidence that is objectively suitable for being considered. The fact that the applicant's father declared himself to be a Polish national when applying for refuge in Austria does not change anything, because it cannot be ruled out that he only found out later that he lost his Polish nationality - for example under Article 15 of the Polish Citizenship Act of February 15, 1962, according to which a nationality of a Polish national who resides abroad can be revoked, among other things, if he has violated his duty of loyalty to the People's Republic of Poland (line 1) or acted to the detriment of vital interests of the People's Republic Poland (Z. 2), left the territory of the People's Republic of Poland illegally after May 9, 1945 (line 3), or evaded the fulfilment of the compulsory military service prescribed by Polish law. The fact that the applicant did not (also) support his submission by documents does not change the fact that a witness statement by his father is an objective suitability piece of evidence to consider, but could be relevant when assessing the witness statement after it has been taken. The authority concerned should therefore only have been able to assess whether this evidence was suitable for establishing the statelessness of the applicant's father at the time of the applicant's birth after the witness evidence had been carried out. Since the conclusion of the authority that the applicant's father was a Polish national at the time of the applicant's birth, which was essential to reaching the contested decision, is based on an anticipated evidentiary value of the evidence, the contested decision is unlawful [...] due to violation of procedural regulations.”

### **Decision documents**

[Verfassungsgerichtshof\\_3Dec1997.pdf](#)

### **Outcome**

The Court declared the decision declaring the applicant not Austrian to be unlawful

on procedural grounds, as the testimony of the applicant's father should have been admitted and evaluated on its content before reaching a conclusion about the nationality status of the father at the time of the applicant's birth.