

Article

There is Something about Marrying... The Case of Human Rights vs. Migration Regimes using the Example of Austria

Irene Messinger

Department for Political Sciences, Alumna University of Vienna, Vienna, 1090, Austria;

E-Mail: irene.messinger@univie.ac.at

Received: 9 August 2013; in revised form: 7 September 2013 / Accepted: 24 September 2013 /

Published: 30 September 2013

Abstract: States pursue various juridical strategies to prevent ‘marriages of convenience’ seen as undermining tightening migration regimes. This article examines how Austrian Alien Law constitutes entering into such a marriage as a criminal offense and looks at the legal proceedings in district courts in Vienna where most cases of alleged ‘marriages of convenience’ are being dealt with. It also studies the work of the Viennese branch of alien police investigating into this offense. These practices are often in conflict with Article 8 and 12 of the European Convention of Human Rights, granting the right to respect for private and family life and the right to marry.

Keywords: Austria; Alien Law Act; bi-national marriage; migration regulations; Article 8 ECHR; Article 12 ECHR; marriage of convenience

Abbreviations

ECHR: European Convention on Human Rights Convention; ECtHR: European Court of Human Rights; EEA: European Economic Area; EMN: European Migration Network; EU: European Union; NGO: Non-governmental organization; TCN: Third Country National; UN: United Nations.

1. Introduction

The fundamental right to the protection of marriage and family life is laid down in various international human rights documents. This right encompasses family migration and family re-unification. Given that this issue of LAWS is about Human Rights and Migration, this article will show the tension between international human rights standards and state imposed migration regimes using Austria as an example.

It will address how Austrian Alien Law seeks to prevent ‘marriages of convenience’, both in legislation and in legal practice, and how these measure are in conflict with the right to marriage and to privacy enshrined in the European Convention on Human Rights (ECHR). Marriage and family rights, which are binding and enforceable, are written down in Article 8 and 12 of the ECHR, which is part of the Austrian Constitutional Law. The two articles define: the right to “private and family life, his home and his correspondence” (Article 8 ECHR) and the right “to marry and to found a family, according to the national laws governing the exercise of this right.” (Article 12 ECHR) [1].¹ Section 2 will describe the legal situation of bi-national couples in Austria with a special focus on the changes in the 2005 Alien Law Act that included a clause on ‘marriages of convenience’ for the first time. Sections 3 and 4 will discuss article 8 and 12 ECHR in the light of legal exclusion mechanisms to the right to marry and will analyze the surveillance and control practices of the Austrian alien police and respective court decisions in regards to bi-national couples.

In recent years there has been a growing debate as to how the understandings and interpretations of Article 8 and 12 ECHR effects on governmental immigration policies [3,4]. Less in legal studies, but more in political practice, the question boils down to what is more important: international human rights standards that usually rank as constitutional law in most EU countries or national and European migration law and practice which tends to be harmonized on a European level on the strictest basis possible. The Viennese UN-Human Rights Expert, Manfred Nowak, states that one of the most severe and widespread violations of the right to family life derives from the restrictive asylum and migration policies of industrialized countries ([5], p. 374).

In several European states ‘marriages of convenience’ started to gain public and political attention in the 1970, when they came to be seen as a means to gain access to the labor market that states tried to close off for migrants [6] in the wake of oil crises. In recent years, again a growing number of EU states have introduced legal provision (e.g., income requirements) seeking to prevent ‘marriages of convenience’. Some European research projects compare national developments between states [7–9], others focus on national strategies dealing with marriage migration e.g., in the United Kingdom [10–12], or in Norway [13–15]. As for the situation in Germany and Austria, the scholarly debate has mainly focused on bi-national couples in general, but very little research has been done on the situation of ‘marriages of convenience’. German academic publications are mainly written by legal experts [16,17]. In Austria, the only work on ‘marriages of convenience’ is also a purely legal analysis dating from 1993 [18]. It was mainly NGOs (Non-governmental organizations) and journalists working and publishing their points-of-view in that field [19,20]. My publications [21–23] were breaking new

¹ The correct legal term for a person not holding an Austrian citizenship is “legal alien”. The term “third country national” refers to any alien from outside the European Economic Area (*i.e.*, European Union member states plus Norway, Iceland and Lichtenstein) and Switzerland. These definitions have their basis in a problematic categorisation of human beings. By excluding “the rest” from Europe, it is assumed that Europeans share homogeneous norms, values and traditions which are being elevated from the “others” and therefore is a construct that fosters racist and nationalist notions. A critical analysis of such hierarchisations was first introduced by the cultural theorist and sociologist Stuart Hall in his work on “The West and the Rest” [2].

ground in this field, not only by being the first in more than 10 years, but also by adding an inter-sectional analysis to a subject that was considered a purely legal matter.²

This article is based on my dissertation in political sciences that analyzes the construction of the phenomenon of ‘marriages of convenience’ by state authorities in Austria [22]. The empirical data used in this article are mainly based on questionnaires filled in by alien-police officers and on court records of Viennese proceedings regarding ‘marriages of convenience’.

2. Legal Situation in Austria

Since the early 1990s, Austria has been sharpening asylum and migration law [24]. The debate over the right to family life and marriage *versus* migration law has to be seen in that light. It is consequently a debate that has been dominated by a growing fear of abuse of the right to marriage by more and more migrants, allegedly entering into mere ‘marriages of convenience’ with willing Austrian, thus, undermining the tightening migration regime.

In 2000, the newly elected right of center government announced that it would take actions against bogus marriages [25]. This was the first time a government program would refer to this issue. After some delay, the Alien Law Act 2005 came into power on 1 January 2006 [26]. It proved to be a paradigmatic change in policy towards the families of Austrian citizens married to or wishing to marry a non-EU citizen [27]. As the rights of spouses of settled third country nationals (TCN) are similar to the ones of Austrians, I will use the term Austrians for referring to both groups. Some amendments have been made in 2009 and in 2011 to include same-sex couples but, in general, regulations have become more severe for bi-national couples seeking marriage.

2.1. Changes in the Alien Law

In Austria, during the last few years, between 35,000 and 39,000 marriages per year were contracted. Most marriages are between Austrians and EU citizens [28]. This has never been a political concern and spouses from other EU countries have not been affected by the new law. The Alien Law Act 2005 wishes to curb migration from outside the EU into Austria. With around 75% third-country-nationals family members, family migration forms the largest group of migration [27]. To restrict this type of immigration is one of the main objectives of the reorganization of the Aliens Law Act 2005. Indeed, in 2006, the number of Austrians marrying TCNs dropped by almost two-thirds compared to the years 2004 and 2005 [27].

Under the old legislation TCNs married to an Austrian citizen had a right to work and to stay and were entitled to apply for a residence permit within the country of Austria regardless their current legal residence status. With the Alien Law Act 2005 the Austrian government seeks to protect the institution of marriage from possible abuse by a range of measures. The newly introduced juridical term “residence marriage” indicates that the main interest of legislation is to prevent the evasion of

² Intersectionality studies the relationships and interactions among multiple dimensions of oppression or discrimination. The theory maintains that different forms of inequality—which are based on categories—do not act independently from one other, but rather interrelate. For my intersectional analysis I have used the categories: gender, nationality/ethnicity, class and residence status.

residence regulations through ‘marriages of convenience’. The equally new sanctions including court sentences and additional surveillance possibilities for the police [29] are accompanied by tightened provisions in the Settlement and Residence Act for the non-Austrian partner to obtain a residence permit [30]. The residence title “family relative” is issued for twelve months each only during the first two years of residency and, after this, will only be extended for three years if the couple is able to prove that necessary requirements are still being met. Since 2011, the knowledge of German has to be proven as well. In addition, the new legislation on income requirement poses an obstacle for many couples wishing to marry but whose monthly income does not reach a necessary minimum level of income.

The Alien Law Act 2005 has also led to the interesting, and somewhat absurd, situation that the TCN spouse of an EU or indeed EEC citizen living in Austria enjoys greater freedoms than the TCN spouse of an Austrian in the same situation [31]. Unfortunately, it is beyond the scope of this article to look into the legal repercussions of EU and EEA individuals who have enjoyed the European Union right to freedom of movement and wishing to marry a TCN.

2.2. “Residence Marriage”³

The Family Reunification Council Directive 2003/86/EC of the European Commission defines ‘marriage of convenience’ as a marriage “contracted for the sole purpose of enjoying the right of free movement and residence.” ([32], p. 38) The Alien Law Act 2005, using a wider interpretation of the term ‘residence marriage’, defines “an Austrian or an TCN entitled to settle in Austria who enters into a marriage or a registered partnership with a TCN without the intention of leading a family life within the meaning of Art. 8 ECHR and knows or must have known that the TCN intends to rely on it to obtain or secure a residence title or residence rights secured by European Union law or to acquire Austrian nationality or to prevent measures terminating residence has to be sentenced by the court to a fine of up to 360 daily rates” ([29], my translation), *i.e.*, they are threatened to receive a criminal conviction.

In case of entering into a ‘residence marriage’ for a pecuniary advantage, the penalty is up to one year imprisonment. From 2006 to 2009, only the Austrian partner was punishable, the law changed in 2009. Now the TCN who wants to rely on such a marriage or registered partnership also has to be punished as a party to the offense. In addition, to these sentences under Administrative Penalty Law, the TCN will have to face residence terminating procedures taken by alien police (*i.e.*, non-issuance and termination of residence titles and the possibility of entry or return bans) [33]. An Austrian spouse who voluntarily cooperates with police and denounces him or herself before the state prosecutor has started investigations may remain exempt from punishment [29].

In political debates the ‘marriages of convenience’ are judged as an attempt to undermine the rigid immigration regime by illegal and almost offensive means. The general suspicion of being a bogus couple, that bi-national marriages have to face, displays the contradiction between a state promoted pro-family policy and a repressive anti-migration regime.

³ In common debate the expressions “marriage of convenience” but also “sham marriage” or “bogus marriage” are being used. The Austrian Alien Law Act 2005 introduces the term “residence marriage”. Whenever, I refer to the strictly legal practice I will use the latter.

2.3. Numbers of Marriages/Registered Partnerships and Immigration

Since the early 1990s, the number of marriages between Austrians and people of other nationalities has more than doubled, rising from 14% of all marriages, contracted in 1995, to as much as about 28% in 2005 [28]. This rise is not only proof of a more globalized world, but also of a social phenomenon: the benefit of the right to stay, to work, and the possibility to gain Austrian citizenship more easily.

For the last few decades, Austrians have mainly married fellow Austrians and/or partners from European Union states. However, especially the group of TCNs grew until 2005, as it was one of the last options to enter the country legally and to profit from the benefits of family migration. A note-worthy gender gap can be observed during the last years among Austrians who marry TCNs: whereas Austrian men predominately marry Asian women, Austrian women mainly marry men from African countries [34]. Therefore, I will analyze whether these two groups show comparable figures of being suspected of ‘marriage of convenience’ and of being policed accordingly.

While in 2006 bi-national marriages between Austrian men and TCN women decreased by about 20%, the number of Austrian women and TCN husbands decreased even further by 34% [34]. A comparison with the marriage statistics for 2009 shows that this trend continues: the number of Austrian women who marry TCN partners is still dropping, more so than the number of Austrian men marrying TCN wives [35]. With a substantial decline of 84.8%, the number of marriages between Austrian women and partners from African countries illustrates who are the most affected of this change in law [35].

3. The Right to Marry

In Austria two individuals become a ‘family’ either through marriage (for heterosexual couples) or by entering into a registered partnership (for same-sex couples). Spouses are entitled to custody, the right to inherit, and a residence permit if required on family grounds. From a migration-control perspective gaining permission of residence due to a marriage or registered partnership allows for too many loopholes. As this perspective has become the mainstream discourse on migration, consequently most EU Member states have tightened their policies on marriage and same-sex partnership involving third-country nationals since the 1990s. It, indeed, conforms to human rights to declare marriages as null and void, which have solely been entered into in order to gain a residence status. However, it is incompatible to deny marriage merely because it would help one partner in obtaining a residence permit [36].

3.1. Family Rights for Married Couples Only?

The concept of ‘family life’ protected by Art 8 ECHR encompasses the right to close family relationships. This includes not only persons already related to each other through existing marriage but also to people planning to a build family [37]. At present, Austrian laws relating to foreigners only define the married spouse as a family member whereas the European Court of Human Rights (ECtHR) has ruled in constant jurisdiction that the marital partner-to-be also enjoys the protection of Art 8 ECHR [38]. Thus, the Austrian definition of the term family member is lacking and needs to be revised and broadened to be in compliance with the rulings of the ECtHR.

3.2. No Marriage for Partners without a Residence Permit?

In several EU Member States a legal residence permit of both marital partners is precondition for marriage or same-sex partnership, e.g., Germany, Denmark, Estonia, Greece, Lithuania, and Latvia [36]. In Austria, the same was discussed in parliamentary debate in preparation of the Alien Law Act 2005. The idea of simply barring illegal residents from the right to marry was dropped due to severe criticism, not only by many Austrian NGOs and Christian institutions, but also by the Office of the Federal Chancellor (the official constitutional law service of the government) and by the Association of Austrian Cities. This interesting example shows that drastic measures, *i.e.*, excluding a group of people from the right to marry altogether was opposed by a growing number of organization and, at least at that given moment in time, the right to marry for everyone was seen as more important than the prevention of a possible abuse.

3.3. Document Problems at Registry Offices

Most EU Member States require prospective marital partners to produce a ‘certificate of no impediment to marriage’. This procedure seeks to prevent prohibited forms of marriages, e.g., polygamy, marriage of persons under marriageable age, or marriages between close relatives. In practice, such certificates have become an impediment to marriage for bi-national couples in general. In particular, citizens of less developed countries with inefficient and cumbersome bureaucracies fail to provide the documents needed. Austrian registry offices necessitate a considerable number of documents in order to register a planned marriage, all of which have to be presented in German and notarized, some of them becoming invalid after half a year. It requires a great deal of money and logistical prowess to have all papers ready at the same time, and not everyone is able to perform that task successfully in the preparations of the marriage. Fibel, an Austrian NGO representing bi-national couples, reports cases where Austrian embassies refuse to issue an entry (Schengen) visa for the prospective TCN spouse [39]. As a result, many Austrians must marry abroad. This poses a problem mainly for partners with low income or mothers of small children with limited options to travel.

3.4. Security Problems at Registry Offices

Since 2006, civil registry offices are required to pass on personal data of all fiancés from third countries to the alien police. This transfer of data occurs not only when there are tangible reasons for suspicion but is a general security procedure in all marriages with TCNs. Sometimes a marriage is prevented by alien police arresting one partner at the registry office [40,41]. Cases have been reported where fiancés, with precarious or no residence status, did not dare to marry because the registry office had become a highly unsafe place for them. It has been criticized that a civil act, such as marriage, is overburdened by potential police action [42].

3.5. Legalization with Marriage

Marriage alone does not guarantee a residence status for the TCN. Once being married he/she has to apply for residence permit. Those who entered Austria legally may apply for residence status as family member from within the country, all others have to apply from abroad [30]. For asylum seekers this

often means going back to their country of origin, waiting for months, or even years until their application for family-reunification is dealt with. This option is quite expensive and also risky. For a newly wedded couple it is a heavy burden to be separated for such a long period, especially, if they have a child. In addition, it is also difficult to prove a family life when having to live apart. This is yet another feature of the Austrian migration regime, showing that security issues are considered more important than humanitarian matters.

3.6. Class-Exclusion via Income

Since 2006, the couple has to prove a regular income of more than 1,200 Euro per month, and 120 Euro, extra, per every child. It should be noted that, at this stage, the non-Austrian spouse is not yet allowed to work and, therefore, unable to contribute to the couple's income. The Austrian partner has to provide income for family alone. By comparison: Austria does not have a general minimum wage but welfare benefits provide a monthly minimum income of roughly 800 Euro which is considered enough to secure one's livelihood [43]. The gender pay gap in Austria is wider than in other EU member states, Women have about 25% less income than men [44]. Looking into recent statistics on working class women's income, it can be clearly seen that a woman in this wage bracket cannot earn these amounts of money, even with a full-time job [45]. The income requirement also excludes couples where the Austrian partner is working part-time or is only receiving child care allowance and, thus, cannot account for the required regular income. Again, this is, in particular, true for female Austrians. In consequence, the non-Austrian partner will not be granted legal residence status and is still not able to contribute to the required combined income. The individual consequences of these practices are dire: The husbands are denied a residence permit as a family member and families are separated simply on grounds of low income. This measure was devised to hinder poor people to enter into a 'residence marriage' for the sole reason of money. In practice, it works to the disadvantage of people already facing major discrimination in life and shows that family migration policies are highly gendered, in particular, with regard to dependency.

Measures on marriage restrictions as described and analyzed in this section do reflect concerns of states and their sovereign right to control immigration. However, as the Fundamental Rights Agency of the EU argues, states are meant to respect individuals' fundamental rights and must ensure that any measures adopted against the abuse of marriage do not endanger the fundamental right of each person to enter a marriage of his or her own free will [36]. As shown, some of these regulations are in stark conflict with Art 8 and 12 ECHR, *de facto* excluding groups of people from their right to marry and to enjoy family life.

4. Marriages under Surveillance and the Right to Private Life

European states expend substantial effort to find ways how to prevent 'marriages of convenience' on the EU and on the national level. European Migration Network (EMN) was founded in 2008 to support policymaking in the European Union on migration and asylum with the aim of a common asylum and immigration policy. In 2012, the EMN published 24 national reports on the misuse of the right to family reunification that included marriages of convenience and false declarations of parenthood for migration purposes. It is the official response "to a growing concern that the right to

family reunification may be misused as a route to settlement in the EU” ([7], p. 5) The report on Austria [46] is rather unsatisfactory as it is based on interviews with alien police authorities and representatives from the Federal Ministry of Interior only and refers to their point of views unreflectingly, focusing merely on the potential misuse. Possible tensions with human rights standards were not addressed.

To enjoy the protection of human rights, a marriage has to be considered as genuine. In this section I will look into the control practices of alien police and respective court rulings. I was given access to all documents of the Viennese court proceedings on alleged ‘residence marriages’ taking place in 2006 and in 2007. Hence, it was possible to work with a full survey of 57 Viennese court records of the first two years when the new Alien Law Act came into force. For comparison: in the years 2006 and 2007 in all of Austria about 120 procedures were heard at a court of first instance, which means about half of all procedures were allotted to Viennese courts [47]. The second source is 98 completed questionnaires, filled in by alien police officers specializing in the detection of ‘marriages of convenience’. These set of data were combined for the analysis of the control practices using both quantitative statistical approaches and qualitative methods such as content analysis to reconstruct the timeline of being suspected, controlled, and possibly convicted.

As mentioned already the registry offices send personal data of TCN fiancés to the alien police. The alien police decide and select cases that are investigated in detail. Similar as in most other European countries, alien police will investigate couples at home and invite them for separate interrogation sessions.

4.1. What are Reasons for “Suspicion”?

According to a 1997 EU council document [48], the following circumstances point toward a possible marriage of convenience: The couple does not live together or misses the “appropriate contribution to the responsibilities arising from the marriage”—this is taken to mean that they have not met before the marriage or do not know any personal details about the other person, maybe because of not speaking the same language. Other reasons are that money is involved or that one of them has already been married for immigration benefits. Not a lot has changed since then.

I was able to prove gender-related factors that may result in suspecting a marriage of being bogus: the difference in age is only decisive if the Austrian woman is older than her husband, not *vice versa*. What is distinct about Austria is that alien police relies on the family name system, which is patri-lineal. This singles out women who previously have been married to a foreigner. Men who may have been involved in previous ‘sham marriages’ thereby go undetected, which—strangely enough—is of no concern to alien police. A precarious legal status as asylum seeker or illegal status makes a couple suspicious, especially if the husband is from Nigeria or from Serbia [22].

4.2. Control Practices

Alien police investigations include on-the-spot checks in the house and at the work place, asking neighbors, colleagues, superiors, parents, apartment searches, and interviews with both partners. The central focus of alien police control practices is the couple’s shared residence. It is checked for signs of cohabitation. Personal items such as clothes, shoes, cosmetics, documents, shared mementos, such as

pictures, videos, letters, and even the couple's bed are searched and examined. Although the Austrian Marriage Act uses the term "conjugal life companionship" instead of "domestic community" [49], the cohabitation of bi-national couples is treated as the basis for credibility. This means that cohabitation is not a required characteristic of "conjugal life companionship", *i.e.*, marriage/same-sex partnership among Austrians, but is vital if one spouses or same-sex partners is a TCN. While the courts uphold the opinion that conjugal life companionship suffices, alien police regularly considers separate flats as an evidence for a 'marriage of convenience'. Investigating a couple's residence is a legal grey area [49]. In general, institutions have to respect ones intimacy and any state intervention into the private sphere has to be of due relevance. If the police carries out body searches or searches of a person's home, effective measures must be taken to protect the intimacy and dignity of the person searched. Furthermore, searches should be permitted only if absolutely necessary, such as to prevent a crime and always with a legally authorized search warrant [5].

Things are different when a TCN is involved and Austria's right of protected privacy becomes somewhat shaky. Although alien police officers do not have to be let into the apartment without a search warrant, there is the fear that this may easily be interpreted to the disadvantage of the persons concerned. The distinction between a tolerated house tour and a house search is debatable from a fundamental and human right's perspective [50]. Art. 36 Alien Law also provides for other circumstances where alien police may enter private houses without exigent circumstances or a legal warrant.

In addition to house searches, the couple's finances are investigated into. The financial data can be related to each other and compared with those made at the request for a residence permit. Moreover, financial transactions are easy to verify, and the necessary income levels can be checked for several months at a time [22].

The next step in alien police investigations is an invitation to separate interviews. If one person is abroad to apply for a residence permit, the interview often takes place at the embassy. These interviews include private questions about the relationship, the wedding, friends and family, future plans, and the daily life of the couple. It has to be criticized that these questions partly deal with very intimate matters of the relationship (e.g., questions concerning sexual preferences and frequency of intercourse, contraception, *etc.*). The questions asked frequently display Euro-centric notions, for instance, putting a large emphasis on celebrating Christmas together as a family.

For the affected couples, these inspections and interviews invade their private and intimate spheres and are frequently perceived to be very humiliating and highly distressing. Furthermore, this practice leads to delays in the family migration procedure. The investigations of the authority may take a period of three months, which can be prolonged by a further two months. These five months extra are a time of inquiries in which the spouses are sometimes separated and are unable to continue or build up their family life. The Austrian Ombudsman Board that independently monitors public administration reports cases where such alien police investigations were taking up to four years [51].

4.3. Who Defines What 'Family' and 'Marriage' is?

As already pointed out, the term 'residence marriage' is ill-defined. Alien police has numerous possibilities for interpretation. These interpretations are influenced by the moral ideals of alien police officers. The lives of bi-national families under scrutiny are less determined by their individual

inter-cultural concepts of family live but rather by the often limited imagination of alien police using traditional concepts of what family is or should be as the following examples from police reports show:

Upon inspection of a very small apartment where also other family members had to live, the police officer stated “I cannot imagine how a marriage can be consumed here.” ([22], p. 248, my translation) In another case, a police inspector described the lack of public display of affection during his observations at the registry office and concluded that the spouses “according to my subjective feeling are not behaving like a newlywed couple in love.” ([22], p. 248, my translation). The assessments of whether a marriage is ‘real or bogus’ are based on subjective norms of Austrian alien police officers, commonly not speaking a foreign language, not trained in cross-cultural inter-action and with little knowledge of the living conditions of migrants.

4.4. How Do Courts Rule on ‘Residence Marriage’?

If the alien police is confident of having identified a ‘residence marriage’, it proceeds as follows: first, the procedure of a residence or entry ban against the TCN will be initiated, and secondly, they file charges against the couple with the public prosecutor who will refer the procedure to the respective district court. Providing a formal proof that a marriage is indeed a ‘residence marriage’ is difficult in most cases. The court principle ‘*in dubio pro reo*’ lead to a low number of convictions in the Viennese court cases in 2006 and 2007: in about one third of the cases the accused were found innocent or at least there was insufficient evidence for a conviction, in another third investigations did not produce any results and court procedures were stopped or given up on, and in a remaining one third, the accused couple was found guilty [22]. Analysis shows that only the ones who confessed of having entered into a ‘residence marriage’ were sentenced. The convicted couples were also mainly the ones where a monetary benefit was suspected or proven. The financial penalties were quite low as it affected mainly persons with a low income. (In Austria, law fines have to reflect the income situation of the convicted person.) Despite this low “success rate”, the number of trials did rise: in 2009 there were 344 court cases in Austria [52], not counting all of those cases in which the suspicions were not sufficient to file a charge or the proceedings were later abandoned by the prosecution. Alien police is still trying through home searches and interrogations to provide evidence of a ‘marriage of convenience’. However, the independent district courts apply different standards and judge more carefully: Out of the 344 procedures, only 53 were sentenced for having entered into a ‘residence marriage’. This means that 84.6% of court proceedings were conducted without sufficient basis for a court conviction [52].

These low numbers in cases and even lower numbers in convictions indicate that the criminalization of ‘residence marriages’ serves merely as a threat scenario and gives alien police a powerful tool to control bi-national marriages. It should be noted that alien police may, and will, seek to terminate the residence of the TNC (either by deportation or refusing re-entry) irrespective a verdict of acquittal by a court. Both legal proceedings (court trial and granting or refusing residence permit by alien police) are independent and separate from each other. Court ruling affects only the criminal offence of ‘residence marriage’ but not the administrative procedures under Alien Law. Thus, a couple can be cleared of

the suspicion of leading a ‘residence marriage’ by a court, yet, alien police may deport or ban the acquitted spouse.

Given that the concept of ‘residence marriage’ only affects TCNs and their families by definition, we can speak of institutionalized racism against this group. However, this discrimination has to be differentiated along the categories gender, class, nationality, and residence status. Chiefly couples with under-privileged Austrian women and their TCN husbands, mainly without legal status, were affected. They were inspected more frequently by alien police, but not convicted by the courts. Ironically, this group of Austrian women, discriminated against on several levels, is more likely to be suspected of having entered into a ‘residence marriage’ even though their marriages could not result in a later gained residence permit for the TCN spouse as this group of Austrian women do not meet required income levels in the first place.

The statistically by far more frequent constellation of the marriage between male Austrians and TCN women from Asia is not investigated into: neither in the construction of the group of the suspected ones, nor by alien-police or in judicial practices. This shows that not everyone is equal in front of the Alien Law but that there is a clear gender and nation bias. The concept of ‘marriages of convenience’ is a flexible narration that can easily be adopted for various groups of migrants or otherwise marginalized persons.

Above examined control measures seek to differentiate between “real” and “fake” marriages—but whose marriage is “real”? Is it the romantic marriage where he goes down on his knees when proposing with no reasons at the back of anybody’s mind other than enduring love? Leaving romantic notions aside, we can assume that in each marriage at least one person profits by, for instance, the legalization of children, tax, or other legal advantages, taking over a family business, and further strategic reasons. The state has shown no interest in verifying or ruling out any of such reasons and it would be seen as an inappropriate intervention of state policies infringing private matters. This changes when a foreigner is involved who might benefit from a marriage by gaining access to a residence and work permit and (facilitated) naturalization. Here the reasons for a marriage otherwise considered private become subject to state scrutiny. It is highly questionable that the government in a secular state proscribes the morally “correct” reasons for marriage in this way [20]. These control measures result in arbitrary intrusion in the couples’ private and intimate spheres, thus, violating Art. 8 ECHR.

5. Conclusions

Migration regimes of Western states are extremely eager to defend their sovereign right to regulate the entry and residence of foreigners on their territory. These aims are often in conflict with human rights standards. In Austria, the Alien Law Act 2005 and its implementation exacerbate or even hinder Austrians to marry a TCN and is effectively violating the human and constitutional right to the protection of marriage enshrined in Art 12 ECHR. Marriages between Austrian citizens and TCNs are strongly affected by the legal changes and their numbers have been in decrease since 2006. The ones worst hit are Austrian women with little income wishing to marry an Africa man who did not enter the country legally. Exactly, this group is the one suspected the most of having entered into a ‘residence marriage’—although the future husband would not get a residence permit out of the marriage. On the

contrary, the group of Austrian men marrying Asian women did not come under suspicion at all. This shows underlying gendered, classist, and racist structures. The criminalization of ‘residence marriages’ and the practices of the alien police trying to evaluate the “authenticity” of marriages by home visits, interrogations, and interviews violates human rights to private and family life laid down in Art 8 ECHR. The courts rarely follow the argumentation of the alien police and usually decide in favor of the accused couple. Acute police investigations lead to surprisingly low numbers of actual convictions.

Therefore, the following question has arisen: Can the intense invasion into the private life of bi-national couples and their right to marriage still be seen as proportional? Posing this question of balance between the interests of the individual rights and freedoms on the one hand and the interests of the states migration regime on the other hand, the result is sobering but probably not surprising: human rights lose out and are seen as less crucial than the fight against (alleged) ‘marriages of convenience’. On one hand, the state is the guarantor of human rights, on the other hand, the very same state increasingly violates human rights of bi-national couples by effectively blocking them from living together or from marrying and by exercising a growing level of control into their private homes and most intimate relationships.

The case study of Austria leaves little hope that human rights will gain attention again in the near future. The current political discourse is dominated by xenophobic reflexes and the question remains open as to how human rights can take on greater significance, in theory and practice.

Conflicts of Interest

The author declares no conflict of interest.

References and Notes

1. European Court of Human Rights. “European Convention on Human Rights as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13. Strasbourg.” 2010. Available online: http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed on 10 June 2013).
2. Stuart Hall. “The West and the Rest. Discourse and Power” In *Formations of Modernity*. Edited by Stuart Hall and Bram Gieben, 1997, pp. 275–320.
3. Julia Woesthoff. “Romancing the Foreigner? ‘Fictitious Marriages’ and the Crisis between Immigration and Human Rights.” In *Sexuality in Austria*. Edited by Günter Bischof, Anton Pelinka and Dagmar Herzog. New Brunswick: Transaction Publ., 2007, pp. 158–71.
4. Jari Pirjola. “European asylum policy—inclusions and exclusions under the surface of universal human rights language.” *European Journal of Migration and Law* 11 (2009): 347–66.
5. Manfred Nowak. “Right to Privacy and Family Life.” In *All Human Rights for All. Vienna Manual on Human Rights*. Edited by Manfred Nowak, Karolina Januszewski and Tina Hofstätter. Vienna-Graz: NWV Neuer Wissenschaftlicher Verlag, 2012, pp. 371–75.
6. Betty de Hart. “Introduction. The marriage of convenience in European immigration law.” *European Journal of Migration and Law* 8, no. 3–4 (2006): 251–62.

7. European Migration Network. “Misuse of the Right to Family Reunification.” *Marriages of Convenience and False Declarations of Parenthood*. Luxembourg: Publications Office of the European Union, 2012.
8. Albert Kraler. “Civic Stratification, Gender and Family Migration Policies in Europe. Final Report.” 2010. Available online: http://research.icmpd.org/fileadmin/Research-Website/Test_content/FINAL_Report_Family_Migration_Policies_Online_FINAL.pdf (accessed on 10 June 2013).
9. Eleonore Kofman. “Family-related migration: A critical review of European Studies.” *Journal of Ethnic and Migration Studies* 30, no. 2 (2004): 243–62.
10. Katharine Charsley, and Michaela Benson. “Marriages of convenience, and inconvenient marriages: Regulating spousal migration to Britain.” *Journal of Immigration, Asylum and Nationality Law* 26, no. 1 (2012): 10–26.
11. Helena Wray. *Regulating Marriage Migration into the UK. A Stranger in the Home*. Farnham: Ashgate, 2011.
12. Helena Wray. “An ideal husband? Marriages of convenience, moral gate-keeping and immigration to the UK.” *European Journal of Migration and Law* 8, no. 3–4 (2006): 303–20.
13. Anne Staver. “Family Reunification: A Right for Forced Migrants?” Refugee Studies Centre Working Paper, Series no. 51, 2008. Available online: http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper51.pdf (accessed on 10 June 2013).
14. Anne Britt Flemmen, and Ann Therese Lotherington. *Transnational Marriage Migration: Russian-Norwegian Encounters*. Saarbrücken: VDM Verlag, 2009.
15. Helga Eggebø. “The problem of dependency: Immigration, gender, and the welfare state.” *Social Politics* 17, no. 3 (2010): 295–322.
16. Jens Eisfeld. *Die Scheinehe in Deutschland im 19. und 20. Jahrhundert*. Tübingen: Mohr Siebeck, 2005.
17. Kathi-Alexandra Hartmann. *Scheinehen mit Deutschen Staatsangehörigen. Struktur, Politik, (deutsch-)deutsches Ehebild*. Berlin: Wissenschaftlicher Verlag Berlin, 2008.
18. Ute Mayer. “Die Ehe als Scheingeschäft unter Besonderer Berücksichtigung der Namens- und Staatsbürgerschaftsehe.” Diploma Thesis (MA), University Salzburg, 1993.
19. Antje Dertinger. *Schenk mir Deinen Namen. Scheinehen zwischen Menschlichkeit und Kriminalität*. Bonn: Dietz, 1999.
20. Association of Binational Families and Partnership. “Human rights infringements in the context of family migration policies in Germany.” Submission for the Second Cycle of the Human Rights Council Universal Periodic Review, 16th session, 22 April–3 May 2013, Frankfurt, Germany. Available online: http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/UN-Dokumente/UPR_zu_Deutschland/UPR2013_germany_IAF_en.pdf (accessed on 10 June 2013).
21. Daniela Digruber, and Irene Messinger. “Marriage of residence in Austria.” *European Journal of Migration and Law* 8, no. 3–4 (2006): 281–302.
22. Irene Messinger. “Verdacht auf Scheinehe. Intersektionelle Analyse staatlicher Konstruktion von, Schein- und Aufenthaltsehe’ und ihre Auswirkungen im Fremdenpolizeigesetz 2005.” Ph.D. Thesis, University Vienna, May 2011.

23. Irene Messinger, and Schein oder Nicht Schein. *Konstruktion und Kriminalisierung von "Scheinehen" in Geschichte und Gegenwart*. Wien: Verlag Mandelbaum, 2012.
24. Karin König, and Bettina Stadler. "Entwicklungstendenzen im Öffentlich-Rechtlichen und Demokratiepolitischen Bereich." In *Österreichischer Migrations- und Integrationsbericht. Demographische Entwicklungen—sozioökonomische Strukturen—rechtliche Rahmenbedingungen*. Edited by Heinz Fassmann, Irene Stacher and Helga Amesberger. Klagenfurt: Drava Verlag, 2003, pp. 225–61.
25. ÖVP-FPÖ. "Österreich neu regieren." Available online: www.bka.gv.at/2004/4/7/Regprogr.pdf (accessed on 10 June 2013).
26. "Fremdenrechtspaket 2005." Available online: http://www.parlament.gv.at/PAKT/VHG/XXII/I/I_00952/ (accessed on 10 June 2013).
27. Sebastian Schumacher. "Die Neuorganisation der Zuwanderung durch das Fremdenrechtspaket 2006." In *2. Österreichischer Migrations- und Integrationsbericht*. Edited by Heinz Fassmann. Klagenfurt: Drava Verlag, 2007, pp. 74–82.
28. Statistik Austria. "Eheschließungen seit 1970 nach Staatsangehörigkeit." Available online: http://www.statistik.at/web_de/static/eheschliessungen_seit_1970_nach_staatsangehoerigkeit_024813.pdf (accessed on 10 June 2013).
29. Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreiseteil, Fremdenpolizeigesetz 2005 (Alien Police Law 2005), Para. 117. (1 January 2006).
30. Niederlassungs- und Aufenthaltsgesetz 2005 (Settlement and Residence Act 2005), Para. 21 (1 January 2006).
31. "Directive 2004/38/EC of the European Parliament and Council from 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States." *Official Journal of the European Union L229* (2004): 35–48.
32. "Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification." *Official Journal of the European Union L251* (2003): 12–18.
33. Niederlassungs- und Aufenthaltsgesetz 2005 (Settlement and Residence Act 2005), Non-issuance and termination of residence titles: Para. 11, Art.1 (4) NAG, and Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreiseteil, Fremdenpolizeigesetz 2005 (Alien Police Law 2005), residence ban for TCNs who had legal residence: Para. 63 FPG, and entry ban for Asylum seekers Para. 54 FPG. (1 January 2006).
34. Verein Fibel. "Jahresbericht 2007." Available online: http://www.verein-fibel.at/images/stories/downloads/Fibel_JB_2007.pdf (accessed on 10 June 2013).
35. Verein Fibel. "Binationale Eheschließungen in Österreich 2009." Available online: http://www.verein-fibel.at/images/stories/Binationale_Eheschlieungen_in_sterreich_2009.pdf (accessed on 10 June 2013).
36. European Union Agency for Fundamental rights. *Fundamental Rights of Migrants in an Irregular Situation in the European Union*. Luxembourg: Publications Office of the European Union, 2011.

37. Rudolf Feik. "Recht auf Familienleben." In *Handbuch Menschenrechte. Allgemeine Grundlagen—Grundrechte in Österreich—Entwicklungen—Rechtsschutz*. Edited by Gregor Heißl. Vienna: facultas.wuv, 2009, pp. 176–92.
38. Sabrina Claudia Wittmann. "Binationale Ehen von ÖsterreicherInnen mit Drittstaatsangehörigen im Lichte der Judikatur des EGMR, VfGH und VwGH zu Artikel 8 EMRK." Master Thesis, Karl-Franzens Universität Graz, January 2010.
39. Verein Fibel. "Bi-cultural/bi-national partnership and Families in Austria 2010." Available online: <http://www.verein-fibel.at/images/stories/Lnderbericht2010-englisch.pdf> (accessed on 10 June 2013).
40. Irene Brickner. "Angst vor Festnahme beim Ja-Wort-Sagen." *Der Standard*, 6 June 2006. http://derstandard.at/2462716?sap=2&_seite=13.
41. "Eheleute am Standesamt durch Fremdenpolizei getrennt." *Der Standard*, 23 May 2007. <http://derstandard.at/2892519>.
42. Wolf Szymanski. "Fremdenrechtspaket 2005." *MigraLex, Zeitschrift für Fremden und Minderheitenrecht* 3, no. 2 (2005): 68–75.
43. City of Vienna. "Mindestsicherung." Available online: <http://www.wien.gv.at/gesundheit/leistungen/mindestsicherung> (accessed on 10 June 2013).
44. Bundeskanzleramt Österreich. "Sozioökonomische Situation." In *Frauenbericht 2010*. Available online: http://www.bka.gv.at/studien/frauenbericht2010/Frauenbericht_Teil1_4Soziooekonomie.pdf (accessed on 10 June 2013).
45. Statistik Austria. "Unselbständig Erwerbstätige nach Nettomonatseinkommen, Geschlecht und sozioökonomischen Merkmalen—Prozentwerte Jahresdurchschnitt 2011." Available online: http://www.statistik.at/web_de/static/unselbstaendig_erwerbstaetige_nach_nettomonatseinkommen_geschlecht_und_soiz_057213.pdf (accessed on 10 June 2013).
46. European Migration Network. *Misuse of the Right to Family Reunification. Marriages of Convenience and False Declarations of Parenthood*. Vienna: IOM, Focussed Study Austria, 2012.
47. Claudia Bandion-Ortner. "Anfragebeantwortung 553J-NR/2009." Available online: http://www.parlament.gv.at/PAKT/VHG/XXIV/AB/AB_00661/imfname_153067.pdf (accessed on 10 June 2013).
48. EU Council. "Resolution 97/C 382/01 of 4 December 1997 on measures to be adopted on the combating of marriages of convenience." *Official Journal C 382*, 1997. Available online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1216%2801%29:EN:HTML> (accessed on 10 June 2013).
49. Bea Verschraegen. "Entwicklungen des österreichischen Eherechts im 20. Jahrhundert. Zwischen Tradition und Wandel." In *Festschrift 200 Jahre ABGB*. Edited by Constanze Fischer-Czermak, Gerhard Hopf, Georg Kathrein and Martin Schauer. Vienna: Manz Verlag, 2011, pp. 667–90.
50. Walter Berka. *Lehrbuch Grundrechte*. Wien: Springer, 2000.
51. Volksanwaltschaft. "Misstandsfeststellung und Empfehlung des Kollegiums der Volksanwaltschaft." Available online: <http://volksanw.gv.at/downloads/974tj/misstandsfeststellung-und-empfehlung-bmi-september-2010-1.pdf> (accessed on 10 June 2013).

52. Claudia Bandion-Ortner. “Beantwortung der Parlamentarischen Anfrage 4305/J-NR/2010.” Available online: http://www.parlament.gv.at/PAKT/VHG/XXIV/AB/AB_04319/fname_183065.pdf (accessed on 10 June 2013).

© 2013 by the author; licensee MDPI, Basel, Switzerland. This article is an open access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/3.0/>).