



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

Communicated on 23 March 2015

FIRST SECTION

Application no. 40597/12
D and B
against Austria
lodged on 28 June 2012

STATEMENT OF FACTS

The applicants, Ms D. (the first applicant) and Ms B. (the second applicant), are Austrian nationals, who were born in 1973 and 1972 respectively and live in Vienna. They are represented before the Court by Ms D. Einwallner, a lawyer practising in Vienna.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

The applicants are two women who have been living in a stable relationship since 2004. Between 2008 and 2009 the applicants decided to raise a child together and agreed to the fertilisation of the first applicant by means of medically assisted reproduction. As this type of reproduction is not available to same-sex couples under Austrian law, the fertilisation proceedings took place in a hospital in Denmark with the assistance of donor sperm. On 20 January 2010 the first applicant gave birth to N., her son. N. does not have any established legal tie to his father, who acted as an anonymous donor in accordance with Danish law. Under Danish law the insemination is expressly authorised for single women and same-sex female couples. Therefore, the names of both applicants appear in the Danish hospital documents. Under Austrian law, however, the biological mother of the child conceived is the sole parent of the child, if the father is unknown. Therefore, only the first applicant has custody for N. The applicants have been cohabitating for many years, N. has lived all his life in the applicants' shared home and both care for N. jointly.

On 30 January 2011, the applicants agreed upon in writing that they would both share the common responsibility for the care and upbringing of N. The applicants' intention was to share parental custody (*Obsorge*) and

create a legal relationship between the second applicant and N. corresponding to the parent-child relationship between them, without severing the relationship with N.'s biological mother, the first applicant.

The applicants requested the Donaustadt District Court (*Bezirksgericht*) to approve the custody agreement, to the effect that both applicants would be awarded joint custody over N. In their submissions they explained that they were considered as a family by their social environment and even at the second applicant's workplace the first applicant and her son N. would be considered as family members. A parent-child relationship would therefore not only exist between the first applicant and the biological mother, but also with the second applicant.

By decision of 10 March 2011 the Donaustadt District Court refused to approve the above agreement, holding that the current legal situation (section 186a § 1 in conjunction with sections 187 et seq. of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*)) and the established jurisprudence of the Supreme Court (*Oberster Gerichtshof*) did not provide for any form of custody producing the effect desired by the applicants. The District Court held that there was no need to award custody to a foster parent or step-parent alongside that of the biological parent who was capable to fulfil the parental obligations. An additional parent-child-relationship alongside that of the biological mother was not considered as necessary under the current jurisprudence (see *inter alia* the Supreme Court judgment in the case no. 7 Ob 144/02 f, 25 September 2002). The District Court further held that same-sex and different-sex foster parents were in a different situation when it came to the award of custody. It concluded that there was no difference in treatment of unmarried same-sex couples and unmarried different-sex couples, especially because Austrian law foresaw special rules of custody only for married couples. It further held that the recognition of the applicants' long-term partnership could not establish the necessity for the establishment of an additional parent-child-relationship either.

The applicants appealed. They argued that the current restrictions on child custody did not reflect the reality anymore. New models such as the "patchwork" family have emerged and are widely lived in society nowadays. Therefore the provisions in sections 90 § 3 and 137 § 4 of the Civil Code, as amended by the Family Law Reform Act of 2009 (*Familienrechtsänderungsgesetz, FamRÄG 2009*), should be interpreted in the sense that they created a legal possibility to award joint custody for non-married couples.

Moreover, they argued that there was a need for the analogous application of section 167 of the Civil Code to homosexual couples who conceived a child by methods of medically assisted reproduction. They argued that medically assisted reproduction opened new forms of family models since in case of in-vitro fertilisation with sperm from an anonymous donor, the biological father was always excluded from paternity. Therefore, the situation of the applicants had to be interpreted in the sense that the child was conceived within their relationship and the biological mother's partner had to be seen as the second parent of the child, not the anonymous sperm donor.

Referring to Articles 8 and 14 of the Convention, they argued that sections 186 et seq. of the Civil Code was discriminatory in that they led to

an unjustified difference in treatment, because non-married different-sex couples were able to share joint custody for a child that was conceived by artificial insemination, but same-sex couples were not. The applicants therefore argued that there was a difference in treatment under the law depending on whether a couple raising children consisted of two women cohabiting or of a woman and a man in the same situation.

On 13 April 2011, the Vienna Court of Appeal in Civil Matters (*Landesgericht für Zivilrechtssachen*) rejected the applicants' appeal. The court held that all the provisions concerning custody required the parents to be biological or adoptive parents. Relying on sections 144, 167 and 177 of the Civil Code, it held that custody could only be granted to the biological or adoptive parents. The child care provisions in Austrian law were therefore to be interpreted in the sense that the sole custody of one parent would guarantee the child's interest in a sufficient manner. The law did not provide the award of custody to non-biological parents. The court held that according to jurisprudence, the award of custody to a foster carer was not possible if at least one biological parent continued to have custody. It found no difference in treatment of same-sex and different-sex couples, because the rules governing foster parents' rights to custody were gender-neutral and thus applied irrespective of the sexual orientation of the persons concerned.

The applicants lodged an appeal on points of law with the Supreme Court.

On 30 November 2011, the Supreme Court dismissed this appeal. It held that from the provisions concerning parental custody rights, no intention of the legislator transpired which would indicate that the traditional family model should be extended to another model, e.g. that of a biological parent and a foster parent. Hence, there was no room for an analogous application of section 167 of the Civil Code. Concerning sections 90 § 3 and 137 § 4 of the Civil Code, the court held that these provisions only stated the obligation of one spouse to support the other, but not the right to award joint custody. Parental rights deriving from the traditional family model could not automatically be transferred to other family models, even under the newly established provisions under the Family Law Reform Act 2009. The court further held that pursuant to section 8 § 4 of the Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*), registered partners are not allowed to adopt a child; nor is the adoption of stepchildren permitted, that is to say, the adoption of one partner's child by the other partner. The Court held that this provision strengthened the legal interpretation that the establishment of a registered partnership could not be considered identical with the model of biological parents.

Finally, the Supreme Court found that there had been no difference in treatment, as the sections 187 et seq. of the Civil Code applied to all couples, whether of different sex or of the same sex. Different-sex couples can be given joint custody as foster carer even though they are not the biological-parents of the child. However, this would not result in a difference in treatment, as joint custody between foster parent and biological parent was not possible, irrespective of the couple's sexual orientation.

B. Relevant domestic law

Section 90 § 3 of the Civil Code provides that each spouse has to assist the other in exercising custody for his or her children (i.e. if one spouse is not the parent of the other spouse's child) in an appropriate manner. If circumstances so require, he or she represents his or her spouse in custody matters of everyday life.

Section 137 § 4 of the Civil Code as in force at the relevant time states that an adult permanently living together with a parent and his or her under-aged child, who is in a family relationship with the parent, has to take every reasonable measure to protect the child's best interest.

Pursuant to section 166 of the Civil Code as in force at the relevant time, the mother of a child born outside marriage has sole custody, meaning that she exercises parental responsibility, caring for the child and raising him or her, representing the child in legal matters and managing his or her assets.

Section 167 of the Civil Code as in force at the relevant time provides that if the parents of a child born outside marriage are living in a common household, they can agree to exercise custody jointly. The Court has to approve the agreement if it is in the child's best interest. The parents of a child born outside marriage can also agree to exercise custody jointly if they are not living in a common household. An agreement to that effect is also subject to the approval of a court.

Pursuant to section 8 § 4 of the Registered Partnership Act as in force at the relevant time, registered partners are not allowed to adopt a child; nor is the adoption of one partner's child by the other partner permitted.

Section 2 § 1 of the Artificial Procreation Act (*Fortpflanzungs-medizingesetz*) provides that assisted reproduction is available only to married or unmarried different-sex couples.

Pursuant to section 3 § 1 and 2 of the Artificial Procreation Act, only the eggs and sperm of the married couple or non-married couple can be used for assisted reproduction. The sperm of a third party can only be used if the husband or partner is infertile.

Recent developments

Following the Court's judgment in the case *X and Others v. Austria* ([GC], no. 19010/07, ECHR 2013), section 8 § 4 of the Registered Partnership Act was amended in March 2013. It is now possible for registered partners to adopt the biological children of the other.

The Constitutional Court (*Verfassungsgerichtshof*) in a recent judgment has held that the prohibition of medically assisted reproduction for lesbian couples amounts to discrimination on grounds of sexual orientation (see judgment of 10 December 2013, cases no. G/162013-16 and G 44/2013-14).

In another recent judgment, the Constitutional Court declared the prohibition for same-sex couples to adopt children unconstitutional (judgment of 11 December 2014, case no. G 119-120/2014). The respective legal provisions will cease to be in force on 31 December 2015.

COMPLAINTS

The applicants complain under Article 8 of the Convention that the denial of joint custody for N. amounted to a violation of their right to respect for their private and family life. N., even though he was conceived by means of medically assisted reproduction, should be considered as having been conceived within the applicants' relationship. The applicants claim that they have suffered discrimination on grounds of their sexual orientation, contrary to Article 14 of the Convention read in conjunction with Article 8, because of the refusal of the Austrian authorities to extend the first applicant's custody of N. to the second applicant.

QUESTIONS TO THE PARTIES

1. Has there been an interference with the applicants' right to respect for their private and family life, within the meaning of Article 8 § 1 of the Convention? If so, was the interference justified under Article 8 § 2?

2. Would there have been a positive obligation for the State under Article 8 of the Convention to grant the second applicant shared custody for the first applicant's child N.?

3. Have the applicants suffered discrimination on grounds of their sexual orientation, contrary to Article 14 of the Convention read in conjunction with Article 8, because of the refusal of the Austrian authorities to extend the first applicant's custody of N. to the second applicant?