

Impossibility of securing judicial review of custody of a child born out of wedlock discriminates against father

In today's Chamber judgment in the case [Sporer v. Austria](#) (application no. 35637/03), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

A violation of Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for family life) of the European Convention on Human Rights.

The case concerned Mr Sporer's complaint about custody proceedings with regard to his son who was born out of wedlock.

Principal facts

The applicant, Gerald Sporer, is an Austrian national who was born in 1976 and lives in Schalchen (Austria). His son, K., was born out of wedlock in May 2000, at a time when the child's mother was living in the same building as Mr Sporer, who shared an apartment with his long-term partner and their son. During K.'s first year, Mr Sporer and K.'s mother took turns taking care of the child and taking parental leave.

After K.'s mother had moved out of the house in January 2002, Mr Sporer asked the district court to transfer sole custody to him, arguing that K.'s mother was not capable of taking care of the child. She opposed the transfer of custody and the youth office expressed the view that both parents were capable of exercising custody. In a hearing before the district court, it was agreed that, pending a decision, K. would spend half of the time with each parent. A child psychology expert appointed by the court on Mr Sporer's request subsequently submitted an opinion, which was discussed during a second court hearing, according to which K.'s mother was immature and not capable of taking care of him. A second expert subsequently appointed by the court contradicted this conclusion, however. A third expert, called to submit a decisive opinion, confirmed the second opinion, holding that the child's interest would not be endangered if custody remained with the mother. Mr Sporer did not make use of his opportunity to submit written comments but requested that the expert opinion be discussed at a hearing.

In December 2002, without holding a further hearing, the court dismissed Mr Sporer's request for sole custody to be transferred to him, noting that under the Austrian Civil Code the mother of a child born out of wedlock had sole custody unless the child's best interest was at risk. The decision was upheld by the regional court and, in June 2003,

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

the Supreme Court dismissed Mr Sporer's appeal. K.'s mother continues to have sole custody while Mr Sporer has a right of access as recommended by the courts.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair hearing), Mr Sporer complained that in the custody proceedings the district court had failed to hear him in person to discuss the decisive expert opinion. He further alleged, under Article 14 taken together with Article 8, that he had been discriminated against as the father of a child born out of wedlock. He argued that on the basis of the relevant provisions of the Civil Code, he was treated differently in comparison with the mother, in that he had no opportunity to obtain joint custody without the latter's consent, and in comparison with married or divorced fathers, who were able to retain joint custody following divorce or separation from the mother of their child.

The application was lodged with the European Court of Human Rights on 12 November 2003.

Judgment was given by a Chamber of seven, composed as follows:

Christos **Rozakis** (Greece), *President*,
Nina **Vajić** (Croatia),
Anatoly **Kovler** (Russia),
Elisabeth **Steiner** (Austria),
Khanlar **Hajiyev** (Azerbaijan),
Giorgio **Malinverni** (Switzerland),
George **Nicolaou** (Cyprus), *Judges*,

and also Søren **Nielsen**, *Section Registrar*.

Decision of the Court

Article 6 § 1

The Court noted that Mr Sporer had been entitled to a hearing, as there had been no exceptional circumstances, which would have justified dispensing with it. Nor did the proceedings concern highly technical issues or purely legal questions. In custody proceedings, the personal impression of the parents was, moreover, an important element.

The Court further observed that two hearings had been held before the district court, one of a preparatory nature and one on the merits of the case. The hearings had allowed that court to gain a personal impression of both parties and had provided an opportunity to discuss various aspects of the case. The Court found the district court's argument convincing that there had been no need for a further hearing as the third expert opinion was conclusive and all factual and legal issues of the case had been sufficiently clarified. There was no indication that Mr Sporer would not have been able to make further submissions had he wished to do so. Indeed, the decisive expert opinion had been prepared in an adversarial manner, based on interviews with and written submissions by both parties.

In view of these considerations, the Court concluded that there had been no violation of Article 6 § 1.

Article 14 taken together with Article 8

The Court first underlined that, as was undisputed between the parties, Mr Sporer's relationship with his son had constituted "family life" for the purpose of Article 8, given that he had taken parental leave and that he had continued to take care of him on a regular basis.

In the custody proceedings brought by Mr Sporer, the Austrian courts had not been in a position to examine whether joint custody would be in the child's interest, as under the applicable provisions of the domestic Civil Code, the mother's agreement – not given in his case – was required for such an examination. Nor had the courts been called on to examine whether one of the parents was better suited to exercise custody than the other. The only question before them had been whether K.'s mother endangered his well-being. On the basis of the decisive expert opinion they had dismissed Mr Sporer's request for the transfer of sole custody. There had thus been a difference in treatment as regards the attribution of custody to Mr Sporer in his capacity as the father of a child born out of wedlock in comparison with the mother. At the same time, as provided by the Civil Code, he was treated differently in comparison with married fathers.

As regards the initial attribution of custody of a child born out of wedlock to its mother, the Court saw no reason to come to a different conclusion than in the very similar case of *Zaunegger v. Germany*², in which it had found that, in the absence of an agreement on joint custody, that attribution was justified in order to ensure that there was a person who would act for the child from birth in a legally binding way.

However, in the case of *Zaunegger*, the Court had not shared the assumption that joint custody against the will of the mother was *prima facie* against the child's interests. While there was no European consensus as to whether fathers of children born out of wedlock had a right to request joint custody even without the consent of the mother, in a majority of Member States decisions regarding the attribution of custody had to be based on the child's best interests and, in the event of a conflict between the parents, such attribution was to be subject to scrutiny by the national courts. In Mr Sporer's case, Austrian law neither allowed for judicial review of whether joint custody would be in the interest of the child or, in the event that joint custody was against that interest, of whether it was better served by awarding sole custody to the mother or to the father. The Government had not submitted sufficient reasons to justify why the situation of Mr Sporer, who had assumed his role as K.'s father from the very beginning, should allow for less judicial scrutiny than that of fathers who had originally held parental authority and later separated or divorced from the mother.

There had accordingly been a violation of Article 14 of the Convention taken in conjunction with Article 8.

Article 41

Under Article 41 (just satisfaction) of the Convention, the Court held that Austria was to pay Mr Sporer 3,500 euros (EUR) in respect of costs and expenses. It further held that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by him.

The judgment is available only in English.

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² *Zaunegger v. Germany* (22028/04) of 3 December 2009

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.