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

FIFTH SECTION

DECISION

Application no. 40597/12
D and B
against Austria

The European Court of Human Rights (Fifth Section), sitting on 31 october 2017 as a Committee composed of:

Erik Møse, *President,*
Yonko Grozev,
Gabriele Kucsko-Stadlmayer, *judges,*
and Anne-Marie Dougin, *Acting Deputy Section Registrar,*

Having regard to the above application lodged on 28 June 2012,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

FACTS

1. The applicants, Mrs D. (the first applicant) and Mrs B. (the second applicant), are Austrian nationals who were born in 1973 and 1972 respectively and live in Vienna. The applicants' request for their identity not to be disclosed to the public was granted (Rule 47 § 4 of the Rules of Court). They were represented before the Court by Mrs D. Einwallner, a lawyer practising in Vienna.

2. The Austrian Government ("the Government") were represented by their Agent, Mr H. Tichy, Head of the International Law Department at the Federal Ministry for Europe, Integration and Foreign Affairs.

A. The circumstances of the case

3. The applicants are two women living together in a long-term same-sex relationship. Around 2008/2009, they decided to have a child

together by means of medically assisted reproduction, namely by fertilisation of the first applicant in Denmark using anonymous donor sperm. Under the Austrian Artificial Procreation Act (*Fortpflanzungsmedizingesetz*) as in force at the relevant time, this type of reproduction was not available to same-sex couples, whereas Danish law explicitly allowed artificial insemination for female same-sex couples.

4. On 20 January 2010 the first applicant gave birth to N. In accordance with Danish law, the names of both applicants appear in the Danish hospital documents, and N. does not have any legal ties to his father.

5. On 19 February 2011 the applicants submitted a written agreement on joint custody for N. to the Donaustadt District Court (*Bezirksgericht*) and asked for approval. They claimed that a parent-child relationship existed between N. and both applicants. By means of a joint custody agreement, they intended to create a legal relationship between the second applicant and N. They argued that under the Artificial Procreation Act, read in conjunction with the legal provisions on custody rights, there was a difference in treatment of same-sex couples and different-sex couples. While the latter were entitled to share custody rights for a child who had been conceived by the female partner by means of artificial insemination, same-sex couples were not.

6. On 10 March 2011 the Donaustadt District Court dismissed the request. On 13 April 2011 the Vienna Regional Civil Court (*Landesgericht für Zivilrechtssachen*), and on 30 November 2011 the Supreme Court (*Oberster Gerichtshof*) dismissed the applicants' appeals. The courts held that the legal provisions of the Civil Code, as in force at the relevant time, did not provide for joint custody between a foster parent (or step-parent) and the biological parent, irrespective of whether they were a same-sex or a different-sex couple. They further found that it did not appear from the provisions concerning parental rights that the Austrian legislator intended to extend the traditional family model. Such a conclusion could not be drawn from section 8 § 4 of the Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*) either, as it did not allow for the adoption of a child by a same-sex couple.

7. On 5 January 2016 the applicants informed the Court that the applicable legal provisions had been amended. Already on 25 November 2013 the second applicant and N. (represented by the first applicant) had concluded an adoption contract, which was approved by the Donaustadt District Court on 12 February 2014. This decision took effect retroactively as of the day of the conclusion of the contract. Therefore, since 25 November 2013 the second applicant has been exercising custody rights concerning N. by virtue of the law.

B. Relevant domestic law

8. The legal situation in Austria relating to the applicants' complaints can be summarised as follows. The legal provisions of the Civil Code relating to custody rights, as in force at the relevant time as well as in the amended version, provide for rulings or agreements on joint custody concerning unmarried or married biological parents, whereas a biological parent could not and still cannot share custody rights with a foster- or step-parent. The legislation provides first and foremost for the biological parents to have custody. As long as there is one biological parent apt to exercise custody rights, it is not necessary to extend custody rights to another person, even if that person has a close relationship to the child (see, for example, Supreme Court, 7 Ob 144/02f, 25 September 2002).

9. In accordance with section 8 § 4 of the Registered Partnership Act, as in force at the time when the present application was lodged, same-sex couples – as opposed to different-sex couples – were not allowed to adopt a child, nor could one partner adopt the other partner's biological child.

10. Section 2 § 1 of the Artificial Procreation Act, as in force at the relevant time, allowed medically assisted reproduction only for married and unmarried different-sex couples.

11. 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 and the relevant provision of the Civil Code were amended, and as of 1 August 2013, a person living in a registered or unregistered same-sex partnership was entitled to adopt the biological child of his or her partner ("second-parent adoption").

12. By judgment of 10 December 2013 (cases no. G 16/2013 and G 44/2013) the Constitutional Court held that the prohibition of medically assisted reproduction for lesbian couples amounted to discrimination on grounds of sexual orientation. Subsequently, the Austrian legislator amended section 2 of the Artificial Procreation Act to allow medically assisted reproduction for lesbian couples. This amendment entered into force on 24 February 2015.

13. By judgment of 11 December 2014 the Constitutional Court declared the ban on joint adoption by same-sex couples unconstitutional (case no. G 119-120/2014). Section 8 § 4 of the Registered Partnership Act ceased to be in force on 31 December 2015 and the relevant provision of the Civil Code was amended. As of 1 January 2016, joint adoption of a child was made possible for same-sex couples, irrespective of whether they lived in a registered or unregistered partnership.

14. Adoptive parents exercise custody rights by virtue of the law, irrespective of whether they live in a registered or unregistered same-sex partnership or as a married or unmarried different-sex couple. In case of medically assisted reproduction, the non-biological parent in a female

same-sex couple obtains custody rights for the biological child of her partner in the same way as the non-biological parent in a different-sex couple. Registered partners have joint custody by virtue of the law like a married couple, while both unregistered same-sex couples and unmarried different-sex couples have to conclude an agreement on joint custody before the Office for Matters of Personal Status (*Standesamt*) or the competent district court (see Articles 144 § 3 and 177 of the Civil Code and section 43 § 1 (27) of the Registered Partnership Act).

COMPLAINTS

15. The applicants complained under Article 8 of the Convention that the refusal to grant them joint custody of N. amounted to a violation of their right to respect for their private and family life. Under Article 14, read in conjunction with Article 8, of the Convention they complained that they were discriminated against compared to different sex-couples in that the latter, after having made use of medically assisted procreation, were allowed to exercise joint custody rights of the child so conceived, whereas same-sex couples who had made use of medically assisted procreation were not.

THE LAW

A. Alleged violation of Articles 8 and 14 of the Convention

16. The applicants allege the violation of Articles 8 and 14 of the Convention which read as follows:

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

1. The parties' submissions

17. The applicants claimed violations of their right to respect for their private and family life on the grounds that due to the legal provisions as in force at the relevant time, the domestic courts had not granted them joint custody of N. On 5 January 2016, thus, after the abovementioned legal amendments had entered into force, the applicants informed the Court that they still considered themselves to be victims of the alleged violations on the grounds that the second applicant had been forced to obtain custody rights by means of adoption; that this would not have been necessary if N. had been born after the amendments of the Artificial Procreation Act had come into force; that, for lack of a retroactive effect of the adoption contract to a child's birth, the second applicant was not considered to be N.'s parent by birth; and that contrary to the Government's arguments there had been negative consequences for the applicants' family life, as the second applicant had not been allowed to represent N. before third parties, save by means of an authorisation given to her by the first applicant.

18. In their observations of 19 November 2015, the Government conceded that there had been an interference with the applicants' family life because of the Austrian courts' refusal to grant them joint custody. This interference, however, was proportionate and served a legitimate aim. Due to the lack of a European consensus on these sensitive matters, the preservation of the "traditional family model" could not be considered to constitute a violation of the right to respect for the applicants' family life. Referring to the Court's judgment in *Schalk and Kopf v. Austria* (no. 30141/04, §§ 104-106, ECHR 2010), the Government further claimed that since equal treatment of same-sex and different-sex couples concerning medically assisted reproduction, adoption and custody rights had in the meantime been established under Austrian law, the Austrian legislator could not be reproached for not having amended the relevant legal provisions any earlier.

2. The Court's assessment

19. The Court considers it appropriate to examine all complaints under Article 14 read in conjunction with Article 8 of the Convention, and not under Article 8 taken alone and will consider them in turn.

20. As regards the complaint about the refusal to grant joint custody of N., the Court observes that N. has been living with the applicants since his birth and that the second applicant, for lack of a biological tie, could not exercise custody rights from his birth. The Court, however, notes that there is no difference in treatment of same-sex and different-sex couples under Austrian law when it comes to the question of joint custody between the biological parent and a foster parent or step-parent. Hence, the applicants have not been discriminated against in that respect, as the same legal

situation applied to different-sex couples and to same-sex couples. Therefore, the applicants' complaint under this head must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

21. Turning to the complaint concerning the alleged discrimination in that different-sex couples, unlike same-sex couples, after having made use of medically assisted procreation, were allowed to exercise joint custody rights of the child so conceived, whereas same-sex couples who had made use of medically assisted procreation were not, the Court considers that it must examine whether in the particular circumstances of the case, the applicants' complaint should be struck out of its list of cases pursuant to Article 37 § 1 of the Convention. It reiterates that in order to conclude that a matter has been resolved within the meaning of Article 37 § 1 (b) and that there is therefore no longer any objective justification for an applicant to pursue the application, it must examine firstly, whether the circumstances complained of directly by the applicant still obtain and secondly, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see *Pisano v. Italy* (striking out) [GC], no. 36732/97, § 42, 24 October 2002; *Shevanova v. Latvia* (striking out) [GC], no. 58822/00, § 45, 7 December 2007; and *Standard Medien AG v. Austria* (dec.), no. 22820/06, 22 January 2013).

22. The Court observes that due to changes in the applicable laws, the second applicant has, since 1 August 2013, been able to formalise her relationship to N. by means of adoption, so that the applicants could exercise joint custody rights (see paragraphs 7 and 11, 13 and 14 above). In addition, medically assisted reproduction has in the meantime been made available for female same-sex couples too, giving them an additional possibility to obtain joint custody (see paragraphs 10 and 12 above). The Court therefore considers that the Austrian legislator has amended the legal provisions in such a way that the difference in treatment between different-sex couples and same-sex couples, on which the present application was based, no longer exists.

23. As to whether the effects of a possible violation of the Convention have been redressed, the Court notes that custody of N. was extended to B. following his adoption some two and half a year after his birth. From birth on N. was living with the applicants, who both cared for him and during this period D. had custody of him. Moreover, the applicants have not shown that in the time before custody of N. had been extended to B. there have been any concrete issues in which lack of formal status of custody had caused prejudice to the applicants.

24. Moreover, the Court considers that the matter in question must still be regarded as one of evolving rights with no European consensus established as yet, where States consequently enjoy a certain margin of appreciation in the timing of the introduction of legislative changes (see,

mutatis mutandis, Schalk and Kopf, cited above, §§ 105-106). Secondly, the Court points out its subsidiary role in supervising the implementation of the rights and freedoms protected by the Convention and its Protocols, and that it is primarily for the member States to implement these and to organise and adapt their legal systems accordingly (compare *Hörmann and others v. Austria* (dec.), nos. 31176/13 and 31185/13, § 10, 7 March 2017).

25. In the light of the above, the Court considers that the complaint concerning access to medically-assisted reproduction for same-sex couples and the consequences for custody rights has been resolved within the meaning of Article 37 § 1 (b) of the Convention and that respect for human rights as defined in the Convention and its Protocols does not require it to continue the examination of the application under Article 37 § 1 *in fine*. Accordingly, it is appropriate to strike this complaint out of the list.

B. Application of Article 43 § 4 of the Rules of Court

26. Rule 43 § 4 of the Rules of Court provides:

> "When an application has been struck out in accordance with Article 37 of the Convention, the costs shall be at the discretion of the Court."

27. The applicants jointly claimed 7,000 euros (EUR) in respect of non-pecuniary damage and EUR 6,953.84 for their legal representation in the domestic proceedings and in the proceedings before the Court. According to the documents submitted by the applicants, EUR 2,936.40 relate to the applicants' legal costs for legal representation before the Court.

28. The Government submitted that the legal costs were not reasonable as to quantum as they did not comply with the Lawyers' Fees Act (*Rechtsanwaltstarifgesetz*) and appeared to be excessive.

29. The Court notes that it is not empowered to award damages if a case is struck out of the list. However, in accordance with Rule 43 § 4 of the Rules of Court, the Court finds it suitable in the special circumstances of the present case to make an award in respect of the costs of the Convention proceedings (see, among many other authorities, *Asgari v. Austria* (dec.), no. 62154/10, 29 January 2013, and *Hörmann and others v. Austria* (dec.), nos. 31176/13 and 31185/13, § 10, 7 March 2017).

30. Taking note of the costs genuinely and necessarily incurred in the proceedings before it and of its case-law on the matter (*Yelverton Investments B.V. and others v. Latvia* (dec.), no. 57566/12, § 47, 18 November 2014), the Court awards reimbursement of costs and expenses in the amount of EUR 2,000 jointly to the applicants, plus any tax which may be chargeable to them. Furthermore, the Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court, unanimously,

Declares the complaint under Article 14 read in conjunction with Article 8 of the Convention inadmissible in so far as the applicants claimed to be discriminated against compared to unmarried different-sex couples by not being granted joint custody of the first applicant's son;

Decides to strike out of its list the complaint under Article 14 read in conjunction with Article 8 of the Convention in so far as the applicants, living in a same-sex partnership, claimed to be discriminated against compared to different-sex couples in that the latter, after having made use of medically assisted procreation, were allowed to exercise joint custody rights of the child so conceived, whereas same-sex couples who had made use of medically assisted procreation were not;

Holds

a) that the respondent State is to pay to the applicants jointly, within three months of the date of notification of this decision, EUR 2,000 (two thousand euros), plus any tax which may be chargeable to them, in respect of costs and expenses;

b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English and notified in writing on 23 November 2017.

Anne-Marie Dougin
Acting Deputy Registrar

Erik Møse
President