



Impossibility of second-parent adoption in a same-sex relationship in Austria is discriminatory in comparison with situation of unmarried different-sex couples

In today's Grand Chamber judgment in the case of [X and Others v. Austria](#) (application no. 19010/07), which is final¹, the European Court of Human Rights held:

by a majority, that there had been a **violation of Article 14 (prohibition of discrimination)** taken in conjunction with **Article 8 (right to respect for private and family life)** of the European Convention on Human Rights on account of the difference in treatment of the applicants in comparison with unmarried different-sex couples in which one partner wished to adopt the other partner's child; and,

unanimously, that there had been **no violation of Article 14** taken in conjunction with **Article 8** when the applicants' situation was compared with that of a married couple in which one spouse wished to adopt the other spouse's child.

The case concerned the complaint by two women who live in a stable homosexual relationship about the Austrian courts' refusal to grant one of the partners the right to adopt the son of the other partner without severing the mother's legal ties with the child (second-parent adoption).

The Court found that the difference in treatment between the applicants and an unmarried heterosexual couple in which one partner sought to adopt the other partner's child had been based on the first and third applicants' sexual orientation. No convincing reasons had been advanced to show that such difference in treatment was necessary for the protection of the family or for the protection of the interests of the child.

At the same time, the Court underlined that the Convention did not oblige States to extend the right to second-parent adoption to unmarried couples. Furthermore, the case was to be distinguished from the case *Gas and Dubois v. France*², in which the Court had found that there was no difference of treatment based on sexual orientation between an unmarried different-sex couple and a same-sex couple as, under French law, second-parent adoption was not open to any unmarried couple, be they homosexual or heterosexual.

Principal facts

The applicants are two Austrian women ("the first and the third applicant"), both born in 1967, who live in a stable homosexual relationship, and the son of one of them ("the second applicant"). The latter was born out of wedlock in 1995 and his mother (the third applicant) has sole custody of him. The applicants live together and the two women jointly care for the child.

Wishing to create a legal relationship between the first applicant and the child without severing the relationship with his mother, they concluded an adoption agreement in

¹ Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

² *Gas and Dubois v. France* (25951/07), Chamber judgment of 15 March 2012

February 2005 and submitted it to the competent district court for approval. Being aware that the relevant provisions of the Civil Code could be understood to exclude the adoption of the child of one partner of a homosexual couple by the other partner without severing the relationship with the natural parent, the applicants requested the Constitutional Court to declare those provisions unconstitutional as discriminating against them on account of their sexual orientation. The Constitutional Court rejected the request as inadmissible in June 2005, pending the decision of the district court.

In October 2005, the district court refused to approve the adoption agreement, holding that the Civil Code envisaged that in the case of an adoption by one person the adopting parent replaced the natural parent of the same sex, thus severing the child's relationship with him or her. In the case at hand, the child's adoption by the first applicant would sever his relationship with his mother, not with his father.

The applicants' appeal was dismissed by the regional court in February 2006. In addition to the considerations of the district court, it observed that Austrian law, while not giving a precise definition of the term "parents", plainly envisaged two people of different sex. Where, as in the present case, a child had both parents there was no need to replace one of them by an adoptive parent. In that connection, the court noted on the basis of the file that the child had regular contacts with his father. It did not deal with the question whether, as alleged by the applicants, there were grounds for overriding the father's refusal to consent to the adoption. In September 2006, the Supreme Court dismissed the applicants' appeal on points of law, holding that the adoption of a child by the female partner of his or her mother was legally impossible. It considered that the relevant provisions of the Civil Code did not disclose any appearance of being unconstitutional.

Complaints, procedure and composition of the Court

The applicants complained under Article 14 taken in conjunction with Article 8 that they were being discriminated against on account of the first and third applicants' sexual orientation. They submitted that there was no reasonable and objective justification for allowing adoption of one partner's child by the other partner if heterosexual couples were concerned, be they married or unmarried, while prohibiting the adoption of one partner's child by the other partner in the case of homosexual couples.

The application was lodged with the European Court of Human Rights on 24 April 2007. On 5 June 2012, the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber. A Grand Chamber hearing took place in Strasbourg on 3 October 2012.

Under Article 36 of the Convention, the President of the Grand Chamber authorised the following organisations and institutions to submit written comments as third parties:

- *Federation International des ligues des Droits de l'Homme* (FIDH), International Commission of Jurists (ICJ), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), British Association for Adoption and Fostering (BAAF), Network of European LGBT Families Associations (NELFA) and the European Commission on Sexual Orientation Law (ECSOL), jointly,
- European Centre for Law and Justice (ECLJ),
- Attorney General for Northern Ireland,
- Amnesty International (AI) and
- Alliance Defending Freedom.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
Josep **Casadevall** (Andorra),
Guido **Raimondi** (Italy),
Ineta **Ziemele** (Latvia),
Nina **Vajić** (Croatia),
Lech **Garlicki** (Poland),
Peer **Lorenzen** (Denmark),
Anatoly **Kovler** (Russia),
Elisabeth **Steiner** (Austria),
Khanlar **Hajiyev** (Azerbaijan),
Egbert **Myjer** (Netherlands),
Danutė **Jočienė** (Lithuania),
Ján **Šikuta** (Slovakia),
Vincent A. **de Gaetano** (Malta),
Linos-Alexandre **Sicilianos** (Greece),
Erik **Møse** (Norway),
André **Potocki** (France), judges,

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

Decision of the Court

[Article 14 in conjunction with Article 8](#)

The Court confirmed that, in accordance with its case-law, the relationship between the three applicants amounted to “family life” within the meaning of Article 8. Therefore, Article 14 taken in conjunction with Article 8 applied in their case. The Austrian Government had not disputed that applicability.

Comparison with a married couple in which one spouse wished to adopt the other spouse’s child

In a recent judgment in another case, *Gas and Dubois v. France*, the Court had considered that a same-sex couple in which one partner wished to adopt the other partner’s child without severing the mother’s legal ties with the child, was not in a relevantly similar situation to a married couple. The Court did not see any reason to deviate from its finding in that case. It reiterated that the Convention did not impose an obligation on Member States to grant same-sex couples access to marriage. Where a State chose to provide same-sex couples with an alternative means of legal recognition, it enjoyed a certain amount of discretion (margin of appreciation) as regards its exact status. Furthermore, marriage conferred a special status on those who entered into it, giving rise to social, personal and legal consequences.

The Court concluded that the first and third applicants in the case of *X and Others* were not in a relevantly similar situation to a married couple. Consequently, there had been no violation of Article 14 taken in conjunction with Article 8 when the applicants’ situation was compared with that of a married couple in which one spouse wished to adopt the other spouse’s child.

Comparison with an unmarried different-sex couple in which one partner wished to adopt the other partner’s child

The Court accepted that the applicants were in a relevantly similar situation to an unmarried different-sex couple in which one partner wished to adopt the other partner’s child. The Austrian Government had not argued that a special legal status existed which

would distinguish an unmarried heterosexual couple from a same-sex couple, conceding that same-sex couples could in principle be as suitable or unsuitable for adoption, including second-parent adoption, as different-sex couples.

Austrian law allowed second-parent adoption by an unmarried different-sex couple. Under the Civil Code, individuals could adopt and nothing in the relevant regulations of the Civil Code prevented one partner in an unmarried heterosexual couple from adopting the other partner's child without severing the ties between that partner and the child. In contrast, second-parent adoption in a same-sex couple was legally impossible. The relevant regulations of the Civil Code provided that any person who adopted replaced the biological parent of the same sex. As the first applicant was a woman, her adoption of her partner's child could only sever the child's legal relationship with his mother. Adoption could therefore not serve to create a parent-child relationship between the first applicant and the child *in addition* to the relationship with his mother.

The Court was not convinced by the Austrian Government's argument that the applicants' adoption request had been refused on grounds unrelated to their sexual orientation and that, therefore, the applicants were asking the Court to carry out an abstract review of the law. The Austrian courts had made it clear that an adoption producing the effect desired by the applicants was impossible under the Civil Code. Both the district court and the regional court had essentially relied on the legal impossibility of the adoption requested by the applicants. They had not carried out any investigation into the circumstances of the case. In particular, they had not dealt with the question of whether there were any reasons for overriding the refusal of the child's father to consent to the adoption. By contrast, the regional court had underlined that the notion of "parents" in Austrian family law meant two persons of opposite sex and it had stressed the interest of the child in maintaining contact with two parents of different sex. The Supreme Court had confirmed that the adoption as requested by the applicants was legally impossible.

Given that the legal impossibility of the adoption had consistently been at the centre of the Austrian courts' considerations, they had been prevented from examining in any meaningful manner whether the adoption would be in the child's interests. In contrast, in the case of an unmarried different-sex couple they would have been required to examine whether an adoption served the child's interests. Consequently, the applicants were directly affected by the legal situation of which they complained. Moreover, since they enjoyed "family life" together, for the purpose of Article 8, as was undisputed, all three of them could claim to be victims of the alleged violation.

The difference in treatment between the first and third applicants and an unmarried different-sex couple in which one partner sought to adopt the other partner's child had been based on their sexual orientation. The case was thus to be distinguished from *Gas and Dubois v. France*, in which the Court had found that there was no difference of treatment based on sexual orientation between an unmarried different-sex couple and a same-sex couple as, under French law, second parent adoption was not open to either of them.

There was no obligation under Article 8 to extend the right to second-parent adoption to unmarried couples. Given that Austrian law did allow second-parent adoption in unmarried different-sex couples, however, the Court had to examine whether refusing that right to (unmarried) same-sex couples served a legitimate aim and was proportionate to that aim.

The Austrian courts and the Government had argued that Austrian adoption law was aimed at recreating the circumstances of a biological family. The Court accepted that the protection of the family in the traditional sense was in principle a legitimate reason which could justify a difference in treatment, as was the protection of the child's interests.

However, according to the Court's case-law, in cases where a difference in treatment based on sex or sexual orientation was concerned, the Government had to show that that difference was necessary to achieve the aim.

The Austrian Government had not provided any evidence to show that it would be detrimental to a child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes. Moreover, under Austrian law, adoption by one person, including one homosexual, was possible. If he or she had a registered partner, the latter had to consent to the adoption. The legislature therefore accepted that a child might grow up in a family based on a same-sex couple and that this was not detrimental to the child. Furthermore, the Court found force in the applicants' argument that *de facto* families based on a same-sex couple existed but were refused the possibility of obtaining legal recognition and protection. Those considerations cast considerable doubt on the proportionality of the absolute prohibition on second-parent adoption in same-sex couples.

The Austrian Government had further argued that there was no consensus among European States regarding second-parent adoption by same-sex couples, and that consequently the State had a wide discretion (margin of appreciation) to regulate this issue. However, the issue before the Court was not the general question of same-sex couples' access to second-parent adoption, but the difference in treatment between unmarried different-sex couples and same-sex couples in respect of this type of adoption. Consequently, only ten Council of Europe member States, which allowed second-parent adoption in unmarried couples³, might be regarded as a basis for comparison. Within that group, six States treated heterosexual couples and same-sex couples in the same manner, while four⁴ adopted the same position as Austria. The narrowness of that sample did not allow conclusions as to a possible consensus among European States.

In sum, the Court found that the Government had failed to give convincing reasons to show that excluding second parent adoption in a same-sex couple, while allowing that possibility in an unmarried different sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. The distinction was therefore discriminatory. There had accordingly been a violation of Article 14 taken in conjunction with Article 8.

Just satisfaction (Article 41)

The court held that Austria was to pay the applicants jointly 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 28,420.88 in respect of costs and expenses.

Separate opinions

Judge Spielmann expressed a concurring opinion. Judges Casadevall, Ziemele, Kovler, Jočienė, de Gaetano, Šikuta and Sicilianos expressed a joint dissenting opinion.

The judgment is available in English and French.

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³ Belgium, Iceland, the Netherlands, Portugal, Romania, Russia, Slovenia, Spain, Ukraine and the United Kingdom (with the exception of Northern Ireland)

⁴ Portugal, Romania, Russia and Ukraine

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Press contacts

echrpress@echr.coe.int | tel: +33 3 90 21 42 08

Nina Salomon (tel: + 33 3 90 21 49 79)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Céline Menu-Lange (tel: + 33 3 90 21 58 77)

Denis Lambert (tel: + 33 3 90 21 41 09)

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.