
Austria

Constitutional Court

Important decisions

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2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000.**

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation.**

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**

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Headnotes:

Excluding same-sex partners in registered partnerships *a priori* from jointly adopting a child breaches the principle of equality.

Summary:

I. According to Article 8.4 of the Federal Act on Registered Partnership (*Eingetragene Partnerschaft-Gesetz*), registered same-sex partners may neither jointly adopt a child nor adopt the adopted children of the other partner. Article 191.2 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides that, adopting a child by more than one person either simultaneously or subsequently is only permitted if



the adopting partners are married, with the exception of biological children of the other registered partner ("stepchild"), who shall be adopted.

The applicants, two women living in a stable relationship, had entered into a registered partnership in 2011. In 2012, one partner gave birth to a daughter who had been conceived by medically assisted reproduction. According to the Civil Code, this child was allowed to be adopted by the other partner. The applicants wished to have another child, in addition to their first one, by adoption. However, unlike married couples, they were barred by the above-mentioned provisions from jointly adopting a child.

The applicants lodged a constitutional complaint against Article 8.4 of the Federal Act on Registered Partnership as well as Article 191.2 of the Civil Code, claiming that they were discriminated against merely on grounds of their gender and sexual orientation. They maintained that the challenged provisions were contrary to the constitutional principle of equality, as laid down in Article 2 of the Basic Law on Fundamental Rights of the Citizens (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*), Article 7 of the Federal Constitutional Act (*Bundes-Verfassungsgesetz*), as well as Article 14 ECHR in conjunction with Article 8 ECHR.

The applicants submitted that the different treatment of same-sex registered partners and heterosexual married couples regarding the joint adoption of children neither pursued a legitimate goal nor was it necessary. In particular, they considered that there was no apparent justification for generally forbidding registered partners to jointly adopt a child and to preclude *a priori* a court review of the applicants' suitability for a joint adoption in light of the child's best interests, whereas married couples were *per se* considered suitable as adoptive parents.

II. At first, the Constitutional Court turned to the question of applicability of Article 14 ECHR, according to which the enjoyment of the rights and freedoms set forth in the Convention shall be granted without discrimination. Following established case-law of the European Court of Human Rights, the European Convention on Human Rights, specifically Article 8 ECHR, did not provide for a right to adoption. However, as the existing legal provisions permitted adoption by individual persons irrespective of their sexual orientation as well as simultaneous parenthood of same-sex partners *vis-à-vis* a child with a view to adopting a stepchild, the Court found that the legal provisions governing adoption fell within the scope of application of Article 8 ECHR. As a consequence, these provisions had to satisfy the requirements of Article 14 ECHR.

Both the principle of equality and Article 14 ECHR, according to the case-law of the European Court of Human Rights, required convincing and weighty reasons to justify unequal treatment based on gender and sexual orientation.

The Constitutional Court observed that, according to the Civil Code, adopting a child was not exclusively reserved to spouses (together or individually, if the requirements were satisfied), but also possible for individuals – irrespective of their sexual orientation – whether they lived in a partnership or registered partnership or not, with the court approval of the adoption contract. In detail, the law allowed both unmarried heterosexual partners as well as registered partners to become the legal parents of a child, without that child descending from both partners.

Against this legal backdrop, the Court found that the challenged provisions created unequal treatment between registered partners as adopting parties in an adoption contract as against registered partners or (same-sex or heterosexual) partners in the case of stepchild adoption. Whereas the challenged ban precluded joint adoptive parenthood of registered partners, even if both had a foster child or one partner had already adopted the child, the law allowed for simultaneous legal parenthood of the biological and the adoptive parent in stepchild adoption by adding the contractual adoption relationship for the same child.

The Court established that neither Article 8 ECHR in conjunction with Article 14 ECHR, nor Article 7 of the Federal Constitutional Act provided for an objective justification to exclude registered partners *per se* as joint contracting parties to an adoption contract. In particular, the interests of the child could not serve as justification; in a way these interests were, on the contrary, even counteracted by such exclusion.

As a result, the Court found that the general exclusion by law of registered partners from jointly adopting a child as contracting parties to an adoption contract, while allowing the joint parenthood of registered partners in other constellations, was inconsistent and could not be justified on the grounds of protecting the child's best interests.

Cross-references:

Constitutional Court:

- nos. G 16/2013, G 44/2013, 10.12.2013, *Bulletin* 2013/3 [AUT-2013-3-004].