

Austria

Supreme Court: No Second Parent Adoption

RKL announces application to the European Court of Human Rights

After the great successes gained on tax law, health insurance partner benefits and TransX-marriage RKL-litigation offensive for same-sex partners' rights goes into its next, the European round. The District Court of Neusiedl refused to approve the adoption of a minor child by the same-sex partner of her mother. After the Regional Court of Eisenstadt now also the Supreme Court confirmed this decision. The case is now going to the European Court of Human Rights.

Theoretically according to Austrian law also homosexuals can, as individuals, adopt a child (single adoption), also the (biological) children of their partners (stepparent-adoption). In fact this however is not practically possible, since the biological mother loses her parental rights, when her partner adopts her child; vice versa the biological father loses his parental rights, when his partner adopts his child. On the contrary heterosexual couples (also if unmarried) can be both legal parents after adoption of a child of one of the partners by the step-parent. The law withholds this possibility, and therefore a meaningful and practical step-parent adoption, from same-sex partners.

RKL supports the case of a woman, who entered into an adoption contract with her partner concerning the adoption of her child. The woman however could not ask the Court for approval of this contract since such an approval would have meant that the biological mother, her partner, would lose all her parental rights. So the woman and the child asked the Constitutional Court to repeal the respective statutory provision (Art. 182 par. 2 2nd sentence General Civil Code, ABGB). The Constitutional Court referred the applicants to the family court. After this court refuses approval of the adoption the applicants could then ask the Appeals Court or the Supreme Court to address the Constitutional Court for repeal of the provision (VfGH 14.06.2005, G 23/05).

License to discriminate?

The applicants did so and the family court, the District Court of Neusiedl am See, refused approval by decision of 10th October 2005 (1 P 101/05g). Sexual orientation, the judge said, is a protected category under the right to private and family life (Art. 8 ECHR) and discrimination on the basis of sexual orientation as a principle is intolerable. Nevertheless the judge (referring to the judgment of the European Court of Human Rights in *Fretté vs. France* 2002) held the opinion that in the area of adoption states would enjoy a wide margin of appreciation, which margin would allow disadvantaging of same-sex couples in stepparent-adoption.

The two partners and her child appealed this decision and pointed out that their case, unlike *Fretté* 2002, is not about single adoption of a foreign child, to which there is no relation yet established at all, but that their case is about unequal treatment of unmarried same-sex couples in relation to unmarried opposite-sex couples (such unequal treatment having been declared inadmissible by the Court one year after *Fretté* in *Karner vs. Austria* 2003) regarding stepparent-adoption.

The Regional Court of Eisenstadt however confirmed the decision (21.02.2006, 20 R 177/05m). The panel of three appellate judges was of the opinion that the difference in treatment were

justified on the basis that a child always would need parents of opposite sex. The family is challenging this decision now before the Supreme Court and alleges inter alia that children are provided with manifold opportunities to experience male and female ways of life, be it with friends and acquaintances, be it in kindergarten, school, media and many more. Above all the issue in question is not, as in Fretté, whether a child should grow up in a same-sex family, but if children in such families should be disadvantaged vis a vis children in heterosexual families by withholding from them a legally secured and recognized relationship to their stepparents.

Supreme Court: only natural, heterosexual partners are responsible parents

The Supreme Court now has confirmed the decisions of the lower courts. (OGH 27.09.2006, 9 Ob 62/06t). Also this Court insists on the judgment of the ECHR in Fretté vs. France (2002) and refers to the Court saying in this case, that adoption means providing a child with a family, not a family with a child. Education and Care by apt and responsible persons could only be secured in man-woman-(in the words of the Supreme Court: "natural")-families, the Supreme Court said.

This highly discriminatory remark of the Supreme Court judges contradicts all scientific evidence, the most important of which the judges had in their hands. And in referring to Fretté the judges missed to consider that, different then in Fretté, the issue in this case is not adoption of a foreign child but adoption of a stepchild, the biological child of the partner; adoption of a child which already is (happily) living in a same-sex family. Neither has a child to be provided with a family, nor has a family to be provided with a child. The rainbow-family is already there (for long).

The question is not, as in Fretté vs. France (2002), if a homosexual can adopt foreign children, but, as in Karner vs. Austria (2003), if unmarried same-sex couples may be disadvantaged, here concerning stepparent-adoption, compared to unmarried opposite-sex couples. This question the Supreme Court does not touch and it ignores the Karner-case despite the fact that the family essentially relied on this case. The decision does not even cite Karner, not even a single time.

"Now it's the turn of the European Court of Human Rights", says *Dr. Helmut Graupner*, president of the Austrian lesbian and gay rights organization *Rechtskomitee LAMBDA (RKL)* and counsel of the family, "The Austrian courts have missed the chance to establish a modern, human-rights-oriented and humane case-law on this issue, but instead, as so often in the past, persistently adhered to discrimination".

Rechtskomitee LAMBDA (RKL), founded in 1991, on a supra-partisan and denominational level is working for the implementation of human rights for homo- and bisexual men and women. In its honorary board it convenes so prominent members as the Chairman of the Social-Democratic Party of Austria (SPÖ) Dr. Alfred Gusenbauer, President MP Peter Schieder, MP Mag. Terezija Stoisits (Green Party), the well-known child and adolescent psychiatrist Univ.-Prof. Dr. Max Friedrich and the Ombudspersons for Children and Adolescents of Vienna DSA Monika Pinterits und Dr. Anton Schmid, the Secretary General of Amnesty International Austria Mag. Heinz Patzelt and the well-known human rights experts Dr. Lilian Hofmeister und Univ.-Prof. Dr. Manfred Nowak, the sexologists ao.Univ.-Prof. Dr. Josef Christian Aigner, Prof. Dr. Rotraud Perner and Mag. Johannes Wahala, the theologian Univ.-Prof. Dr. Kurt Lüthi, entertainer Günter Tolar and many more. October 2nd, 2006, RKL's 15 years anniversary has been celebrated in historic Ceremonial Act "Against Sexual Apartheid" in the lower chamber of Austrian federal parliament. This first honouring of an lgbt organisation in a national parliament worldwide took place in attendance of over 500 guests including highest representatives from the judiciary, administration and politics.

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