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Title: Zaunegger v. Germany
Application No: 22028/04
Respondent: Germany
Referred by:
Date of reference by Commission:
Date of reference by State:
Date of Judgment: 03-12-2009
Articles: 8 **Conclusion:** Violation of article 8
 14 Violation of article 14
 41 Judgment in itself sufficient just satisfaction
Keywords: RESPECT FOR FAMILY LIFE / DISCRIMINATION

Summary:

(Press release)

The applicant is a German national who was born in 1964 and lives in Pulheim (Germany). He has a daughter born out of wedlock in 1995, who grew up with both parents until their separation in August 1998 and from that time until January 2001 lived with the applicant. After the child had moved to live with the mother, the parents reached an agreement with the help of the Youth Welfare Office, according to which the applicant would have contact with the child on a regular basis. Pursuant to the relevant provisions of domestic law, Article 1626a § 2 of the German Civil Code, the mother held sole custody for the child. As she was not willing to agree on a joint custody declaration, the applicant applied for a joint custody order. The Cologne District Court dismissed the application, holding that under German law joint custody for parents of children born out of wedlock could only be obtained through a joint declaration, marriage or a court order, the latter requiring the consent of the other parent. The decision was upheld by the Cologne Court of Appeal in October 2003.

Both courts referred to a leading judgment of the Federal Constitutional Court of 29 January 2003, which had found that the relevant provision of the Civil Code was constitutional with regard to the situation of parents of children born out of wedlock who had separated after 1 July 1998, the date an amended Law on Family Matters entered into force. On 15 December 2003 the Federal Constitutional Court declined to consider the applicant's constitutional complaint.

The applicant in particular complained under Article 14 read in conjunction with Article 8 that the application of Article 1626a § 2 of the German Civil Code amounted to unjustified discrimination against unmarried fathers on the grounds of sex and in comparison with divorced fathers.

The Court noted that by dismissing the applicant's request for joint custody without examining whether it would be in the child's interest - the only possible decision under national law - the domestic courts had afforded him a different treatment in comparison with the mother and in comparison with married fathers. To assess whether this treatment was discriminatory for the purposes of Article 14, the Court first considered that the provisions on which the domestic courts' decisions had been based were aimed at protecting the welfare of a child born out of wedlock by determining its legal representative and avoiding disputes between the parents over custody questions. The decisions had therefore pursued a legitimate aim.

It further considered that there could be valid reasons to deny the father of a child born out of wedlock participation in parental authority, for example if a lack of communication between the parents risked harming the welfare of the child. These considerations did not apply in the present case, however, as the applicant continued to take care of the child on a regular basis.

The Court did not share the Federal Constitutional Court's assessment that joint custody against the mother's will could from the outset be assumed to be contrary to the child's interest. While it was true that legal proceedings on the attribution of parental authority could unsettle a child, domestic law provided for judicial review of the attribution of parental authority in cases where the parents were or had been married or had opted for joint parental authority. The Court did not see sufficient reasons why the situation of the present case should allow for less judicial scrutiny.

Consequently there was not a reasonable relationship of proportionality between the general exclusion of judicial review of the initial attribution of sole custody to the mother and the aim pursued, namely the protection of the best interests of a child born out of wedlock. The Court therefore held by 6 votes to 1 that there had been a violation of Article 14 taken together with Article 8.

The Court further held unanimously that the finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

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