



Discrimination in custody case based on mother's relationship with another woman

In today's **Chamber judgment**¹ in the case of **X. v. Poland** (application no. 20741/10) the European Court of Human Rights held, by six votes to one, that there had been:

a violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The case concerned proceedings the applicant brought to contest the removal of her youngest child from her custody after her former husband obtained a change in the custody arrangements ordered in the divorce judgment. She alleged that the courts had acted in his favour because of her relationship with another woman. Relying on Article 14 taken in conjunction with Article 8, the applicant complained that the domestic courts had refused to grant her custody of her child on the grounds of her sexual orientation.

The Court found that the applicant's sexual orientation and relationship with another woman had been consistently at the centre of deliberations and present at every stage of the judicial proceedings. It concluded that there had been a difference in treatment between the applicant and any other parent wishing to have full custody of his or her child. That difference had been based on her sexual orientation and therefore amounted to discrimination.

Principal facts

The applicant, Ms X, is a Polish national who was born in 1970 and lives in Poland. She has four children from her marriage in 1993 with Mr Y.

After becoming involved in a relationship with another woman, Z, X applied for a divorce in April 2005. Her parents, who did not approve of their daughter's decisions, subsequently sought custody of the children. Temporary custody was granted to them by the District Court, sitting as a single judge – a judge who was allegedly well acquainted with her parents. Following an appeal by both X and Y, in June 2005 the Regional Court quashed that decision. In the same month it pronounced a no-fault divorce and granted X full parental rights and custody of the four children.

In October 2006 the applicant's former husband applied to change the custody arrangement. After assessment of their respective parenting abilities, during which the applicant was asked directly whether she was homosexual and had had sexual intercourse with Z, the District Court inverted the parental rights, granting full parental rights to Y and restricting those of X.

The applicant appealed, emphasising that she had always been the main carer for the children and that her former husband had not spent time with the children since the divorce, either not using his contact rights or leaving the children in the care of her parents. The appeal was dismissed in January 2008, despite the applicant's former husband proposing that X retain custody of the youngest child; acknowledging that the latter had a stronger bond with his mother and that his

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

taking care of him would be difficult. The applicant's three older children moved to live with their father in compliance with the court order.

In April 2008 X requested that the custody order be revised in respect of her youngest child. The District Court, sitting as the same single judge, and relying on the expert opinions issued in the previous proceedings, held that the applicant "had concentrated excessively on herself and her relationship with her girlfriend", and rejected her request for an interim measure allowing her to retain custody during the proceedings. On 26 May 2008, X lodged an application challenging the impartiality of the judge. The following day, the same judge ordered that the child be removed from her care. A few days later the court guardian took the boy from his kindergarten and handed him over to his father.

On 8 June 2009, the District Court dismissed X's application for amendment of the custody order and for parental and custody rights over the youngest child. The court decided that the seven-year-old should continue to live with his siblings and father so that his correct emotional and social development needs could be met, stating that that decision was "justified by the current stage of the child's development and the father's larger role in creating [the child's] male role model".

X appealed, claiming that the child was being looked after mainly by his sisters and grandparents. She considered that the court had failed to recognise the interests of the child and had taken her husband's homophobic opinions into account, opinions which he had voiced to the children, the courts and the experts. She argued that the main grounds for the court's decisions had been her relationship with another woman and discriminatory on the basis of her sexual preferences. The Regional Court dismissed the appeal.

Complaints, procedure and composition of the Court

Relying on Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life), the applicant complained that the domestic courts had refused to grant her custody of her youngest child on the grounds of her sexual orientation.

Relying on Article 6 § 1 (right to a fair hearing), the applicant complained that the District Court single judge had not been impartial since she was well acquainted with her parents.

The application was lodged with the European Court of Human Rights on 18 March 2010.

Third party interventions were received from the Committee of Human Rights of the National Chamber of Legal Advisers, the Institute of Psychology of the Polish Academy of Sciences and the Ordo Iuris Institute for Legal Culture. A joint third-party intervention was submitted by the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the International Federation for Human Rights (FIDH), the Campaign against Homophobia (KPH), the Network of European LGBTIQ* Families Associations (NELFA) and the International Commission of Jurists (ICJ).

Judgment was given by a Chamber of seven judges, composed as follows:

Ksenija **Turković** (Croatia), *President*,
Krzysztof **Wojtyczek** (Poland),
Gilberto **Felici** (San Marino),
Erik **Wennerström** (Sweden),
Raffaele **Sabato** (Italy),
Lorraine **Schembri Orland** (Malta),
Ioannis **Ktistakis** (Greece),

and also Renata **Degener**, *Section Registrar*.

Decision of the Court

Article 14 taken in conjunction with Article 8

The Court found that the references to the applicant's homosexuality and relationship with Z were predominant in the first set of proceedings concerning the four children. The first expert report had concluded that it would be possible for the applicant to keep her children if she "decisively corrected her attitude and excluded her girlfriend from family life". Her suspected homosexuality and sex life also featured in the second expert opinion, the expert having openly questioned the applicant about her intimate relations with Z and concluding that the children would prefer to live with their father. Those two opinions had been the basis of the ruling which placed all four children in their father's care and limited the applicant's parental rights.

The Court considered that the same expert opinions and the first ruling had had a decisive bearing on the final set of domestic proceedings concerning custody of the youngest child. Both the applicant and her former husband had been considered to have similar parenting abilities; yet the courts had refused to alter the status quo as regards custody of the youngest child on the basis of two main arguments – the advantages of all the siblings living together and the importance of a male role model in the boy's upbringing.

The applicant's sexual orientation and relationship with another woman had been consistently at the centre of the deliberations and omnipresent at every stage of the judicial proceedings. There had therefore been a difference in treatment between the applicant and any other parent wishing to have full custody of his or her child. That difference had been based solely or decisively on her sexual orientation, amounting to discrimination within the meaning of the European Convention.

There had thus been a violation of the Convention under these Articles.

Article 6 § 1

The Court considered that the final decision concerning this part of the application had been given on 16 September 2008. The application to the Court had thus been lodged out of time.

Just satisfaction (Article 41)

The Court held that Poland was to pay the applicant 10,000 euros (EUR) in respect of non-pecuniary damage.

Separate opinion

Judge Wojtyczek expressed a dissenting opinion, which is annexed to the judgment.

The judgment is available only in English.

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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.