

# CASE OF X AND OTHERS v. AUSTRIA

## GENERAL INFORMATION

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Full case name	Case of X And Others v. Austria
Parties	X and Others Austria
Date	19.02.2013
Forum	European Court of Human Rights
Type of delivery	Judgment (Grand Chamber)
Articles	Article 14, and Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950.
Key words	discrimination; sexual orientation; same-sex partners; adoption; second parent adoption; European consensus; comparator
Link to the case	<a href="http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-116735">http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-116735</a>

## FACTS OF THE CASE

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The applicants are a child (second applicant), the child's biological mother (third applicant), and the mother's partner (first applicant). The first and the third applicant are of the same sex and have been living together since the second applicant was five years old. They used the domestic judicial instances by initiating a procedure for adoption at the District Court, and challenging the provision regulating effects of one-parent adoptions from the Austrian Civil Code (Article 182(2)) in front of the Constitutional Court under a claim that it is discriminatory on grounds of sexual orientation (§ 12). The applicants filed a case to the ECtHR, claiming discrimination on grounds of sexual orientation in relation to private life (Article 14 in conjunction with Article 8) after the national courts rejected the request to cease the relationship with the biological father and his family, and to allow the first applicant to adopt the child thus taking the place of a second parent (instead of the biological father), and after the Constitutional Court rejected the initiative challenging the constitutionality of the above stated provision.

## DECISION

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The Court found a violation of Article 14 in conjunction with Article 8(1) when the applicants' situation is compared with that of an unmarried different-sex couple in which one partner wishes to adopt the other partner's child. It ordered the Austrian government to pay EUR 10,000 jointly to the applicants for non-pecuniary damage and EUR 28,420.88 in respect of costs and expenses.

## ARGUMENTS OF THE APPLICANT

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The applicants claimed they have suffered discrimination on grounds of sexual orientation with regards to a second-parent adoption procedure (§ 16). They chose unmarried different-sex couples raising children as a comparator for their case (§ 62). Refraining themselves from asserting a right reserved to marriage-based families (§ 63), the applicants claimed that the unequal treatment at stake is between unmarried different-sex couples and unmarried same-sex couples. Unmarried different-sex couples would have had the possibility to raise the issue of second-parent adoption; the same is not the case for the unmarried same-sex couples. They were automatically excluded any chance of adoption, making their case similar to E.B. (§ 66).

They reject the claim of the Government that the Austrian legislation regulating adoption aimed at protecting the interests of the child, as scientific evidence shows that same-sex couples were as capable as different-sex couples of ensuring positive development of children (§ 67). Moreover, under the national law, *de facto* same-sex parents and families existed for many years now (inter alia due to the possibility for one-parent adoption regardless of sexual orientation); it is the possibility for legal recognition of family life for these persons that remains denied (§ 68).

## ARGUMENTS OF THE STATE

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After failing to persuade the Court in declaring the application manifestly ill-founded and thus inadmissible, the Government contested the applicants' claims on several grounds. Recalling the ECtHR practice, notably *Gas and Dubois*, the Government claimed that the applicants can in no case be considered as in a comparable situation with a married couple (§ 71). It accepted that the applicants were in a comparable situation with an unmarried different-sex couple, as "in personal terms, same-sex couples could in principle be as suitable or unsuitable as different-sex couples for the adoption of children in general, or for second-parent adoption in particular" (§ 72). This meant, according to the Government, that they were also in a comparable situation in that any adoption required the consent of both biological parents (§ 72); in this case, the biological father did not consent to the adoption.

Even if the ECtHR finds that there had been difference in treatment, according to the Government it can be justified as recreating the biological family and securing the child's well-being were both legitimate aims (§ 76). Moreover, according to the Government, there is no common European standard on the issue of second-parent adoption by same-sex couples, which meant that States had a wide margin of appreciation.

## REASONING OF THE FORUM

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The Court found this case to be admissible, as the issue clearly fell within the ambit of Article 8, as an issue pertaining to family life. It reiterated its previous relevant case law, where family life was considered to include the relationship of a cohabiting same-sex couples living in a stable *de facto* relationship, and the relationships of same-sex civil partnerships and children conceived by one of the partners by means of assisted reproduction but being brought up by both of them (§ 95).

The ECtHR found no room for comparison between this case and a case of married different-sex couples in which one spouse wishes to adopt the other spouse's biological child. When it comes to same-sex partnerships, issues pertaining to marriage do not necessarily fall within the ambit of Article 12, as this article does not require that States grant same-sex partners the right to marry (§ 106). Thus, it found no room for a violation of Article 14 in conjunction with Article 8 regarding this comparator.

The Court noted lack of coherence of the domestic law, referring to *Christine Goodwin* on the issue of coherence, as it seems to allow for a one-parent adoption by a homosexual, thus indirectly stating that adoption and raising of children should not be dependent on sexual orientation (§ 144).

## COMMENT

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*X and Others* builds upon the existing case law, settling the ECtHR jurisprudence on discrimination on grounds of sexual orientation even firmer, and distinguishing this case even clearer from previous case law. It also reinforces the protection against discrimination for persons with a sexual orientation other than heterosexual in the ECHR system.

On matters falling within the rights provided for in the ECHR, States must not discriminate on grounds of sexual orientation unless the distinction is justified, serves a legitimate aim and/or is proportional. In cases of different treatment, they will need to provide very weighty reasons to justify the difference in treatment. In this case, the ECtHR was right to find that there was an unjustified different treatment of unmarried same-sex couples when compared to unmarried different-sex couples in relation to second parent adoption. Namely, the issue can be boiled down to a ‘had the woman been a man’ distinction, as Grégor Puppincq puts it, which clearly shows that it is the same-sex quality of the partnership of the applicants that was a crucial fact for the decisions of the domestic courts.

Moreover, the possibility for second parent adoption exists under Austrian law, as does the possibility for child adoption by a homosexual. Thus, the coherence of domestic law is rightfully challenged, as it seems that the system does accept homosexuals as potential adoptive parents.

Issues considered by the ECtHR on which European consensus has not been reached fall within the realm of the states’ margin of appreciation. In *X and Others* the Court found that this is not the case. The necessity of considering the (non)existence of European consensus in a case where obviously no reasonable justification for the difference of treatment exists and the approach of the Court in building its conclusion on the (non)existence of this consensus were challenged by some (see Stijn Smet. ‘X. and Others v. Austria (Part II): A Narrow Ruling on a Narrow Issue’) and supported by others (see Robert Wintemute. ‘Written Comments of FIDH, ICJ, ILGA-EUROPE, BAAF, NELFA and ECSOL).

It seems this is a clear case of a different treatment on which no reasonable justification can be provided. Thus, it is not necessary to consider the European consensus. As the case is one of clear discriminatory provision of rights based on sexual orientation, the Court could have skipped the consideration of European consensus. The Court did not do so and chose to derive the statistics on the European consensus on a narrow sample, from among the Council of Europe states, which have removed the restrictions on second-parent adoptions. As the applicants argue different treatment in relation to a possibility given to unmarried couples, the Court was right to narrow down the sample and consider the consensus on this issue from among these countries.

The applicants based their main case on a comparator, which they were very likely to win, i.e. they did not attempt to compare themselves to married heterosexual couples but rather to the unmarried ones. They were aware that choosing to compare themselves to married heterosexual couples would place their case more within the margin of appreciation of the country, and thus would make it more likely that they will lose.

## RELEVANT CONCURRING OR DISSENTING OPINIONS

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(1) Concurring opinion of Judge Spielmann;

(2) Joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, de Gaetano and Sicilianos.

## EXCERPTS FROM THE DELIVERY

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‘Sexual orientation is a concept covered by Article 14. The Court has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons [...].

Where a difference of treatment is based on sex or sexual orientation the State's margin of appreciation is narrow [...]. Differences based solely on considerations of sexual orientation are unacceptable under the Convention [...].' (§99)

'The Court reiterates that the relationship of a cohabiting same-sex couple living in a stable de facto relationship falls within the notion of "family life" just as the relationship of a different-sex couple in the same situation would [...]. Furthermore, the Court found in its admissibility decision in *Gas and Dubois v. France* (no. 25951/07, 31 August 2010) that the relationship between two women who were living together and had entered into a civil partnership, and the child conceived by one of them by means of assisted reproduction but being brought up by both of them, constituted "family life" within the meaning of Article 8 of the Convention.' (§ 95)

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