



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 8017/11  
Sabine BOECKEL and Anja GESSNER-BOECKEL  
against Germany

The European Court of Human Rights (Fifth Section), sitting on 7 May 2013 as a Chamber composed of:

Mark Villiger, *President*,

Angelika Nußberger,

Boštjan M. Zupančič,

Ganna Yudkivska,

André Potocki,

Paul Lemmens,

Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 3 February 2011,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Ms Sabine Boeckel and Ms Anja Gessner-Boeckel, are German nationals, who were born in 1965 and 1969 respectively and live in Hamburg. They were represented before the Court by Ms I. Quirling, a lawyer practising in Hamburg.

**A. The circumstances of the case**

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

3. Since 2001, the applicants live together in a registered civil partnership (*eingetragene Lebenspartnerschaft*). On 22 December 2008 the second applicant gave birth to a son, L.

4. On 19 January 2009 the Hamburg-Eimsbüttel Civil Registry Office issued a birth certificate naming the second applicant as L.'s mother. The space provided in the form for the father's name was left blank.

5. On 25 February 2009 the first applicant and the second applicant concluded an agreement whereby the child L. would be adopted by the first applicant. On 27 January 2010 the Hamburg-Altona District Court granted the adoption order under section 9 § 7 of the Act on Registered Civil Partnerships (see paragraph 19, below) and declared that the child L. obtained the legal position of a child of both applicants.

6. In the meantime, on 17 March 2009 the applicants requested the Hamburg District Court to rectify the birth certificate by inserting the first applicant as L.'s second parent. They submitted that section 1592 § 1 of the Civil Code (see paragraph 18, below), stipulating that the father was the man who was married to the mother of the child at the time of birth, should be applied *mutatis mutandis* in case the mother lived in a registered civil partnership with another woman. They argued that it was irrelevant under section 1592 § 1 of the Civil Code whether the mother's husband was indeed the biological father of the child born into the union. There was thus no reason to treat children born into a civil partnership any differently from children born in wedlock.

7. On 24 June 2009 the Hamburg District Court rejected the applicants' request as being unfounded. The District Court considered that there was no reason to rectify the birth certificate, because the birth certificate was neither incorrect nor incomplete. The birth certificate documented the child's descent. It contained the names of the parents the child descended from. It was irrelevant in this context whether the parents were married or not. The prerequisites of section 1592 of the Civil Code were clearly not met in the instant case.

8. The District Court further considered that there was no legal ground for inserting the first applicant as "second" mother into the birth certificate, as it was impossible that the child had descended from her. The mere fact that the child's mother lived in a registered civil partnership when giving birth did not justify inserting a second parent. This was not called into question by the fact that section 1592 of the Civil Code contained the rebuttable presumption that the mother's husband was the child's father. In the instant case, there was no room for the presumption of the child's descent from his mother's partner; on the contrary, such descent could be ruled out.

9. The District Court finally observed that the possibility of adoption of the partner's child under section 9 § 7 of the Law on Registered Civil Partnerships demonstrated that the legislator had been aware of the civil

partner's rights in respect of the other partner's children. Under these circumstances, there was no room for an analogous application of section 1592 of the Civil Code in the instant case.

10. On 4 November 2009 the Hamburg Regional Court rejected the applicants' appeal.

11. On 26 January 2010 the Hanseatic Court of Appeal rejected the applicants' appeal on points of law. The Court of Appeal confirmed the lower courts' reasoning. It further considered that the applicants had not been discriminated against in their capacity as women living in a registered civil partnerships *vis-à-vis* persons living in wedlock. It could not be said that persons living in a civil partnership were discriminated against or that they were deprived of certain rights enjoyed by married couples, as a child could only descend from a specific mother and father. This was excluded on biological grounds in the case of two women living in a registered civil partnership.

12. The Court of Appeal further considered that it followed from the above considerations that there had been no violation of the applicants' rights under Article 14 in conjunction with Article 8 of the European Convention on Human Rights.

13. On 2 July 2010 the Federal Constitutional Court (case-file no. 1 BvR 666/10) refused to accept the applicants' constitutional complaint for adjudication. The Constitutional Court observed, at the outset, that there was no indication that the lower courts had failed to take into account the requirements of the European Convention on Human Rights. It further considered that the refusal to insert the first applicant into the birth certificate prior to adoption did not violate the applicants' right to the enjoyment of their family life. Article 6 of the Basic Law protected the family as a union of parents and children. It did not matter in this respect whether the children descended from their parents and whether they were born in or out of wedlock. However, the entry of the name of a civil partner into the birth certificate did not concern the family life between the civil partners and the child. The birth certificate had the sole purpose of giving evidence of the child's descent. It did not interfere in any way with the child's living together with his or her parents within the family.

14. The Constitutional Court further considered that the applicant had not been discriminated against. Civil partners did not have a right to be treated equally to legal or biological fathers with respect to their entry into the birth certificate. In this respect, the two groups were not comparable, as biological or legal paternity established a legal relationship comprising mutual rights and duties. Such a legal relationship did not exist between the civil partner and the child, as long as the child was not adopted.

15. The fact that there was no legal presumption that the mother's civil partner was the child's second parent did not amount to discrimination

*vis-à-vis* married couples, as the legal presumption was based on biological descent and did not have a basis in the case of civil partners.

## **B. Relevant domestic law**

### 16. Article 6 of the Basic Law provides

“(1) Marriage and the family shall enjoy the special protection of the State.

(2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The State shall watch over them in the performance of this duty.”

### 17. Section 54 of the Act on Civil Status (*Personenstandsgesetz*) provides:

#### **Evidentiary value of the civil status register and certificates**

“(1) The entry into the civil status register gives evidence of the fact...of birth and of the further information given in this context and the further information on the civil status of the persons the entry refers to.

(2) Certificates on personal status have the same evidentiary value as the entry into the civil status register.

(3) The incorrectness of the documented facts may be proofed...”

### 18. The relevant provisions of the German Civil Code provide:

#### **Section 1591 Maternity**

“The mother of a child is the woman who gave birth to it.”

#### **Section 1592 Paternity**

“The father of a child is the man

1. who is married to the mother of the child at the date of the birth,

2. who has acknowledged paternity or

3. whose paternity has been judicially established...”

#### **Section 1754 Effect of Adoption**

“(1) If a married couple adopt a child or if a spouse adopts a child of the other spouse, the child attains the legal position of a child of both the spouses.

(2)...

(3) The parental custody is held in the cases of subsection (1) by the spouses jointly...”

19. Section 9 of the Act on Registered Civil Partnerships (*Lebenspartnerschaftsgesetz*) provides insofar as relevant:

**Parental responsibility of the civil partner**

“(1) If one civil partner has the sole custody over his or her child, he or she can arrange with his or her civil partner a right of co-decision concerning matters of the child’s daily life...

(2) In case of clear and present danger to the child, the civil partner has the right to take all relevant legal decisions that are necessary for the child’s well-being; the civil partner who has the sole custody of the child is to be informed without delay.

...

(7) A civil partner may adopt a child of his or her civil partner. In this case sections...1754 §§ 1 and 3 ... of the German Civil Code shall apply accordingly.”

## COMPLAINTS

20. The applicants complained under Article 8 taken on its own and in conjunction with Article 14 of the Convention about the domestic authorities’ refusal to insert the first applicant’s name in the birth certificate.

## THE LAW

21. The applicants complained under Article 8 of the Convention taken on its own and in conjunction with Article 14 of the Convention that they were discriminated against in the enjoyment of their family life on account of their gender. They submitted that there was no reasonable justification for entering the biological mother’s husband into the birth certificate as the child’s father, while refusing to enter the biological mother’s same-sex partner.

22. The Court considers that the instant complaint primarily falls to be examined under Article 14 of the Convention taken in conjunction with Article 8, which provide:

**Article 14**

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

### Article 8

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

23. The applicants complained, in particular, about the fact that the first applicant had to adopt the child L. before being legally recognised as his second parent. According to the applicants, section 9 of the Act on Registered Civil Partnerships should only apply in case one of the partners already had a child when entering the partnership. Conversely, the German legislator had failed to issue adequate regulations governing the legal status of children born into an existing registered civil partnership. They argued that the legal presumption of paternity laid down in section 1592 § 1 of the Civil Code applied irrespective of the child’s actual descent from the mother’s husband. It even applied in case biological fatherhood could be ruled out. As the protected interests were the same, section 1592 § 1 of the Civil Code should be applied *mutatis mutandis* in case a child was born into a civil partnership.

24. The applicants further submitted that the necessity of adoption could jeopardise the child’s welfare. Before adoption, the other partner could only co-decide on matters of daily life with the biological mother’s consent. In case of serious complication during or after birth, there was the risk that the child became an orphan. They finally submitted that the adoption by the biological partner’s mother might be denied in case the registered partners did not live together in the same household.

25. The Court notes, at the outset, that the Hamburg-Altona District Court granted the adoption requested by the applicants on 27 January 2010 and that the child L. obtained the legal position of the child of both applicants. The applicants did not submit that they encountered any particular difficulties in the adoption process. The Court further observes that it does not appear from the applicants’ submissions that they encountered any specific legal or practical difficulties in respect of their life as a family until the adoption was granted on 27 January 2010.

26. In view of the fact that the first applicant eventually obtained the full legal status as the child L.’s second parent, the question arises whether the applicants can still claim to be victims of a violation of their Convention rights within the meaning of Article 34 of the Convention. However, having regard to the nature of the applicants’ complaint, the Court will base its further examination on the assumption that the applicants can still claim to be victims of a violation of their Convention rights in view of the fact that

the first applicant had to undergo the adoption process in order to be recognised as L.'s second parent.

27. 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 situation of a different-sex couple in the same situation would (see, most recently, *X and Others v. Austria* [GC], no. 19010/07, § 104, 19 February 2013). The Court notes that the applicants live together in a registered civil partnership and are raising the child L. together. It follows that the relationship between the two applicants and the child L. amounts to "family life" within the meaning of Article 8 of the Convention. Accordingly, Article 14 of the Convention in conjunction with Article 8 applies in the instant case.

28. It is the Court's established case-law that in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference of treatment (see *X and Others*, cited above, § 98; *Schalk and Kopf v. Austria*, no. 30141/04, § 96, ECHR 2010; and *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008). The Court has also held that, where a State chooses to provide same-sex couples with an alternative means of recognition such as a registered civil partnership, it enjoys a certain margin of appreciation as regards the exact status conferred (see *Schalk and Kopf*, cited above, § 108; and *Gas and Dubois v. France*, no. 25951/07, § 66, 15 March 2012). Given the special status which the act of marriage confers to those who enter it, the Court has held that Article 14 in conjunction with Article 8 of the Convention did not oblige the Contracting States to grant same-sex couples equal rights as married couples in respect of second-parent adoption (see *X and others*, cited above, §§ 105-106 and *Gas and Dubois*, cited above, § 68).

29. The first issue to be addressed is whether the applicants, who were living together in a registered same-sex civil partnership when the second applicant gave birth to a child, were in a situation which was relevantly similar to that of a married different-sex couple in which the wife gave birth to a child.

30. The Court takes note of the domestic courts' reasoning according to which section 1592 § 1 of the Civil Code contained the – rebuttable – presumption that the man who was married to the child's mother at the time of birth was indeed the child's biological father. This principle is not called into question by the fact that this legal presumption might not always reflect the true descent. The Court also notes that it is not confronted with a case

concerning transgender or surrogate parenthood. Accordingly, in case one partner of a same-sex partnership gives birth to a child, it can be ruled out on biological grounds that the child descended from the other partner. The Court accepts that, under these circumstances, there is no factual foundation for a legal presumption that the child descended from the second partner.

31. Having regard to the above considerations, the Court holds that it cannot be said that the applicants found themselves in a relevantly similar situation as a married husband and wife in respect of the entries made into the birth certificate at the time of birth. Consequently, there is no appearance of a violation of Article 14 of the Convention taken in conjunction with Article 8.

32. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

33. Having regard to the above considerations, the Court considers that there is also no appearance of a violation of Article 8 of the Convention, taken separately. It follows that also this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

*Declares* the application inadmissible.

Claudia Westerdiek  
Registrar

Mark Villiger  
President