CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 22028/04
by Horst ZAUNEGGER
against Germany

The European Court of Human Rights (Fifth Section), sitting on 1 April 2008 as a Chamber composed of:

Peer Lorenzen, *President,*
Snejana Botoucharova,
Karel Jungwiert,
Rait Maruste,
Renate Jaeger,
Mark Villiger,
Isabelle Berro-Lefèvre, *judges,*

and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 15 June 2004,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together.

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Horst Zaunegger, is a German national who was born in 1964 and lives in Cologne. He was represented before the Court by Mr F. Wieland, a lawyer practising in Bonn. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice.

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

The applicant is the father of a daughter born out of wedlock in 1995. The applicant and the mother of the child separated in August 1998. Their relationship had lasted five years. Until January 2001, the daughter lived with the applicant, whereas the mother had moved to another flat which was located in the same building. As the parents did not make a joint custody declaration (*gemeinsame Sorgerechtserklärung*), the mother obtained sole custody (*alleinige Personensorge*) pursuant to Article 1626a § 2 of the German Civil Code (*Bürgerliches Gesetzbuch*, see Relevant domestic law and practice below).

In January 2001, the child moved to the mother's flat. Subsequently, the parents started to argue about the applicant's contact with the child. In June 2001 they reached an agreement with the assistance of the Cologne-Nippes Youth Welfare Office, according to which the applicant would have contact with the child for four months per year. In 2001, the applicant applied for a joint custody order, as the mother was unwilling to agree on a joint custody declaration, although otherwise both parents were cooperative and on good terms.

On 18 June 2003, the Cologne District Court dismissed the applicant's application. It found that there was no basis for a joint custody order. 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 under Article 1672 § 1 of the Civil Code, the latter requiring the consent of the other parent. The Cologne District Court considered Article 1626a of the Civil Code to be constitutional and referred to the leading judgment of the Federal Constitutional Court of 29 January 2003 (see Relevant domestic law and practice below). Having regard to the fact that the pertinent legal provisions did not allow for a different decision, the District Court did not consider it necessary to hear the concerned parties in person.

On 2 October 2003, the Cologne Court of Appeal dismissed the applicant's appeal. It reasoned that, as the applicant and the mother were unmarried, the applicant's participation in the exercise of custody was only possible in accordance with Article 1626a of the Civil Code. The applicant and the mother had, however, not submitted the required joint custody declaration. In its judgment of 29 January 2003, the Federal Constitutional Court had found that Article 1626a 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 Cologne Court of Appeal noted that the applicant and the mother of the child had separated in August 1998. Thus, they had had a period of one and a half months before they separated in which to make a joint custody declaration. The Cologne Court of Appeal further noted that the new legislation, which had entered into force on 1 July 1998 had received public attention for a considerable period.

Unmarried parents might have been expected therefore to have shown an interest in the matter and to have noticed the new legislation.

On 15 December 2003 the Federal Constitutional Court, referring to the pertinent provisions of its Rules of Procedure, declined to consider the applicant's constitutional complaint, without giving further reasons.

B. Relevant domestic law and practice

I. Relevant provisions of the German Civil Code

The statutory provisions on custody and contact are to be found in the German Civil Code (the "Civil Code"). Article 1626 § 1 of the Civil Code provides that the father and the mother have the right and the duty to exercise parental authority (*elterliche Sorge*) over a minor child.

Originally, custody of children born out of wedlock was, pursuant to Article 1705 of the Civil Code, automatically obtained by the mother. That provision was however declared unconstitutional by the Federal Constitutional Court in 1996. On 1 July 1998, the amended Law on Family Matters of 16 December 1997 (*Reform zum Kindschaftsrecht*, Federal Gazette 1997, p. 2942), entered into force to implement the Federal Constitutional Court's judgment of 1996. The relevant law in the Civil Code was changed as follows: under to Article 1626a § 1, the parents of a minor child born out of wedlock may exercise joint custody if they make a declaration to that effect (joint custody declaration) or if they marry. Otherwise Article 1626a § 2 provides that the mother obtains sole custody.

Under Article 1666 of the Civil Code, the family court may order the necessary protective measures if the child's physical, psychological or mental well-being is threatened by negligence and if the parents are unwilling to take those measures themselves. Measures which result in a separation of the child from one parent are admissible only if the danger for the child cannot be averted otherwise (Article 1666a of the Civil Code).

If the parents have not merely temporarily separated and if the mother has obtained sole custody in accordance with Article 1626a § 2 of the Civil Code, Article 1672 § 1 of the Civil Code provides that the family court may transfer sole custody to the other parent if one parent lodges the relevant application with the consent of the other parent. The application is to be granted if the transfer serves the child's interest. Article 1672 § 2 of the Civil Code provides that in case of a transfer of the right to custody under Article 1672 § 1 of the Civil Code, the family court may subsequently order joint custody on the application of one parent with the consent of the other parent unless it would be to the detriment of the child. The same applies if the transfer of custody under Article 1672 § 1 of the Civil Code is later annulled.

II. Case-law of the Federal Constitutional Court

On 29 January 2003, the Federal Constitutional Court found that Article 1626a of the Civil Code was unconstitutional because it lacked a transitional period for unmarried couples with children who had lived together in 1996 but separated before the amended Law on Family Matters entered into force on 1 July 1998 (in other words they could have had the opportunity to make a joint custody declaration if the legislation at the time would have been constitutional). In order to settle the above constitutional flaws, the German legislator introduced on 31 December 2003, Article 224 (2) (a) of the Introductory Act to the Civil Code (*Einführungsgesetz in das Bürgerliche Gesetzbuch*), according to which a court can substitute the mother's consent to joint custody if an unmarried couple have a child born out of wedlock, have lived together with the child and were separated before 1 July 1998, provided that joint custody would serve the child's interest (*Kindeswohl*).

In its judgment of 29 January 2003, the Federal Constitutional Court however also held that Article 1626a § 2 of the Civil Code, apart from the lack of a transitional period, did not breach the right to respect for the family life of fathers whose children were born out of wedlock. Parents who were married had obliged themselves on marriage to take responsibility for each other and their children. In contrast to this, the legislator could not assume that parents of children born out of wedlock lived together or wanted to take responsibility for each other. Moreover, there was insufficient evidence that a father of a child born out of wedlock would want to bear joint responsibility as a general rule. The child's well-being therefore demanded that the child had a person at birth who could act for the child in a legally binding way. In view of the very different life conditions into which those children were born, generally it was justified to grant sole custody to the mother, and not to the father or to both parents. This legislation could also not be objected to from a constitutional point of view because the legislature had given both parents of children born out of wedlock the possibility of obtaining custody through a joint declaration.

The Federal Constitutional Court found that the legislator could legitimately assume that joint custody which was exercised against the will of one parent would have more disadvantages then advantages for a child born out of wedlock. Joint custody required a minimum of agreement between the parents. If the parents were unable or unwilling to cooperate, joint custody might run counter to the child's well-being. The legislator assumed that the will to exercise joint custody which parents explicitly expressed upon marriage also showed their will to cooperate. Unmarried parents could express this will to cooperate through a joint custody declaration. The father's right to custody indeed depended on the mother's willingness to exercise joint custody, but the mother in turn could not exercise joint custody without the father's consent. The parents could thus only exercise joint custody if they both wanted to. That limitation on the

father's right to respect for his family life was not unjustified, given that the joint custody exercised by a married couple was based on their marriage. The applicable law would give unmarried couples the possibility of exercising joint custody, in particular, if they lived together with the child and not after the couple had separated. The legislator could legitimately assume that, if the parents lived together but the mother refused to make a joint custody declaration, the case was an exceptional one in which the mother had serious reasons for the refusal which were based on the child's interest. Given this assumption, the applicable law did not infringe the father's right to respect for his family life by not providing for a judicial review. In the event of such serious reasons it could not be expected that the courts would consider joint custody to be in the child's best interest.

In view of the fact that this legal structure had only recently been established, it had not been possible to ascertain whether there was a substantial number of similar cases where joint custody was in dispute or crucially, to reach conclusions as to why this should be the case.

The Federal Constitutional Court stated that the legislator was obliged to keep developments under observation and to verify whether the assumptions it had made when forming the rules in question were sustainable in the face of reality. If this should not be the case, the legislator was obliged to revise legislation and to provide fathers with an adequate possibility to obtain custody rights.

COMPLAINTS

The applicant complained under Article 8 of the Convention that the outcome of the proceedings had infringed his right to respect for his family life. Moreover, he complained under Article 14 read in conjunction with Article 8 of the Convention that Article 1626a § 2 of the Civil Code amounted to an unjustified discrimination on grounds of sex.

THE LAW

The applicant complained under Article 8 of the Convention that the court decisions refusing joint custody had infringed his right to respect for his family life, and that Article 1626a § 2 of the Civil Code amounted to an unjustified discrimination on grounds of sex (Article 14, read in conjunction with Article 8 of the Convention).

Article 8 provides:

> "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."

Article 14 reads as follows:

"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."

1. The Government's submissions

The Government contested that argument. In their submissions, Article 1626a § 2 of the Civil Code was founded on the differences that existed in the respective environments into which children born out of wedlock were born, ranging from father-child relationships that were intact to those where the father was indifferent. With the primary assignment of parental custody to the mother, whose identity – in contradistinction to that of the father – was established at the time of birth, the intention was to have clear allocation of the right of custody, for the purpose of legal certainty, so that from the outset there would be a binding determination of the statutory representative for the protection of the child concerned. The approval requirement applying to both parents for the joint exercise of parental custody was based on the notion that parents who could not agree to make a custody declaration were highly likely to come into conflict when specific questions relating to the exercise of parental custody were at stake, which could cause painful disputes at the child's expense.

The Government further underlined that the Federal Constitutional Court obliged the legislator to keep actual developments under observation and to verify whether the assumptions it had made when forming the rules in question were sustainable in the face of reality as well. For the purpose of fulfilling this obligation, the Government had taken various measures such as raising statistical data and conducting surveys which have not, however, yet yielded any definite results.

In the Government's view, the interference through the statutory provision making joint custody dependent on the mother's approval was necessary in a democratic society for the legitimate aim of protecting the child's interest pursuant to Article 8 § 2 of the Convention, even though there existed no European consensus on the issue. While it was true that the majority of the Member States provided for paternal participation in custody if the parents were not married to each other, either irrespective of the mother's will or at least by court order following an evaluation of the child's interests, other European countries (such as Austria, Liechtenstein, Switzerland and Denmark) had similar rules to those in force in Germany.

As the Court did not evaluate the abstract statutory position but rather the way in which the rules were being applied to the applicant under the specific circumstances concerned, the agreement of the parents, with the assistance of the Youth Welfare Office, which gave the applicant contact with the child for a good four months every year had to be taken into account. Therefore, the applicant had the opportunity to play a large part in his daughter's life. He had neither been discriminated against by the ruling in favour of the mother nor had the ruling discriminated against married or divorced fathers. The mother's situation and the father's situation were not totally comparable, given that fatherhood could not be established from the outset if the parents were unmarried. While taking into account as far as possible the interests of everyone concerned, the above provisions in the Civil Code were not linked to gender, but sought to regulate parental custody in a balanced manner in the case of children born out of wedlock. Moreover, German law provided that joint custody with the mother was linked to her consent, regardless of whether the parents were married or not. The Government finally contended that, under the circumstances of the present case, it could not be ruled out that the ordering of joint custody would cause conflicts between the parents and would therefore be contrary to the child's best interests.

2. The applicant's submissions

The applicant maintained that the interest of a child born out of wedlock did not justify that his or her father who had cared for the child in the past could not obtain joint custody. That joint custody against the will of the mother necessarily led to the detriment of the child's interest remained mere speculation. Under the applicable law, the authorities and courts did not even have to take into account the child's interest, given that the law explicitly provided that a father could not obtain joint custody without the mother's consent. Furthermore, the child had not been heard in the present case. Article 1626 a § 2 of the Civil Code was based on the assumption that fathers of children born out of wedlock were less suitable to exercise custody compared with mothers of children born out of wedlock. The present application, however, proved the opposite as the applicant's care for his daughter had in fact been excellent. Moreover, the Federal Republic of Germany had not given sufficient reasons in the present case for excluding the applicant's right to custody which he was willing to exercise. The German legislator had assumed that a father's right to custody was not justified in view of allegedly numerous unstable relationships with children born out of wedlock in society, thereby ignoring developments such as the growing number of unmarried couples who were willing to exercise joint custody. It was hence illegitimate to generally exclude joint custody for fathers of children born out of wedlock because of negative experiences with the exercise of joint custody by couples in instable relationships.

Furthermore, the legislator had failed sufficiently to fulfil its obligation to keep actual developments under scrutiny.

As the applicant's paternity had been certified from the beginning, there was no legal uncertainty in the present case. Moreover, the applicant considered it illegitimate to assume that the mother of a child born out of wedlock was *a priori* better suited than the father to exercise custody because she had given birth to that child. However, the actual defect of the applicable domestic law was not so much that the mother initially would obtain the right to sole custody, but that the father did not have the possibility of correcting that decision. Even if the mother's refusal to make a joint custody declaration was completely arbitrary, the father had no chance to have that declaration replaced by a court order. The legal situation particularly breached the father's right to respect for his family life in situations in which the father had had contact with the child for a considerable amount of time and was closely attached to the child. As regards Article 14, the applicant submitted that the applicable law discriminated against the applicant on grounds of sex without sufficient justification. The child's interest would not allow the mother to veto a declaration on joint custody. Moreover, the applicant did not have the possibility of substituting that veto with a court decision.

3. The Court's assessment

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

In view of the above, it is appropriate to discontinue the application of Article 29 § 3 of the Convention.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

Claudia Westerdiek
Registrar

Peer Lorenzen
President