



POLSKIE TOWARZYSTWO
PRAWA ANTYDYSKRYMINACYJNEGO

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

Last week, on September 16 2021, after 11 years the European Court of Human Rights reached its verdict concerning the case **X against Poland** - discrimination in custody case based on mother's relationship with another woman. The Court agreed with the applicant acknowledging the presence of sexual orientation discrimination and violation of the right to respect for private and family life in the domestic courts' judgements. Not only is the decision crucial and beneficial for our domestic courts, but also (and mainly) for all of the rainbow families of Poland. The applicant was represented pro bono by attorney-at-law Karolina Kędziora from Polish Society of Anti-Discrimination Law.

Domestic court proceedings and principal facts

The applicant, Ms X, after becoming involved in a relationship with another woman, Ms Z, applied for a divorce with her husband, Mr Y, in April 2005. Ms X and Mr Y have 4 children to whom Ms X's parents sought custody, due to the fact that they did not approve of their daughter's decisions. Ms X's parents were granted temporary custody by the District Court, sitting as a single judge who was allegedly well acquainted with them. After an appeal by both X and Y, in June 2005 the Regional Court pronounced a no-fault divorce and granted X full parental rights and custody of the four children.

In October 2006 Mr Y, Ms X's former husband, applied to change the custody arrangement and after assessment of their respective parenting abilities, the District Court inversed the parental rights. During the assessment, the applicant X was asked directly whether she was homosexual and had had sexual intercourse with Z. As a result, Mr Y was granted full parental rights, whereas Ms X's were restricted.

Emphasising the fact that Ms X had always been the main carer for the children and that Mr Y had not spent time with the children since the divorce (either not using his contact rights or leaving the children in the care of Ms X's parents), she appealed. Despite Mr Y's offering that Ms X retain custody of the youngest child due to him having a stronger bond with his mother, Mr Y's facing difficulties in taking care of him and the child's clear preference of staying with his mother, the appeal was dismissed in January 2008. The applicant's three older children moved to live with their father.

In April 2008 Ms X requested the District Court that the custody order be revised in respect of the youngest child and received a rejection concerning the interim measure allowing Ms X to retain custody during the proceedings. A part of the justification from the same single judge was the fact that the applicant „had

concentrated excessively on herself and her relationship with her girlfriend". On 27 May 2008, the same judge ordered that the child be removed from Ms X's care - just a day after she lodged an application challenging their impartiality. The court guardian took the child a few days later from his kindergarten and handed him over to his father.

In June 2009, X's application for the custody order's revision was dismissed by the District Court justifying that the seven-year-old should live with his siblings and father considering his current state of development and the crucial part of the father creating the child's male role model.

X's arguments concerning the fact that Mr Y's homophobic attitude had been harmful for their children, developing hostile mindset towards their mother (the mindset Mr Y had also voiced to the courts and experts) and that Mr Y had hardly taken any part in looking after the youngest son were included in the appeal X lodged. She raised that the previous court's decisions had been discriminatory on the basis of her sexual preferences. Despite the expert opinion indicating that Ms X and Mr Y show similar parenting skills, the Regional Court dismissed the appeal.

The European Court of Human Rights proceedings

At this point X decided to lodge a complaint with the European Court of Human Rights accusing Poland of breaching the articles 14 and 8 of the European Convention of Human Rights. Referring to the similar cases against France and Portugal, on 16 September 2021 a Chamber of seven judges reached its verdict and agreed with the applicant acknowledging the presence of sexual orientation discrimination and violation of the right to respect for private and family life in the domestic courts' judgements. The Court held that Poland was to pay the applicant 10,000 euros in respect of non-pecuniary damage.

Third party interventions

In 2019, third party interventions supporting the applicant's cause 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 group of organisations: European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (IGLA-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). A disapproving intervention was received from Ordo Iuris Institute for Legal Culture.

Sources:

- http://www.ptpa.org.pl/site/assets/files/1914/x_przeciwko_polsce_informacja_po_wyroku-1.pdf
- Press Release issued by the Registrar of the Court, ECHR 274 (2021) 16.09.2021