

AUT-2022-2-002

a) Austria / b) [Constitutional Court](#) / c) / d) 18-06-2022 / e) G 30/2022 / f) / g) ECLI:AT:VFGH:2022:G30.2022 / h) CODICES ([German](#)).

Keywords of the systematic thesaurus:

- [03.17](#) General Principles - **Weighing of interests.**
- [05.02.02.11](#) Fundamental Rights - Equality - Criteria of distinction - **Sexual orientation.**
- [05.03.33](#) Fundamental Rights - Civil and political rights - **Right to family life.**
- [05.03.44](#) Fundamental Rights - Civil and political rights - **Rights of the child.**

Keywords of the alphabetical index:

[Adoption](#), same-sex partners / [Child, adoption](#) / [Child, best interests](#) / [Discrimination, sexual orientation](#) / [Foreign law](#), ordre public reservation.

Headnotes:

According to § 6 of the Austrian Private International Law Act, a provision of foreign law shall not be applied if this would lead to a result that is incompatible with the fundamental values of the Austrian legal system; instead, the corresponding provision of Austrian law shall be applied. Therefore, when Czech law – which prohibits the adoption of a child when the adopters are registered partners of the same sex – would be applicable according to § 26 of the Private International Law Act, an Austrian court should nevertheless apply Austrian law, which does not prevent an adoption by such partners.

Summary:

I. § 26 of the Private International Law Act stipulates that the requirements of adoption are to be assessed according to the civil status of each adopter and the civil status of the child.

The applicants are registered partners who wish to adopt a child. The District Court did not grant the adoption, as the requirements based on the nationality of the applicants had to be assessed according to Czech and Slovak law, and according to Czech law, an adoption by couples in a registered partnership was not possible.

The applicants filed a constitutional complaint with the Constitutional Court, claiming, in particular, that owing to § 26 of the Private International Law Act, same-sex couples were denied access to adoption on the basis of their gender or sexual orientation, since the applicable Czech law did not permit adoption for them. They claimed that this constituted serious discrimination and violated their rights to family life under [Article 8 ECHR](#) in conjunction with [Article 14 ECHR](#), as well as to non-discrimination under Article 7 of the Federal Constitutional Act and Article 2 of the Basic Law on the General Rights of Nationals of 1867. Furthermore, the provision violated the right to the best possible development and fulfilment of every child and to the protection of his or her interests pursuant to Article 1 of the Federal Constitutional Law on the Rights of Children.

II. The Constitutional Court held that according to § 26 of the Private International Law Act, the requirements for adoption are to be assessed according to the civil status of each adopter and that of the child, and, in the proceedings at stake, Czech and Slovak law. Yet, Czech law does not provide for adoption by same-sex couples in a registered partnership.

According to the current Austrian legal situation, adoption is open to individuals, spouses and registered, as well as cohabiting, partners. These options exist irrespective of their sexual orientation. In each individual case, a court shall examine whether the adoption is in the best interests of the child and whether a relationship corresponding to the relationship between natural parents and children exists or is to be established.

The Court continued that pursuant to § 6 of the Private International Law Act, a provision of foreign law shall not be applied if its application would lead to a result incompatible with the fundamental values of the Austrian legal system (order public reservation). This was the case in the present proceedings: the principle of equality includes a prohibition on discriminating against people on the basis of characteristics such as gender and sexual orientation. A (domestic) provision that as such denies adoptive parenthood to registered partners of the same sex would violate the constitutional principle of equality and [Article 8 ECHR](#). A provision of foreign law that prohibits the adoption of a child only because the adopters are of the same sex is not compatible with the fundamental values of the Austrian legal system.

The Constitutional Court reiterated that the best interests of the child could not justify the exclusion of same-sex partners from adoption, but that in those constellations, adoption might even be required from the perspective of the best interests of the child. It would also be contrary to the fundamental values of the Austrian legal system if foreign law could oblige an Austrian court to make a decision that is contrary to the best interests of the child.

According to the Court, § 6 of the Private International Law Act allowed courts to disregard foreign law which is in principle applicable according to § 26 of the Private International Law Act, if its application would lead to a result incompatible with the fundamental values of the Austrian legal system. Therefore, the civil courts shall not apply the provisions of foreign law but apply instead the corresponding Austrian provisions, which do not preclude adoption by registered partners of the same sex.

The Constitutional Court concluded that, in light of the considerations set out above, § 26 of the Private International Law Act was not unconstitutional.

Cross-references:

Constitutional Court:

- G 247/2021, 06.12.2021, [[AUT-2021-3-002](#)];
- G 258/2017, 04.12.2017, [[AUT-2017-3-003](#)];
- G 119-120/2014, 11.12.2014, [[AUT-2015-1-001](#)].

Languages:

German.