



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

CASE OF PETROVIC v. AUSTRIA

(156/1996/775/976)

JUDGMENT

STRASBOURG

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SUMMARY¹

Judgment delivered by a Chamber

Austria – authorities' refusal to grant parental leave allowance to a father, on ground that allowance was only available to mothers (section 26(1) of Unemployment Benefit Act 1977)

ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 8

A. Applicability

Recapitulation of Court's case-law – allowance paid by State was intended to promote family life and necessarily affected way in which latter was organised – allowance enabled States to demonstrate their respect for family life and therefore came within scope of Article 8.

Conclusion: Article 14 taken together with Article 8 applicable.

B. Compliance

Recapitulation of Court's case-law – existence of difference in treatment on grounds of sex and mother and father similarly placed as far as taking care of child concerned – Contracting States enjoyed a certain margin of appreciation, whose scope varied according to circumstances, subject matter and background – in that respect, one of the relevant factors might be the existence or non-existence of common ground between laws of Contracting States – no common standard in that field at material time, as majority of Contracting States had not provided for parental leave allowances to be paid to fathers – gradual introduction by Austrian legislature of legislation which was very progressive in Europe – there still remained very great disparity between legal systems of Contracting States in that field – Austrian authorities' refusal to grant applicant parental leave allowance had not, therefore, exceeded margin of appreciation allowed to them.

Conclusion: no violation of Article 14 taken together with Article 8 (seven votes to two).

COURT'S CASE-LAW REFERRED TO

27.10.1975, National Union of Belgian Police v. Belgium; 6.2.1976, Schmidt and Dahlström v. Sweden; 28.11.1984, Rasmussen v. Denmark; 24.6.1993, Schuler-Zgraggen v. Switzerland; 18.7.1994, Karlheinz Schmidt v. Germany; 21.2.1997, Van Raalte v. the Netherlands

1. This summary by the registry does not bind the Court.

In the case of Petrovic v. Austria¹,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court B², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr F. MATSCHER,

Mr L.-E. PETTITI,

Mr B. WALSH,

Mr A. SPIELMANN,

Sir John FREELAND,

Mr M.A. LOPES ROCHA,

Mr B. REPIK,

Mr J. CASADEVALL,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 27 October 1997 and 28 February 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 5 December 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 20458/92) against the Republic of Austria lodged with the Commission under Article 25 by an Austrian national, Mr Antun Petrovic, on 3 August 1992.

The Commission’s request referred to Articles 44 and 48 and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 14 taken together with Article 8 of the Convention.

2. In response to the enquiry made in accordance with Rule 35 § 3 (d) of Rules of Court B, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 31). The lawyer was given leave by the President to use the German language (Rule 28 § 3).

Notes by the Registrar

1. The case is numbered 156/1996/775/976. The first number is the case’s position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case’s position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

3. The Chamber to be constituted included *ex officio* Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 20 January 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr B. Walsh, Mr R. Macdonald, Sir John Freeland, Mr M.A. Lopes Rocha, Mr B. Repik and Mr J. Casadevall (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently, Mr A. Spielmann, substitute judge, replaced Mr Macdonald, who was unable to take part in the further consideration of the case (Rules 22 § 1 and 24 § 1).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Austrian Government (“the Government”), the applicant’s lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicant’s memorial and the Government’s memorial on 20 and 21 August 1997 respectively.

On 19 September 1997 the Commission produced various documents from the proceedings before it, as requested by the Registrar on the President’s instructions.

5. In accordance with the President’s decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 October 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr W. OKRESEK, Director of the Constitutional Service, Federal Chancellery,	<i>Agent,</i>
Mr R. SAUER, Federal Ministry of Employment and Social Affairs,	
Mrs E. BERTAGNOLI, International Law Department, Federal Ministry of Foreign Affairs,	<i>Advisers;</i>

(b) *for the Commission*

Mr B. MARXER,	<i>Delegate;</i>
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(c) *for the applicant*

Mr A. LAIMER, of the Vienna Bar,	<i>Counsel.</i>
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The Court heard addresses by Mr Marxer, Mr Laimer and Mr Okresek.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. Mr Antun Petrovic, an Austrian national, was born in 1950 and lives in Vienna.

7. At the material time, he was a student and worked part time. His wife, who had already finished her university studies and was a civil servant in a federal ministry, gave birth on 27 February 1989. She carried on working while the applicant took parental leave to look after the child.

8. On 25 April 1989 Mr Petrovic claimed a parental leave allowance (*Karenzurlaubsgeld*).

9. On 26 May 1989 his claim was turned down by the local employment office (*Arbeitsamt*) on the ground that section 26(1) of the Unemployment Benefit Act 1977 (see paragraph 14 below) provided that only mothers could claim such an allowance when a child was born.

10. On 14 June 1989 the applicant appealed against that decision to the Vienna Regional Employment Office (*Landesarbeitsamt*). He contended that that provision of the Unemployment Benefit Act, under which men were not entitled to a parental leave allowance, was discriminatory and, therefore, unconstitutional.

11. On 4 July 1989 the Regional Employment Office dismissed the applicant's appeal for the same reasons as the local employment office (see paragraph 9 above).

12. On 18 August 1989 Mr Petrovic lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*). He again argued that section 26(1) of the Unemployment Benefit Act was unconstitutional, as it was inconsistent with the principle of equality and Article 8 of the Convention.

13. On 12 December 1991, after considering the complaint in private, the Constitutional Court declined to accept it for adjudication on the ground that it did not have sufficient prospects of success.

Referring to its case-law, the Constitutional Court held that section 26(1) did not infringe the applicant's constitutional rights and was not contrary to Article 8 or Article 12 of the Convention. It added that even if regard was had to recent statutory amendments (section 26 of the Unemployment Benefit Act had been amended by a federal law of 12 December 1989 – see paragraph 15 below), the applicant's complaint was unfounded, seeing that the legislature had a certain amount of time in which to adapt new rules to changes in society (*Anpassung gesetzlicher Vorschriften an geänderte Verhältnisse*).

II. RELEVANT DOMESTIC LAW

A. Legislation in force at the material time

14. Under section 26(1) of the Unemployment Benefit Act 1977, mothers were entitled to a parental leave allowance provided that, following the birth of their child, they took up to one year's parental leave and were eligible for maternity benefit (*Wochengeld* – a welfare allowance payable to working mothers for a period of eight weeks after the birth).

B. Subsequent legislation

15. That section was amended by a federal law of 12 December 1989 (Official Gazette no. 651/1989), which came into force on 1 January 1990. It is now provided that a father may claim a parental leave allowance if he is in employment, has primary responsibility for looking after the child and the child lives under the same roof. In addition, the mother must either be entitled to parental leave as a result of the birth and have waived that right in whole or in part or, if not entitled to parental leave, be prevented by her work from looking after the child.

However, the new rules apply only in respect of children born after 31 December 1989 and therefore do not cover the applicant, whose child was born on 27 February 1989.

PROCEEDINGS BEFORE THE COMMISSION

16. Mr Petrovic applied to the Commission on 3 August 1992. Relying on Article 8 of the Convention and on Article 14 taken together with Article 8, he complained of the refusal to grant him a parental leave allowance and of the discriminatory nature of that decision. He also alleged a breach of Article 13 of the Convention in that the Constitutional Court had refused to consider his appeal.

17. On 5 July 1995 the Commission declared the application (no. 20458/92) admissible as to the complaint concerning the allegedly discriminatory refusal to grant him a parental leave allowance, and inadmissible as to the remainder.

In its report of 15 October 1996 (Article 31), it expressed the opinion that there had been a violation of Article 14 taken together with Article 8 of the Convention (by twenty-five votes to five). The full text of the

Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment.¹

FINAL SUBMISSIONS TO THE COURT

18. In their memorial the Government asked the Court to

“declare that Article 8 of the Convention is not applicable to the present case or, alternatively, to declare that Article 8 read in conjunction with Article 14 of the Convention was not violated”.

19. The applicant requested the Court to

“declare his application admissible, as the Commission has done, and to hold that in the instant case there has been a breach of Article 14 taken together with Article 8 [and] to award him just satisfaction in accordance with Article 50...”

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 8

20. Mr Petrovic complained of the Austrian authorities' refusal to award him a parental leave allowance under section 26(1) of the Unemployment Benefit Act 1977 (see paragraph 14 above), which provided that only mothers were entitled to receive such payments. He alleged that he was the victim of discrimination on grounds of sex in breach of Article 14 of the Convention taken together 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...”

Article 8

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

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

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.”

21. The Commission accepted the applicant’s submission but the Government contested it.

A. Applicability of Article 14 taken together with Article 8

22. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, the *Karlheinz Schmidt v. Germany* judgment of 18 July 1994, Series A no. 291-B, p. 32, § 22, and the *Van Raalte v. the Netherlands* judgment of 21 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 184, § 33).

23. The applicant submitted that any financial assistance enabling parents to stop working in order to look after their children affected family life and therefore came within the scope of Article 8 of the Convention.

24. The Government argued that, on the contrary, the parental leave allowance did not come within the scope of Article 8 since, firstly, that provision did not contain any general obligation to provide financial assistance to parents so that one of them could stay at home to look after their children and, secondly, the parental leave allowance was a matter of welfare policy which was not to be included within the concept of family life.

25. The Court therefore has to determine whether the facts of the present case come within the scope of Article 8 and, consequently, of Article 14 of the Convention.

26. In this connection the Court, like the Commission, considers that the refusal to grant Mr Petrovic a parental leave allowance cannot amount to a failure to respect family life, since Article 8 does not impose any positive obligation on States to provide the financial assistance in question.

27. Nonetheless, this allowance paid by the State is intended to promote family life and necessarily affects the way in which the latter is organised as, in conjunction with parental leave, it enables one of the parents to stay at home to look after the children.

28. The Court has said on many occasions that Article 14 comes into play whenever “the subject-matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed” (see the *National Union of Belgian Police v. Belgium* judgment of 27 October 1975, Series A no. 19, p. 20, § 45), or the measures complained of are “linked to the exercise of a right guaranteed” (see the *Schmidt and Dahlström v. Sweden* judgment of 6 February 1976, Series A no. 21, p. 17, § 39).

29. By granting parental leave allowance States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the allowance therefore comes within the scope of that provision. It follows that Article 14 – taken together with Article 8 – is applicable.

B. Compliance with Article 14 taken together with Article 8

30. Under the Court’s case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it “has no objective and reasonable justification”, that is 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” (see, among other authorities, the *Karlheinz Schmidt* judgment cited above, pp. 32–33, § 24, and the *Van Raalte* judgment cited above, p. 186, § 39).

31. In the applicant’s submission, the different treatment of mothers and fathers with respect to granting a parental leave allowance was not justified at all. The allowance was not intended to protect mothers as it was not paid until eight weeks after the birth and until the right to receive maternity benefit had been exhausted, but to assist parents – whether mothers or fathers – who wished to take leave to look after their very young children.

32. The Government, on the other hand, submitted that the fact that there was no common European standard in the matter meant that the Austrian legislature’s decision to pay a parental leave allowance only to mothers fell within the margin of appreciation left to the Contracting States in respect of welfare policy. Furthermore, the provisions in question reflected the outlook of society at the time, according to which the mothers had the primary role in looking after young children.

33. The Commission considered that the lack of a common standard with regard to particular welfare benefits reflected the substantial diversity of social-security schemes in the member States, but could not absolve those States which had adopted a special scheme of parental leave allowances from granting those benefits without discrimination. No objective and reasonable grounds such as to justify the difference in treatment had been made out. The applicant had accordingly been discriminated against in the exercise of his right to respect for his family life as guaranteed by Article 8 of the Convention.

34. The Court notes that at the material time parental leave allowances were paid only to mothers, not fathers, once a period of eight weeks had elapsed after the birth and the right to a maternity allowance had been exhausted (section 26(1) of the Unemployment Benefit Act 1977 – see paragraph 14 above).

35. It was not disputed that that amounted to a difference in treatment on grounds of sex.

36. Maternity leave and the associated allowances are primarily intended to enable the mother to recover from the fatigue of childbirth and to breastfeed her baby if she so wishes. Parental leave and the parental leave allowance, on the other hand, relate to the period thereafter and are intended to enable the beneficiary to stay at home to look after the infant personally. While aware of the differences which may exist between mother and father in their relationship with the child, the Court starts from the premise that so far as taking care of the child during this period is concerned, both parents are “similarly placed”.

37. It is true that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe and very weighty reasons would be needed for such a difference in treatment to be regarded as compatible with the Convention (see, for example, the *Schuler-Zgraggen v. Switzerland* judgment of 24 June 1993, Series A no. 263, pp. 21–22, § 67, and the *Van Raalte* judgment cited above, p. 186, § 39 *in fine*).

38. However, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, among other authorities, the *Rasmussen v. Denmark* judgment of 28 November 1984, Series A no. 87, p. 15, § 40).

39. It is clear that at the material time, that is at the end of the 1980s, there was no common standard in this field, as the majority of the Contracting States did not provide for parental leave allowances to be paid to fathers.

40. The idea of the State giving financial assistance to the mother or the father, at the couple’s option, so that the parent concerned can stay at home to look after the children is relatively recent. Originally, welfare measures of this sort – such as parental leave – were primarily intended to protect mothers and to enable them to look after very young children. Only gradually, as society has moved towards a more equal sharing between men and women of responsibilities for the bringing up of their children, have the Contracting States introduced measures extending to fathers, like entitlement to parental leave.

41. In this respect Austrian law has evolved in the same way, the Austrian legislature enacting legislation in 1989 to provide for parental leave for fathers. In parallel, eligibility for the parental leave allowance was extended to fathers in 1990 (see paragraph 15 above).

It therefore appears difficult to criticise the Austrian legislature for having introduced in a gradual manner, reflecting the evolution of society in that sphere, legislation which is, all things considered, very progressive in Europe.

42. There still remains a very great disparity between the legal systems of the Contracting States in this field. While measures to give fathers an entitlement to parental leave have now been taken by a large number of States, the same is not true of the parental leave allowance, which only a very few States grant to fathers.

43. The Austrian authorities' refusal to grant the applicant a parental leave allowance has not, therefore, exceeded the margin of appreciation allowed to them. Consequently, the difference in treatment complained of was not discriminatory within the meaning of Article 14.

FOR THESE REASONS, THE COURT

Holds by seven votes to two that there has been no violation of Article 14 of the Convention taken together with Article 8.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 March 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Pettiti;
- (b) joint dissenting opinion of Mr Bernhardt and Mr Spielmann.

Initialed: R. B.
Initialed: H. P.

CONCURRING OPINION OF JUDGE PETTITI

(*Translation*)

I voted in favour of finding that there has been no violation. However, my reasons for so doing differ from those set out in paragraphs 37 and 41.

It appears to me to be difficult to look at equality between men and women where parental leave is concerned in the same way as where work, family reunion or elections are concerned.

Both in Community law and European human-rights law, it is necessary when considering the issue of equality to differentiate substantially according to the type of case, whether before the Court of Justice of the European Communities or the European Court of Human Rights.

Even had there been no Austrian decision in 1990 to extend the allowance to fathers, the Court would have had to find that there had been no violation.

In paragraph 37 the Court said that *very weighty* reasons would be needed for such a difference in treatment to be regarded as compatible with the Convention. That requirement was true of the Schuler-Zraggen and Van Raalte cases, but not necessarily of the Petrovic case, in which a more equal sharing of tasks between men and women was not expressly in issue.

In a different context (fares on public transport and sexual orientations and preferences) the Court of Justice of the European Communities has recently delivered an interesting judgment (17 February 1998, Grant), from which it is worthwhile quoting here as it is relevant in the analysis of the scope of the principles governing discrimination on grounds of sex.

Those principles do not require total assimilation of the sexes in provisions on economic and welfare protection – see the United Nations International Covenant on Economic, Social and Cultural Rights of 16 December 1966.

The Court of Justice of the European Communities reiterated that:

“The Covenant is one of the international instruments relating to the protection of human rights of which the Court takes account in applying the fundamental principles of Community law (see, for example, Case 374/87, *Orkem v. Commission* [1989] ECR 3283, paragraph 31, and Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 68).

However, although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community (see, *inter alia*, on the scope of Article 235 of the EC Treaty as regards respect for human rights, Opinion 2/94 [28 March 1996] ECR I-1759, paragraphs 34 and 35).”

As regards Article 14 of the European Convention on Human Rights (discrimination on grounds of sex), it cannot be construed as being unrestricted.

It should also be noted that when Directive no. 96/34/EC of the Council of the European Communities of 3 June 1996 was issued it was considered that the Council of the European Union, in spite of a large consensus, was not ready to decide on a draft directive on parental leave and time off for family reasons (as amended on 15 November 1984). The directive is limited to a framework agreement between the UNICE (Union of Industrial and Employers' Confederation of Europe), the *CEEP* (European Centre of Enterprises with Public Participation) and the ETUC (European Trade Union Confederation).

For there to be equality of treatment of men and women under the European Convention on Human Rights does not require that they be treated absolutely alike under tax and economic provisions. In particular, the fact that States give mothers the right to parental leave while they are *looking after their infant children*, does not mean that they automatically have to give such leave to husbands or partners, though that would be desirable for the future. Such rights are indisputably inspired by the biological and psychological bond between mother and child, especially in the period following birth. Certain claims in this sphere sometimes result more from personal convenience than any overriding need.

In this area, it is necessary to classify the problems in order of importance so that greater protection can be given to the major interests.

JOINT DISSENTING OPINION
OF JUDGES BERNHARDT AND SPIELMANN

We are unable to share the opinion of the majority that there has been no violation of Article 14 of the Convention taken together with Article 8 in the present case. The different treatment of fathers and mothers as regards parental leave allowances in 1989 was in our view not compatible with the basic principle that both sexes must be treated equally by the State.

In paragraph 37 the judgment correctly states, following previous decisions of the Court:

“... the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe and very weighty reasons would be needed for such a difference in treatment to be regarded as compatible with the Convention...”

We do not see any such weighty reasons here. It is in reality the traditional distribution of family responsibilities between mothers and fathers that gave rise to the Austrian legislation under which only mothers were entitled to parental leave allowance. The discrimination against fathers perpetuates this traditional distribution of roles and can also have negative consequences for the mother; if she continues her professional activity and agrees that the father stay at home, the family loses the parental leave allowance to which it would be entitled if she stayed at home.

It is correct that States are under no obligation to pay any parental leave allowance, but if they do so, traditional practices and roles in family life alone do not justify a difference in treatment of men and women. The reference to the situation in other European States and to the lack of uniform practice is not conclusive. The Commission correctly stated in its report that there are different social-security systems in the European States, and a State, when opting for one system, is not permitted to grant benefits in a discriminatory manner.