

Salgueiro Da Silva Mouta v. Portugal (Application no. 33290/96)

From DADEL

1) Reference Details

Jurisdiction: European Court of Human Rights

Date of decision: 21 December 1999

Link to full case:

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32118&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49>

2) Facts

The Applicant, a Portuguese national, Mr. Joao Manuel Salgueiro da Silva Mouta, claimed to be a victim of a violation by Portugal of its obligations under Article 8 alone and in conjunction with Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

On 2 November 1987, the Applicant and his wife C.D.S. had a daughter, M. The Applicant separated from his wife in April 1990 and has since been living with a man, L.G.C. During the divorce proceedings instituted by C.D.S, the Applicant signed on 7 February 1991 an agreement with C.D.S. concerning the award of parental responsibility for M, under which C.D.S. was to have parental responsibility and the Applicant the right of contact. On 16 March 1992, the Applicant sought an order giving him parental responsibility for the child, alleging that C.D.S. was not complying with the terms of the agreement since M. was living with her maternal grandparents. In her memorandum of response, C.D.S. accused L.G.C. of having sexually abused the child.

On 14 July 1994, the Lisbon Family Affairs Court awarded the Applicant parental responsibility. C.D.S. appealed the Family Affairs Court's judgment to the Lisbon Court of Appeal, which reversed the lower court's judgment and awarded parental responsibility to C.D.S. and right of contact to the Applicant.

In his submission to the European Court of Human Rights, the Applicant complained that the Lisbon Court of Appeal had based its decision to award parental responsibility for their daughter, M., to his ex-wife rather than to himself exclusively on the ground of his sexual orientation. He alleged that this constituted a violation of Article 8 of the Convention taken alone and in conjunction with Article 14.

3) Admissibility

The application was found to be admissible.

4) Merits

The European Court of Human Rights ("the Court") noted that the judgment of the Lisbon Court of Appeal, in so far as it set aside the judgment of the Lisbon Family Affairs Court of 14 July 1994, which had awarded parental responsibility to the Applicant, constituted

interference with the Applicant's right to respect for his family life and thus required the application of Article 8.

The Court found that in reversing the decision of the Lisbon Family Affairs Court and, consequently, awarding parental responsibility to the mother rather than the father, the Court of Appeal introduced a new factor, namely that the Applicant was a homosexual and was living with another man. The Court concluded that there was a difference of treatment between the Applicant and M.'s mother, which was based on the Applicant's sexual orientation, a concept which is covered by Article 14 of the Convention.

Based on its prior case-law, the Court reiterated that a difference of treatment is discriminatory within the meaning 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 no reasonable relationship of proportionality between the means employed and the aim sought to be realized.

The Court determined that the Court of Appeal's decision undeniably pursued a legitimate aim, namely the protection of the health and rights of the child. However, it took notice of the language used by the Court of Appeals: "The child should live in ... a traditional Portuguese family" and "It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations." In the European Court's view, the above passages suggest that the Applicant's homosexuality was a factor that was decisive in the final decision. The European Court found that the Court of Appeal made a distinction based on considerations regarding the Applicant's sexual orientation, a distinction that is not acceptable under the Convention. It concluded that there was no reasonable relationship of proportionality between the means employed and the aim pursued; and thus a violation of the Convention occurred. In view of its decision on Article 8 taken in conjunction with Article 14, the Court considered it unnecessary to rule on the allegation of a violation of Article 8 taken alone.

5) Decision

The Court unanimously found a violation by Portugal of Article 8 in conjunction with Article 14 of the Convention. The Court considered that the finding of a violation set out in the present judgment constituted in itself sufficient just satisfaction.