



REPUBLIKA SLOVENIJA

USTAVNO SODIŠČE

U-I-425/06
2 July 2009

DECISION

At a session held on 2 July 2009 in proceedings to review constitutionality initiated upon the petition of Mitja Blažič, Dobrovo v Brdih, and Viki Kern, Vodice, the Constitutional Court

decided as follows:

- 1. Article 22 of the Registration of a Same-Sex Civil Partnership Act (Official Gazette RS, No. 65/05) is inconsistent with the Constitution.**
- 2. The National Assembly must remedy the established inconsistency within six months from the publication of this decision in the Official Gazette of the Republic of Slovenia.**
- 3. Until the established inconsistency is remedied, the same rules apply for inheritance between partners in registered same-sex partnerships as apply for inheritance between spouses in accordance with the Inheritance Act (Official Gazette SRS, Nos. 15/76 and 23/78 and Official Gazette RS, No. 67/01).**

Reasoning

A

1. The petitioners challenge Article 22 of the Registration of a Same-Sex Civil Partnership Act (hereinafter referred to as the RSSCPA), which regulates inheritance between partners in such partnerships. They claim that they are partners in a same-sex partnership and that they have registered their partnership in accordance with the RSSCPA, and on the basis of this registration they have acquired the right to inheritance from a deceased partner in accordance with this act. In their opinion, the

challenged regulation on inheritance from a same-sex partner is discriminatory. They allege that the challenged provision inadmissibly differentiates between the inheritance of the separate and the community property of partners in same-sex partnerships and as it does not specifically regulate the inheritance of separate property and does not determine a forced portion to be inherited by a same-sex partner, it entails an unconstitutional differentiation between partners in same-sex partnerships and spouses or common-law partners. In their opinion, the challenged provision is inconsistent with Articles 14, 15, 33, and 66 of the Constitution.

2. The National Assembly did not reply to the petition.

3. The Constitutional Court accepted the petition and due to the fact that the conditions provided for in the fourth paragraph of Article 26 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA) were satisfied, it immediately proceeded to decide on the merits.

4. The first paragraph of Article 22 of the RSSCPA determines that in the event of a partner's death, the surviving partner of a registered same-sex partnership (hereinafter referred to as a same-sex partner) has the right to inheritance of the decedent's share of the community property in accordance with this act. This provision establishes a legal foundation for inheritance between same-sex partners. Neither the Inheritance Act (Official Gazette SRS, No. 15/76 et sub. – hereinafter referred to as the IA) as a general regulation, nor any other regulation in the field of inheritance namely includes same-sex partners in the circle of heirs. [1] The second and third paragraphs of Article 22 of the RSSCPA regulate the manner of inheritance of the community property between same-sex partners. If a decedent has children, the community property is inherited by the surviving partner and the decedent's children in equal shares (the second paragraph of Article 22); if a decedent does not have any children, the surviving partner inherits the entire share on the community property (the third paragraph of Article 22). The fourth paragraph of the challenged Article 22 of the RSSCPA regulates the inheritance of the decedent's separate property and determines that this property is inherited in accordance with the general regulations on inheritance. These regulations are applied also for inheritance of the share of the decedent's community property, if the RSSCPA does not determine otherwise. The fifth paragraph of Article 22 of the RSSCPA determines that local courts have subject-matter jurisdiction to decide in probate proceedings in accordance with this act.

B – II

5. One of the petitioners' allegations regarding the challenged regulation is that, in the field of inheritance, it entails discrimination against same-sex partners in comparison with spouses or common-law partners and is therefore inconsistent with the first paragraph of Article 14 of the Constitution.

6. The first paragraph of Article 14 of the Constitution determines that in Slovenia everyone is guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance. The above-mentioned constitutional provision prohibits discrimination in ensuring, exercising, and protecting human rights and fundamental freedoms regarding individuals' personal circumstance.

7. In order to review this allegation as regards unequal, discriminatory treatment, the following questions must be answered in the case at issue: 1) whether the alleged different treatment refers to ensuring or exercising a human right or a fundamental freedom; 2) if so, whether the petitioners or a person to whom the petitioners compare themselves are receiving different treatment; 3) whether the actual positions that the petitioners are comparing are essentially the same and thus the differentiation is based on a circumstance determined in the first paragraph of Article 14 of the Constitution; and 4) if the differentiation is indeed based on a circumstance determined in the first paragraph of Article 14 of the Constitution and thus there is an interference with the right to non-discriminatory treatment, whether such interference is constitutionally admissible. If the answers to the first three questions are affirmative and the interference does not stand the so-called strict test of proportionality, the discrimination is not constitutionally admissible.

8. The first paragraph of Article 14 of the Constitution prohibits discrimination in ensuring, exercising, and protecting human rights and fundamental freedoms regarding individuals' personal circumstances. In order to establish a violation of the constitutional prohibition against discriminatory treatment, the determination of the existence of inadmissible discrimination in the enjoyment of any human right suffices, whereby a petitioner does not need to demonstrate the interference with this human right in and of itself. [2] In the case at issue, the petitioners claim discriminatory treatment in the statutory regulation of inheritance. In accordance with Article 33 of the Constitution, the right to inheritance is a human right. The allegation thus concerns inadmissible discrimination in ensuring a human right.

9. The IA does not differentiate between the inheritance of the separate and community property of spouses, but regulates the inheritance of both types of property in the same manner. Pursuant to this act, the spouse, as a heir in the first degree, and the decedent's children inherit equal shares (Article 11 of the IA). If a decedent did not have descendants, the heirs in the second degree are the decedent's parents, who inherit one half of the estate (or their descendants on the basis of the right to assume their parents' position; in accordance with Articles 15 and 16 of the IA), and the surviving spouse, who inherits the other half (in accordance with the first and second paragraphs of Article 14 of the IA). In such a case, the surviving spouse inherits the

entire estate only in the event that both of the decedent's parents have died without descendants before the decedent (Article 17 of the IA). In accordance with the first paragraph of Article 33 of the IA, under certain conditions the surviving spouse has the right to have household goods be excluded from the estate. With reference to inheritance on the basis of testacy, the first paragraph of Article 25 of the IA provides for a spouse as among the forced heirs. The spouse's forced portion amounts to one half of the share which he or she would be entitled to in the case of intestacy (the second paragraph of Article 26 of the IA). The same rules apply for inheritance between a man and a woman who live in a lasting partnership and are not married (i.e. common-law partners) if there are no reasons for which a marriage between them would be void (the second paragraph of Article 10 of the IA). Any reference in this decision to (only) spouses (a marriage) shall be deemed to also constitute a reference to common-law spouses (a common-law marriage).

10. In the RSSCPA, the inheritance of the separate and community property of partners is regulated differently. The first paragraph of Article 22 of the RSSCPA determines that in the event of a partner's death, the surviving same-sex partner has the right to inheritance of the share of the community property in accordance with this act. If a decedent has children, the community property is inherited by the surviving partner and the decedent's children in equal shares (the second paragraph of Article 22); if a decedent does not have any children, the surviving partner inherits the entire share on the community property (the third paragraph of Article 22). As regards all other matters, the general regulations on inheritance are applied for the inheritance of the share of the decedent's community property (the second sentence of the fourth paragraph of Article 22 of the RSSCPA). This entails, *inter alia*, that in the case of testacy, a same-sex partner is not entitled to a forced portion. The IA, as a general regulation on inheritance, namely does not include same-sex partners in the circle of forced heirs (Article 25 of the IA). In addition, they are not entitled to the right that household goods be excluded from the estate (Article 33 of the IA). The fourth paragraph of Article 22 of the RSSCPA determines that the decedent's separate property is inherited in accordance with the general regulations on inheritance. Considering the fact that the general regulations on inheritance do not include same-sex partners in the circle of heirs, they cannot inherit the separate property of their partners.

11. It is evident from the above-mentioned summary of the statutory regulation that there are essential, important differences between the regulation of inheritance between spouses and between same-sex partners. The differences, which have also been stated by the petitioners, can be summarised as follows:

- If a decedent does not have any children, the surviving same-sex partner inherits the entire share on the community property, whereas a spouse, as a heir in the second degree, inherits only one half of the estate, while the decedent's parents inherit the other half (or their descendants on the basis of their right to assume their parents'

position). If a decedent does not have any children, the surviving spouse inherits the entire estate only if both of the decedent's parents have died without descendants before the decedent.

- Same-sex partners, differently than spouses, cannot inherit the separate property of their partners.
- Same-sex partners, differently than spouses, do not fall within the circle of forced heirs and do not enjoy the right to have household goods be excluded from the estate.

12. There is evidently discriminatory treatment in cases in which the state (on the basis of personal circumstances) treats individuals in the same situation differently. [3] If the situations being compared are not essentially the same, it is not a matter of unconstitutional discrimination. From the perspective that is important for the review of the challenged regulation (the right to inheritance from a deceased partner, Article 22 of the RSSCPA), it is thus essential whether the petitioners' position is comparable in its essential and legal elements to the position of spouses. The Constitutional Court holds that the answer is affirmative. A registered partnership is a relationship that is in terms of substance similar to a marriage or a common-law marriage. The essential characteristic of such partnerships is also the stable connection of two persons who are close to, help, and support each other. [4] The ethical and emotional essence of registered partnerships, which is expressed in Article 8 of the RSSCPA, and according to which partners must respect, trust, and help each other, is similar to the community between a woman and a man. Also the legal regulation of this relationship is similar to that of marriage. The RSSCPA ensures partners certain mutual rights and obligations, protects the weaker partner, and regulates legal positions toward third persons, the state, and the social environment. [5] In the field of property relations during the period of a registered partnership, the RSSCPA almost entirely follows the regulation of property regime between spouses laid down in the Marriage and Family Relations Act (Articles 9 through 18 of the RSSCPA). Moreover, it regulates the obligation to ensure the maintenance of a partner who does not have sufficient funds for living (Article 19 of the RSSCPA). However, the legislature did regulate inheritance between partners in registered partnerships differently. In the case of such partnerships, the legislature did not enact, as applies for a marriage, the presumed will of the deceased partner that, although he or she did not leave a will, the person with whom he or she had shared his or her life be economically provided for by inheritance. In both a marriage and registered partnership, the decedent's presumed will is based on the same empirical and ethical arguments – to ensure also after one's death the financial security and stability of the person with whom the decedent was emotionally, intimately, financially, and in all areas of life most closely connected. [6]

13. With regard to all of these essentially the same actual and legal bases of partnerships – not only registered same-sex partnerships, but also partnerships between a woman and a man – it is evident that the differences in the regulation of inheritance are not based on any objective, non-personal circumstance, but on sexual

orientation. Sexual orientation is, although not explicitly mentioned therein, undoubtedly one of the personal circumstances provided for in the first paragraph of Article 14 of the Constitution. It is namely a human characteristic that importantly defines an individual, influences his or her life, and follows him or her through his or her entire life, just as circumstances such as race, sex, and birth do. Sexual orientation, as a circumstance which may not be a basis for differentiation, is also regarded as such by the ECtHR, although it is not among the explicitly enumerated circumstances in Article 14 of the ECHR. [7]

14. This different regime of inheritance between same-sex partners interferes with the petitioners' right to non-discriminatory treatment (the first paragraph of Article 14 of the Constitution), which requires a review of the constitutional admissibility of the interference. Interferences with human rights are constitutionally admissible only if they are based on a constitutionally admissible, i.e. objectively justified, aim (the third paragraph of Article 15 of the Constitution) and are consistent with the general principle of proportionality as one of the principles of a state governed by the rule of law (Article 2 of the Constitution). The Constitutional Court carries out a review of whether a challenged regulation is consistent with the general principle of proportionality on the basis of the so-called strict test of proportionality, which comprises a review of three aspects of the interference, i.e. a review of the necessity, appropriateness, and proportionality of the interference in the narrower sense if it is established beforehand that the limitation is based on a constitutionally admissible aim (see, Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03, and OdlUS XII, 86; Paragraph 25 of the reasoning).

15. The Constitutional Court first reviewed whether there exists any constitutionally admissible reason for a different regulation of inheritance between spouses and common-law partners, on one hand, and same-sex partners, on the other. In the case at issue, such a reason cannot be found. The National Assembly did not reply to the petition, and also from the legislative materials there does not follow a constitutionally admissible reason for the challenged regulation, which interferes with the right determined in the first paragraph of Article 14 of the Constitution. Consequently, already the first condition which is required by the Constitution in cases of the limitation of human rights is not satisfied.

16. The Constitutional Court therefore established that the challenged regulation of inheritance in accordance with the RSSCPA is inconsistent with the first paragraph of Article 14 of the Constitution (Point 1 of the operative provisions). Due to the fact that the Constitutional Court established an inconsistency with the above-mentioned constitutional provision, it did not review the petitioners' further allegations as regards inconsistencies with other provisions of the Constitution. In the case at issue, the annulment of the challenged provision is not possible, as it would not remedy the consequences of the established unconstitutionality, but would only exacerbate the

inequalities and could even entail an interference with some other human rights of the petitioners. Therefore, on the basis of the first paragraph of Article 48 of the CCA, the Constitutional Court adopted a declaratory decision. On the basis of the second paragraph of Article 48 of the CCA, it required that the legislature remedy the established inconsistency within six months from the publication of this decision in the Official Gazette of the Republic of Slovenia (Point 2 of the operative provisions).

17. On the basis of the second paragraph of Article 40 of the CCA, the Constitutional Court can determine the manner of the implementation of its decision. In order to ensure that inheritance be regulated in a manner that is not discriminatory for partners in registered same-sex partnerships until the established inconsistency is remedied, the Constitutional Court decided that until the established inconsistency is remedied, the same rules apply for inheritance between partners in registered same-sex partnerships as apply for inheritance between spouses in accordance with the IA.

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18. The Constitutional Court reached this decision on the basis of Article 48 and the second paragraph of Article 40 of the CCA, composed of: Jože Tratnik, President, and Judges Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, Dr Ciril Ribičič, and Jan Zobec. The decision was reached unanimously.

Jože Tratnik
President

Endnotes:

[1] Another regulation which does not include same-sex partners in the circle of heirs is the Inheritance of Agricultural Holdings Act (Official Gazette RS, No. 70/95), which is not, however, a subject of review in the case at issue.

[2] The Constitutional Court has adopted such position already in Decision No. U-I-146/07, dated 13 November 2008 (Official Gazette RS, No. 111/08). Also the European Court of Human Rights (hereinafter referred to as the ECtHR) in its recent case law superseded the dependant, ancillary nature of the right to equality, according to which a violation of Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR) could be successfully exercised only in connection with a violation of one of the Convention rights. In its recent decisions, the ECtHR has namely underlined that the application of Article 14 of the ECHR does not presuppose a violation of one or more of the substantive provisions of the Convention and its Protocols, and that Article 14 of the ECHR was therefore to this extent autonomous. For Article 14 of the ECHR to become applicable, it suffices that the facts

of a case fall within the ambit of another substantive provision of the Convention or its Protocols (*cf. Thlimmenos v. Greece*, 6 April 2000, § 40).

[3] With reference to such, the ECtHR refers to analogous situations (see, *Van der Musselle v. Belgium*, 23 November 1983, § 46).

[4] V. Žnidaršič Skubic, *Dedovanje v istospolni partnerski skupnosti, Podjetje in delo*, No. 6-7/08, p. 1533.

[5] N. Brlič, *Istospolni partnerji in njihov pravni položaj*, *Pravna praksa*, No. 47/05, Priloga, p. III.

[6] In this sense, also V. Žnidaršič Skubic, *ibidem*.

[7] E.g. *Salgueiro da Silva Mouta v. Portugal*, 21 December 1999, § 36, and *E.B. v. France*, 22 January 2008, § 89.