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

THIRD SECTION

CASE OF VALDÍS FJÖLNISDÓTTIR AND OTHERS v. ICELAND

(Application no. 71552/17)

JUDGMENT

Art 8 • Family life applicable • Non-recognition of parental link with non-biological child born abroad via surrogacy, while preserving bond through foster care • Fair balance struck between family life and general interests protected by ban on surrogacy

STRASBOURG

18 May 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Valdís Fjölnisdóttir and Others v. Iceland,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Paul Lemmens, *President,*
Georgios A. Serghides,
Robert Spano,
Georges Ravarani,
María Elósegui,
Darian Pavli,
Anja Seibert-Fohr, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 71552/17) against the Republic of Iceland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Icelandic nationals, Ms Valdís Glódís Fjölnisdóttir ("the first applicant"), Ms Eydís Rós Glódís Agnarsdóttir ("the second applicant") and Mr X ("the third applicant"), on 25 September 2017;

the decision to give notice to the Icelandic Government ("the Government") of the complaints concerning the right to respect for private and family life and the prohibition of discrimination;

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

the comments submitted by Ordo Iuris and the AIRE Centre, who were granted leave to intervene by the President of the Section;

the decision of the President of the Section to grant the third applicant anonymity, in accordance with Rule 47 § 4 of the Rules of the Court;

Having deliberated in private on 6 April 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the non-recognition of a parent-child relationship between the first two applicants and the third applicant, who was born by way of gestational surrogacy in the United States. The first and second applicants are the third applicant's intended parents, but neither of them has a biological link with him.

THE FACTS

2. The applicants were born in 1978, 1977 and 2013 respectively and live in Kópavogur. The applicants were represented by Ms Þyrí Steingrímsdóttir, a lawyer practising in Reykjavik. The third applicant's

application was lodged on the authority of his legal guardian, Ms M. (see paragraph 8 below).

3. The Government were represented by their Agent, Mr Einar Karl Hallvarðsson, Attorney General of Iceland.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The first and second applicants were a married couple who engaged the paid services of a surrogacy agency based in the United States and concluded a surrogacy delivery plan, in accordance with which they were to be the intended parents of a child born by way of gestational surrogacy. They subsequently travelled to California, where a son, the third applicant, was born to them via a surrogate mother in February 2013. The child was conceived using *in vitro* fertilisation with donor gametes and is not biologically related to either the first or the second applicant. Upon the child's birth, the first and the second applicant were registered in California as his parents and a birth certificate to that effect was issued, together with a US passport for the child. The submitted documents indicate that the surrogate mother has waived any claim to legal parenthood in respect of the third applicant.

6. Three weeks after the third applicant's birth the three applicants travelled to Iceland. Shortly thereafter, the first and second applicants applied to Registers Iceland for the third applicant's registration in the national register. The application was made using the form for Icelandic nationals born abroad who were automatically entitled to Icelandic citizenship, and included the third applicant's birth certificate issued in the United States. Upon enquiries being made, the applicants later revealed to Registers Iceland that the third applicant had been born via gestational surrogacy.

7. On 18 June 2013 Registers Iceland denied the request for registration of the third applicant. The decision stated that as the child had been born in the United States to a surrogate mother, Icelandic legal provisions on a child's parentage were not applicable, and the child was therefore not automatically entitled to citizenship under Act no. 100/1952 on Icelandic Citizenship (see paragraphs 29 to 30 below). The decision also stated that Registers Iceland considered the third applicant to be a foreign citizen whose registration and residence fell under Act no. 96/2002 on Foreigners (see paragraph 32 below). The first and second applicants appealed against that decision to the Ministry of the Interior.

8. In the meantime, the third applicant was considered to be a foreign national and an unaccompanied minor in Iceland. The child protection committee in the applicants' municipality therefore took legal custody of him by a decision of 26 September 2013 and appointed him a legal guardian, Ms M., in accordance with Child Protection Act no. 80/2002. Initially, an agreement was made with the first and second applicants for the

third applicant to be placed in their care until a permanent foster agreement was made with them.

9. On 27 March 2014 the Ministry of the Interior confirmed Registers Iceland's decision to deny the third applicant's registration in the national register. The decision stated that under Icelandic law, the woman who gave birth to a child was always considered its mother, regardless of whether the child was conceived using her gametes. The matter of the child's registration depended on whether he fulfilled the conditions of Icelandic citizenship, and could not be based on Act no. 160/1995 on the Recognition and Enforcement of Foreign Decisions on Child Custody, the Return of Abducted Children, and so on (see paragraph 34 below). The child was not automatically entitled to Icelandic citizenship, given that: he had been born in the United States; the surrogate, who under Icelandic law was considered to be the child's mother, was a US citizen; and nothing had been submitted indicating that the child's biological father was an Icelandic citizen. The ministry therefore confirmed Registers Iceland's decision to refuse the third applicant's registration in the national register.

10. The applicants sought judicial review of that decision and were granted State legal aid for the purposes of those proceedings. They demanded the annulment of the ministry's decision and a declaratory judgment to the effect that Registers Iceland was obligated to register the first and second applicants as the third applicant's parents, in accordance with the child's birth certificate.

11. While the proceedings before the District Court of Reykjavik were pending, the third applicant was granted Icelandic citizenship following the adoption of Act no. 128/2015 on the Granting of Citizenship, which came into force on 31 December 2015. He was subsequently entered in the national register as an Icelandic citizen, but the first and second applicants were still not registered as his parents.

12. Additionally, while the proceedings before the District Court were pending, the first and second applicants divorced in May 2015. As a result, the permanent agreement for their foster care of the third applicant became invalid. A new foster care arrangement was subsequently made on 9 December 2015, under which the third applicant was fostered by the first applicant and her new spouse for one year while enjoying equal access to the second applicant. Later, the third applicant was fostered by the second applicant and her new spouse for one year while enjoying equal access to the first applicant. The Supreme Court delivered a judgment in the present case on 30 March 2017 (see paragraphs 22 to 24 below), and as domestic law only allows for temporary foster care arrangements for up to two years, the third applicant has been permanently fostered by the first applicant and her spouse since 18 December 2019, but continues to enjoy equal access to the second applicant and her spouse.

13. The child protection committee's decision regarding permanent foster care, dated 18 December 2019, noted that the aim of the temporary foster care arrangements had been for the third applicant to be cared for by his "mothers" according to his birth certificate, which had been considered to be in his best interests. The intention had been for those foster care arrangements to continue until the first and second applicants were granted custody of him, but that had not happened. An assessment of both intended mothers and their new spouses had found that all parties were competent to care for the child; the first and second applicants had cared for him well and they had cooperated well to ensure his best interests.

14. Prior to their divorce, the first and second applicants had applied to adopt the third applicant. By a letter of 7 October 2013, the District Commissioner of Reykjavik informed the applicants that the application for adoption could not be dealt with while the application for registration of parentage was still pending, as adoption presupposed that the adoptive parents were not the parents of the child. Noting that the result of the registration case before the Ministry of the Interior could affect the adoption proceedings, the Commissioner announced that the processing of the adoption application would be put on hold.

15. After the Ministry of the Interior had delivered its decision in the registration proceedings, the applicants received a second letter from the District Commissioner, dated 28 May 2014. The letter stated that under the general rule on parentage, and in the light of the ministry's conclusion in the registration proceedings, the Commissioner considered the surrogate mother to be the third applicant's mother, and as it appeared from the case file that she was married, her husband was considered the father. They should therefore be considered the child's guardians, and thus their consent had to be obtained pursuant to sections 7, 8 and 9 of the Act on Adoption (see paragraph 33 below). The Commissioner requested that the applicants submit information about the address of the surrogate mother and her husband, and confirmation of her marital status. Furthermore, the Commissioner's letter noted that under section 14 of the Adoption Act, permission to adopt could not be granted if any party giving consent to the adoption received a fee or benefits in relation to the consent, including pay for loss of income. The Commissioner requested declarations from the first and second applicants confirming that such a payment had not been made, and noted that the surrogate mother and her husband would be asked to submit similar declarations.

16. The applicants replied to this second letter on 23 July 2014. In their reply, they protested against the Commissioner's position, stating that even if the surrogate mother were considered to be the third applicant's parent, she should in any event not be considered to be a parent with custody, and therefore her consent to his adoption should not be required (see section 7(1) of the Adoption Act, paragraph 33 below). They submitted that

it was Ms M.'s consent, as the third applicant's legal guardian, which should be obtained pursuant to section 7(3) of the Adoption Act (see paragraph 33 below). They furthermore submitted that the surrogate mother was not married, and that the first and second applicants had not made any payments in connection with consent for adoption within the meaning of section 14 of the Adoption Act, which Ms M. would confirm. This letter had still not been answered by the time the first and second applicants divorced, when they withdrew their application for adoption, by a letter of 10 January 2015.

17. By a judgment of 2 March 2016, the District Court rejected the applicants' claims for the ministry's decision to be annulled and for Registers Iceland to register the first and second applicants as the parents of the third applicant.

18. The District Court found that in accordance with the fundamental principles of Icelandic family law, the woman who gave birth to a child was considered its mother. Consequently, the first and second applicants could not be considered the third applicant's parents. The District Court also noted that the principles of private international law generally did not require a State to recognise a decision rendered by the authorities of another State if it was manifestly incompatible with the fundamental legal principles of the former State, even if the decision was compatible with the laws of the latter. Noting that surrogacy was unlawful in Iceland, and punishable by fines or up to three months' imprisonment in the event of a violation within Icelandic jurisdiction, the District Court found that recognising as parents those who were resident in Iceland but went abroad for the purposes of surrogacy would create a legal loophole around the ban on surrogacy. The District Court therefore found that the Icelandic State had a legitimate reason to refuse to recognise parentage established abroad in such circumstances.

19. As for the third applicant's right to respect for his private and family life, the District Court recognised that "family life" had been established between the three applicants, and that the authorities' refusal to register the third applicant as the first and second applicants' son in the national register had interfered with his private and family life. However, that interference had served the aim of upholding the ban on surrogacy and thereby protecting the interests of others, namely preventing women from being pressured into carrying children for others and ensuring that children could seek information about their heritage. The District Court noted that the authorities had taken steps to ensure the child's best interests and to counteract the difficulties which the applicants had experienced as a result of the refusal to register the third applicant, by allowing the third applicant to be fostered by the first and second applicants to preserve the family bond between them, and by granting the third applicant a residence permit and subsequently citizenship.

20. The District Court also discussed the application for the third applicant's adoption. It noted that special rules applied to the adoption of a child by its foster parents, in accordance with which a child could be adopted without the approval of its biological parents if this was clearly in the child's best interests. Accordingly, the District Court considered that the adoption application would probably have been approved if the first and second applicants had not divorced.

21. In the light of these considerations, the District Court found that the interference with private and family life caused by the refusal to register the third applicant had been necessary to protect morality and the rights of others, and that it had been accompanied by sufficient counter-balancing efforts to alleviate the negative effects of the refusal. The child's best interests, although of paramount importance, could not override the fundamental legal principles of parentage.

22. The applicants appealed against the judgment to the Supreme Court of Iceland. By a judgment of 30 March 2017, the Supreme Court upheld the District Court's rejection of the applicants' claims.

23. The Supreme Court, like the District Court, found that the authorities had been entitled to refuse to recognise family ties which had been established in a manner contrary to the fundamental principles of Icelandic family law. In this regard, the Supreme Court held that neither the first nor the second applicant could be considered to have been the third applicant's mother at the time of his birth, under Icelandic law. The Supreme Court emphasised that the fourth paragraph of section 5 of Act no. 55/1996 on Artificial Fertilisation and the Use of Human Gametes and Embryos for Stem Cell Research explicitly banned surrogacy (see paragraph 28 below). The Supreme Court also noted that under the first paragraph of section 6 of Children Act no. 76/2003, a woman who gave birth to a child conceived by assisted conception treatment had to be regarded as its mother (see paragraph 27 below). Pursuant to the second paragraph of section 6 of the same Act, a woman who had consented to her wife undergoing such treatment had to be regarded as the child's parent (see paragraph 27 below). Considering this, the Supreme Court found that only the woman who gave birth to a child conceived by artificial fertilisation could be considered its mother under Icelandic law, and neither the first nor the second applicant had given birth to the third applicant.

24. Unlike the District Court, however, the Supreme Court found that no family life had existed between the applicants at the time when Registers Iceland's decision had been rendered, and that the refusal had therefore not constituted an interference with the right to respect for private and family life. In this regard, the Supreme Court referred to the Court's judgment in *Paradiso and Campanelli v. Italy* ([GC], no. 25358/12, 24 January 2017) and reasoned as follows:

"The preparatory works of [Article 71 of the Constitution (see paragraph 26 below)] state that the concept of 'family' refers to family ties in a wide sense. *Inter alia* with reference to Article 8 § 1 of the United Nations Convention on the Rights of the Child, referred to above, it must be considered that the constitutional provision in question protects only those family ties which have been established in a lawful manner in accordance with domestic law. Accordingly, the applicants' bond did not enjoy constitutional protection until the child protection committee had approved the [third applicant's] placement with [the first and second applicants], and then only on the basis of the relationship which later became a formal fostering arrangement. Until then, the family ties in question had not been established in accordance with Icelandic law, since neither [the first] nor [the second] applicant bore the child, nor did they have biological ties with him, which is a prerequisite under section 6(2) of the Children's Act. This conclusion is also in conformity with the above-mentioned judgment of the European Court of Human Rights. The decision of the defendant, Registers Iceland, of 18 June 2013, which was confirmed by a decision of the Ministry of the Interior on 27 March 2014, did not concern these family ties and therefore did not violate the applicants' rights under the first paragraph of Article 71 of the Constitution."

25. As matters stand, pursuant to the child protection committee's decision of 18 December 2019 (see paragraph 12 above), the third applicant is thus permanently fostered by the first applicant and her spouse, but enjoys equal access to the second applicant and her spouse. Ms M. continues to act as his legal guardian.

RELEVANT LEGAL FRAMEWORK

26. The relevant provisions of the Icelandic Constitution (*Stjórnarskrá lýðveldisins Íslands*) read as follows:

Article 65

"Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, colour, property, birth or other status.

Men and women shall enjoy equal rights in all respects."

Article 71

"Everyone shall enjoy freedom from interference with privacy, home, and family life.

...

Notwithstanding the provisions of the first paragraph above, freedom from interference with privacy, home, and family life may be otherwise limited by statutory provisions if this is urgently needed for the protection of the rights of others."

27. The relevant provisions of Chapter I-A of Children Act no. 76/2003, entitled "Parents of children", read as follows:

Section 2
Paternity rules applying to the children of married couples and [the children] of parents in registered cohabitation [arrangements]

"The husband of a child's mother shall be regarded as its father if it is born during their marriage. The same shall apply if the child is born so soon after the dissolution of the marriage as to make it possible that it was conceived during the marriage. This shall not apply, however, if the couple were judicially separated at the time of the child's conception, or if the mother married or registered her cohabitation with another man prior to the birth of the child.

If, after the birth of a child, the child's mother marries a man whom she has declared to be the child's father, that man shall then be regarded as the child's father if the paternity of the child has not been established previously.

If the mother of a child and a man whom she has declared to be the father of the child legally registered their cohabitation prior to the birth of the child, that man shall then be regarded as the child's father. The same applies if the child's mother and a man whom she has declared to be the father register their cohabitation in the National Register at a later date, providing that the paternity of the child has not been established by that time."

Section 6
Parents of children conceived by assisted conception

"A woman who gives birth to a child conceived by assisted conception shall be regarded as its mother.

A woman who has given consent for her wife (female partner) to undergo assisted conception treatment under the Assisted Conception Act shall be regarded as the parent of the child conceived in this way. The same shall apply to women who have registered their partnership in the National Register.

A man who has given consent for his wife to undergo assisted conception treatment under the Assisted Conception Act shall be regarded as the father of the child conceived in this way. The same shall apply to a man and a woman who have registered their cohabitation in the National Register.

A man who donates sperm for use in the assisted conception treatment of a woman other than his wife or cohabiting partner (cf. the third paragraph) under the Assisted Conception Act may not be identified by a court judgment as the father of the child conceived with his sperm.

A man who has donated sperm for a purpose other than that stated in the fourth paragraph shall be regarded as the father of a child conceived with his sperm unless the sperm has been used without his knowledge or after his death."

Section 7
Registration of children in the National Register

"Children shall be registered in the National Register immediately after birth.

..."

28. The relevant provisions of Act no. 55/1996 on Artificial Fertilisation and the Use of Human Gametes and Embryos for Stem Cell Research read as follows:

Section 5
Artificial fertilisation treatment

"...

Surrogacy is prohibited."

Section 17

"Violation of the provisions of this Act or the rules based on it entails fines or imprisonment of up to three months.

...

Complicity in such a violation shall entail the same penalties, unless more severe penalties apply under other legislation."

29. The relevant provisions of Chapter I of Act no. 100/1952 on Icelandic Citizenship, entitled "Citizenship acquired at birth, and so on", read as follows at the time of the events:

Section 1

"A child acquires Icelandic citizenship at birth

1. if its mother is an Icelandic citizen; [or]

2. if its father is an Icelandic citizen and is married to the mother. This shall not apply, however, if the couple had obtained a judicial separation at the time when the child was conceived.

Item 2 of the first paragraph shall also apply to the parents of a child conceived by assisted fertilisation (cf. the first sentence of the second paragraph of section 6 of the Children Act).

A child found abandoned in Iceland shall, in the absence of proof to the contrary, be considered an Icelandic citizen."

30. The relevant provision of Chapter II of Act no. 100/1952 on Icelandic Citizenship, entitled "Citizenship granted by legislation", reads as follows:

Section 6

"*Althingi* [the Icelandic Parliament] may grant Icelandic citizenship by legislation.

Before an application for citizenship is submitted to *Althingi*, the Directorate of Immigration shall obtain comments on it from the commissioner of police in the applicant's locality. The Directorate of Immigration itself shall also submit comments on the application.

..."

31. The relevant provisions of Child Protection Act no. 80/2002 read as follows at the material time:

Section 32
Appointment of a legal guardian

"Should parents have waived custody or been deprived of custody, guardianship is assumed by the child protection committee whilst that situation prevails. The child protection committee shall retain guardianship of the child until otherwise decided. The child protection committee may request that a legal guardian or financial trustee be appointed for the child, if it believes this to serve the interests of the child.

The child protection committee shall assume guardianship of a child if he/she is without a guardian for other reasons, and shall similarly ensure that a legal guardian be appointed, cf. the first paragraph."

Section 65
Foster care

"For the purpose of this Act, the term 'foster care' refers to a situation in which a child protection committee entrusts special foster parents with the care of a child for at least three months where it has been established that:

...

e. the child, who has come to Iceland without its guardians, is under the care of a child protection committee or [has] asylum or a temporary residence permit in Iceland.

Foster care may be of two kinds, permanent or temporary. 'Permanent foster care' entails the continuation of the arrangement until duties of guardianship cease under the law. The foster parents generally undertake the duties of guardianship unless some other arrangement is deemed to better serve the needs and interests of the child, in the judgment of the child protection committee. A contract on permanent foster care shall generally not be concluded until after a trial period which shall not exceed one year. 'Temporary foster care' entails the continuation of the arrangement for a limited time when it can be expected that the situation may be improved so that the child will be able to return to its parents without substantial disruption of its personal circumstances, or when another remedial measure is expected to be available within a limited time. Temporary foster care shall not last for more than two years in total, save in absolutely exceptional cases when it serves the interests of the child.

The objective of foster care under the first paragraph is to ensure a child's upbringing and care within a family, in keeping with his or her needs. Good conditions shall be ensured for a child with foster parents, and the [foster parents] shall treat the child with care and consideration, and seek to promote the child's mental and physical development. The rights and obligations of foster parents shall be further specified in a foster care agreement."

Section 66
Licencing

"Those who wish to provide foster care for a child shall apply to the Government Agency for Child Protection. The child protection committee in the applicants' home district shall make a report on their fitness to provide foster care for a child, in accordance with further rules to be issued in regulations."

32. The relevant provisions of Act no. 96/2002 on Foreign Nationals, which was applicable at the time of the events, read as follows at the material time:

Section 1
Scope

"The provisions of this Act apply to the authorisation of foreign nationals to enter Iceland and [the authorisation of] their stay in the country. In accordance with this Act, a foreign national is every individual who does not have Icelandic citizenship.

..."

Section 11
Basic requirements for a residence permit

"...

Under special circumstances, a residence permit may be granted to a foreign national who comes to Iceland for a legitimate and specific purpose if the conditions of the first and second paragraphs are satisfied, even though the person does not fulfil the requirements for a residence permit under sections 12 to 12 e or section 13. Such a residence permit shall not be granted for more than one year at a time, and cannot serve as the basis for a permanent residence permit."

33. The relevant provisions of Act no. 130/1999 on Adoption read as follows:

Section 2
Who can adopt

"A married couple or individuals who have been cohabiting for a period of at least five years shall jointly take part in the adoption process, as only these persons may jointly adopt children, subject to any exemptions provided for in this Article.

One of the spouses, or one of the individuals in a cohabitation [arrangement], may, however, with the consent of the other person, be granted permission to adopt the child or the adopted child of the other person.

One of the spouses, or an individual who is in a cohabitation [arrangement], may furthermore be granted permission to adopt if the other person has disappeared or is in such a mental state as to not understand the meaning of adoption.

A single person may be granted permission to adopt under special circumstances and if the adoption is clearly beneficial for the child.

For the purposes of this Act, cohabitation means a cohabitation [arrangement] of two persons which is registered in the population register or which may be ascertained by other unequivocal evidence."

Section 7
Consent of the [person with custody] of the child, or [of] a legal guardian

"The consent of parents who have custody of a child is required for the adoption of the child.

...

If a child protection committee has custody of the child, the consent of the committee is required for the adoption.

Permission for adoption may be granted even though consent in accordance with paragraph 1 or paragraph 2 is lacking, if the child has been placed in foster care with the applicants and the circumstances of the child otherwise strongly recommend that he or she be adopted."

Section 8
Form and content of consent

"Consent to adoption shall be given in writing, and the person concerned shall confirm the consent before a member of staff of a District Commissioner, who confirms that the person concerned has been informed of the legal effects of consent and adoption.

Consent is not valid unless it has been confirmed three months after the birth of a child at the earliest, unless very special circumstances apply.

The consent of parents or a specially appointed legal guardian is valid even though prospective adoptive parents have not been specified, in the event that the consent relates to a child's placement for adoption with persons to be decided upon by the child protection committee. Otherwise, approval is not valid unless the names of the prospective adoptive parents have been specified.

In the event that the consent to adoption is more than 12 months old, then it shall be reconfirmed before the application for adoption is decided upon, unless special circumstances apply."

Section 9
Consent granted abroad

"The Minister [of Justice] may decide that consent given before a competent authority, court or institute in a foreign country equates to consent given before a member of staff of a District Commissioner (cf. section 8, paragraph 1), and then exceptions from the principles of section 8, paragraphs 2-4, may be granted."

Section 14
Fee

"Permission for adoption shall not be granted if any person who is to give his or her consent to the adoption receives or pays a fee or receives benefits in relation to the consent, including for loss of income. Written declarations on this subject by the persons concerned may be required."

Section 27
The adopted child's access to information

"When an adopted child has reached the age of 18, he or she has the right to receive the available information from the Ministry [of Justice] as to who his or her biological parents or previous adoptive parents are."

Section 36
Jurisdiction in adoption cases

"A person who resides in Iceland can only adopt a child in accordance with the provisions of this Act."

Section 39
Adoption abroad that goes against the basic principles of Icelandic laws

"An adoption which takes place abroad is not valid in Iceland if it is contrary to the basic principles of Icelandic laws (*ordre public*)."

34. The relevant provisions of Act no. 160/1995 on the Recognition and Enforcement of Foreign Decisions on Child Custody, the Return of Abducted Children, and so on read as follows:

Section 2

"The Minister [of Justice] may decide that this Act shall be applied to dealings between Iceland and States which are not parties to the European Convention [on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children] or the Hague Convention [on the Civil Aspects of International Child Abduction]."

Section 7

"An application for recognition or enforcement of a decision shall be rejected if:

1. it is manifestly not in conformity with the fundamental principles of Icelandic legislation on the legal status of families and children,

..."

35. The relevant provisions of Inheritance Act no. 8/1962 read as follows:

Section 34

"Any person who has attained the age of 18 or has married can, by virtue of [his or her] age, dispose of his or her property by means of a will.

A will shall only be valid if the testator is of such sound mind as to be capable of reasonably making the arrangement."

Section 35

"If descendants, including descendants by adoption, or a spouse by marriage stand to inherit, the testator can only dispose of one third of his or her property by means of a will."

36. Icelandic Supreme Court case no. 661/2015 concerned the parentage of two children born via gestational surrogacy in Idaho in the United States, using the gametes of their intended father. The children were born in early 2014 and brought back to Iceland by their intended parents, where they applied to Registers Iceland for the children's registration. Registers Iceland

refused the children's registration on the same grounds as those in the present case. The children were subsequently granted Icelandic citizenship by an Act of Parliament. Upon registering them as citizens, Registers Iceland registered the intended father as both the children's father and the person with custody of them, considering that the judgment of an Idaho district court confirming that the intended parents were the children's parents had established the intended father's biological parentage in a manner consistent with Icelandic law. However, Registers Iceland refused to register the intended mother as the children's mother, citing the fundamental rule of Icelandic law that a woman who gave birth to a child was always considered its mother. The intended parents sued and demanded that the intended mother be registered as the children's mother. By a judgment of 2 July 2015, the District Court of Reykjavik found in favour of the intended parents, concluding that the refusal to register the intended mother as the mother had unlawfully interfered with the family's right to respect for private and family life. The Government appealed against that judgment, but prior to that appeal Registers Iceland complied with the District Court's ruling and registered the intended mother as the children's mother. The Government's appeal to the Supreme Court was therefore dismissed by a judgment of 9 June 2016, as an appeal to overturn the District Court's ruling was considered incompatible because that ruling had already been complied with.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

37. The applicants complained of a violation of their right to respect for private and family life as provided for in Article 8 of the Convention, which reads as follows:

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

A. Admissibility

1. The parties' submissions

38. The Government submitted that the applicants had not exhausted domestic remedies, as neither the first nor the second applicant had applied to adopt the third applicant after their divorce, either as individuals or with

their new spouses. The Government argued that this avenue was available to the applicants, and that it would have resulted in the recognition of the parent-child relationship between the applicants, rendering it an effective domestic remedy which had not been exhausted. The Government therefore submitted that the applicants had not complied with the admissibility criteria of Article 35 § 1 and that their application should be declared inadmissible.

39. The Government furthermore submitted that the application was manifestly ill-founded within the meaning of Article 35 § 3 (a), and should, as such, be declared inadmissible.

40. The applicants objected to the Government's submissions concerning the admissibility of their complaints. They submitted that an adoption application was not a remedy to be exhausted prior to applying to the Court, and that the District Commissioner's reaction to the adoption application which they had submitted prior to the divorce, coupled with the fact that their reply had gone unanswered for half a year before they had withdrawn the application, had indicated that it would not have been approved in any event (see paragraphs 14 to 16 above). Furthermore, the applicants submitted that adoption was no longer available to the first two applicants jointly, as they were now divorced. Moreover, they had not wanted to upset the balance of the family which they had created by either the first or the second applicant applying on her own to adopt the third applicant, as, from a formal perspective, that would have had the effect of severing the ties that the third applicant had with the other parent.

2. *The Court's assessment*

41. The Court considers that the Government's objection concerning the exhaustion of domestic remedies raises issues closely linked to the merits of the complaints. Thus, the Court decides to join this objection to the merits of the case, and considers that the issue falls to be examined below.

42. As for the remaining objection, the Court finds that the applicants' complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, nor are they inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

(a) The applicants

43. The applicants submitted that the refusal by the authorities to register the first and second applicants as the third applicant's parents had amounted to an interference with their right to respect for private and family life. They argued that the refusal had prevented them from enjoying a stable and legal

parent-child relationship, and that all three of them had been affected by the interference, since the first two applicants did not have legal or physical custody of the third applicant, whom they regarded as their son.

44. The applicants also submitted that the refusal to recognise the third applicant's birth certificate, which had been issued in accordance with California law, had violated Article 8.

45. The applicants maintained that the refusal had not been in accordance with the law. Although surrogacy was illegal in Iceland, they maintained that the ban on surrogacy did not apply extraterritorially, and that they had gone through the surrogacy process in California in full accordance with the law of that state.

46. The applicants also maintained that the best interests of the child had not been sufficiently taken into account by the authorities. In this regard, the applicants submitted that the first and second applicants and their new spouses had undergone a screening process and an evaluation of their ability to provide for and care for the third applicant in relation to his placement in their foster care, pursuant to section 66 of the Child Protection Act (see paragraph 31 above). Their results had been very good, and the third applicant was well cared for by the first and second applicants. They had also protected his interests by applying for him to have citizenship, and had informed him of the manner of his birth, as he had had a right to know.

47. The applicants submitted that the child's stable social relationship with the first and second applicants was not sufficiently well protected by the foster system. *Inter alia*, the refusal to recognise them as his parents had resulted in the third applicant not having inheritance rights *vis-à-vis* the first and second applicants, and vice versa (see paragraph 35 above). In addition, the applicants submitted that they lived in a state of uncertainty which had caused them anguish and distress, forcing them to maintain a position as foster parents and foster child.

(b) The Government

48. The Government acknowledged that the non-recognition of a parent-child relationship between the applicants had amounted to an interference with the private life of the third applicant, but submitted that the non-recognition had not interfered with the private life of the first and second applicants, or with the applicants' family life. In any event, they submitted that there had been no violation of the applicants' right to respect for their private and family life.

49. The Government submitted that there had been extensive national and political debate on the subject of surrogacy in the country. This had included a working group on surrogacy appointed by the Minister of Health, whose 2010 report had concluded that surrogacy should not be legalised. Following a successful parliamentary proposal in 2011, a bill legalising altruistic surrogacy with a biological link to one of the intended parents had

been introduced in Parliament twice, but had not been voted on. The Government therefore submitted that adoption was the only available avenue for intended parents to have their relationship with a child born by way of surrogacy recognised as a parent-child relationship.

50. The Government submitted that Article 8 of the Convention did not guarantee the right to found a family or the right to adopt. They furthermore reasoned that the State should enjoy a wide margin of appreciation when deciding on matters concerning surrogacy and assisted reproduction techniques, particularly in cases such as the present one, where there was no biological link between the child and the intended parents. The Government emphasised that domestic law placed a ban on surrogacy which the applicants should not be allowed to circumvent by arranging surrogacy abroad.

51. The Government reasoned that the applicants had not been through any official screening process in Iceland, such as those in place for adoption procedures, and the fact that the surrogacy in this case had been commercial in nature had created a risk of the surrogate mother and the child being exposed to exploitation and abuse. They submitted that the ban on surrogacy excluded the possibility that a woman who gave birth to a child could relinquish her natural status as its mother, and prevented a woman from being pressured to allow her body to be used to bear a child with whom she must then sever all ties. They also submitted that the ban on surrogacy protected children's right to know about their origins, as children born by way of surrogacy would face difficulties in seeking information about their biological parentage.

2. *Third-party interveners*

(a) Ordo Iuris

52. The third-party intervener Ordo Iuris submitted that there was no European consensus on the lawfulness of surrogacy arrangements, and that member States should therefore be afforded a wide margin of appreciation in determining whether and how to recognise parent-child relationships between children born through surrogacy and their intended parents.

53. Ordo Iuris also argued that the right to respect for private life did not oblige member States to recognise foreign birth certificates which did not reveal information about a child's biological mother, particularly as this could undermine the child's opportunity to obtain information about his or her biological identity.

54. Lastly, Ordo Iuris argued that Article 8 did not protect a "potential relationship" between an intended parent and a child born by way of surrogacy, in the absence of a genetic relation or an emotional bond between the two.

(b) The AIRE Centre (Advice for Individual Rights in Europe)

55. The third-party intervener the AIRE Centre submitted extensive material on international surrogacy arrangements and the various legal implications they entailed. It submitted that the Court should ascertain whether the child's best interests had been duly and demonstrably assessed, if necessary with the assistance of an independent representative. It reasoned that the Court should have regard not only to the Convention and its own case-law on the subject of surrogacy, but also to the United Nations Convention on the Rights of the Child (CRC) and the general comments on its provisions made by the Committee on the Rights of the Child. Consequently, the best interests of the child should be accorded at least primary consideration in decisions concerning the recognition of legal parentage in such cases, as was required by Article 3 of the CRC and the Committee on the Rights of the Child's General Comment No. 14. Furthermore, referring to Article 21 of the CRC, the AIRE Centre submitted that if the question of the recognition of intended parents' parentage were treated as being analogous to cases of adoption, then the best interests of the child should be of paramount importance.

3. The Court's assessment

(a) Whether a "family life" existed between the applicants

56. The existence or non-existence of "family life" is essentially a question of fact depending upon the existence of close personal ties. The notion of "family" in Article 8 concerns marriage-based relationships, and also other *de facto* "family ties", including between same-sex couples, where the parties are living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy (see *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 140, 24 January 2017, and the sources cited therein, and *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 130, 21 July 2015).

57. The provisions of Article 8 do not guarantee either the right to found a family or the right to adopt. The right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family, or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father, or the relationship that arises from a genuine marriage, even if family life has not yet been fully established, or the relationship between a father and his legitimate child even if it proves, years later, to have had no biological basis, or the relationship that arises from a lawful and genuine adoption (see *Paradiso and Campanelli*, cited above, § 141, and the sources cited therein).

58. The Court must ascertain whether, in the circumstances of the case, the relationship between the first two applicants and the child, the third applicant, came within the sphere of family life within the meaning of

Article 8. At the outset, the Court notes that the first and second applicants divorced whilst the judicial proceedings were ongoing at national level, and before the Supreme Court of Iceland rendered the judgment in their case on 30 March 2017 (see paragraph 12 above). Before this Court, the question of whether Article 8 is applicable will therefore be examined by taking account of the facts at the point in time when the Supreme Court of Iceland delivered its judgment in the present case, in particular having regard to the way in which the factual ties and relationships between the first two applicants, together and subsequently individually, and the third applicant had developed from his birth up until the end of March 2017.

59. The Court notes that it is not contested that there is no biological link between the three applicants. The situation is therefore comparable to that in the leading case of *Paradiso and Campanelli* (cited above), where a child born by way of surrogacy abroad was removed from its intended parents shortly after their arrival in their home country, taken into State care and later adopted by another family. In that case, the Court found that the conditions for the existence of "family life" had not been met, owing to the short duration of the relationship which the intended parents had had with the child, which had only lasted about eight months, and the uncertainty of the ties from a legal perspective, in spite of the existence of a parental project and the quality of their emotional bonds. However, as the Court explained in *Paradiso and Campanelli* (cited above, §§ 148-149), it does accept, in certain situations, the existence of *de facto* family life between an adult or adults and a child in the absence of biological ties or a recognised legal tie, provided that there are genuine personal ties. It is therefore necessary, in the instant case, to consider the quality of the ties, the role played by the applicants *vis-à-vis* the third applicant and the duration of both their cohabitation all together and the third applicant's subsequent cohabitation with the first two applicants individually (ibid., § 151).

60. At the outset of this assessment the Court notes that unlike in the situation in *Paradiso and Campanelli* (cited above), the relationship between all three applicants was not severed by decisions of the national authorities. On the contrary, the third applicant was initially placed in the first and second applicants' foster care in accordance with national law, an arrangement which was subsequently made permanent until their divorce in May 2015. Following the divorce and until the Supreme Court delivered its judgment on 30 March 2017, a new foster care arrangement was put in place whereby the third applicant spent alternate years with the first and then the second applicant, with equal access granted to the applicant not acting as the foster parent at that time (see paragraph 12 above). Although not directly relevant for the Court's assessment, the Court further reiterates that the third applicant was subsequently placed in the permanent foster care of the first applicant and her spouse on 18 December 2019, but continues to enjoy equal access to the second applicant and her spouse.

61. The Court notes that surrogacy is unlawful in Iceland and is subject to criminal liability if it takes place within Icelandic jurisdiction (see paragraph 28 above). The Court also observes that the basic principle of motherhood under Icelandic law, as submitted by the Government and evidenced in, *inter alia*, section 6(1) of Children Act no. 76/2003 (see paragraph 27 above), is that the woman who gives birth to a child is considered its mother. Under these circumstances, the Court accepts that the ties between the three applicants were legally uncertain at the outset, as in the case of *Paradiso and Campanelli* (cited above). However, it cannot be overlooked that the third applicant has been in the uninterrupted care of the first and second applicants since he was born in February 2013. It follows that upon the delivery of the final domestic judgment at the end of March 2017, the three applicants had been bonded for over four years: the third applicant's entire life. The third applicant remained with the first two applicants, in their legally established foster care, after the initial refusal by Registers Iceland and throughout the judicial proceedings before the District Court and the Supreme Court, initially when all the applicants were together, and subsequently when the third applicant was placed with the first two applicants individually; that arrangement proceeded without any interference by the authorities other than a decision on legal custody and the appointment of a legal guardian, taken three months later. The relationship between the first two applicants and the third applicant was thus clearly strengthened by the passage of time, reinforced by the legally established foster care arrangement. The first and second applicants argued that they had assumed the role of the third applicant's parents, and that he regarded them as such. The quality of their bond has not been contested by the Government.

62. In the light of the above, the Court concludes, applying the test for the applicability of "family life" under Article 8 of the Convention, as laid down in *Paradiso and Campanelli* (cited above, §§ 148-151), that the requirements of "family life" have been fulfilled on the particular facts of the present case. In this regard, the Court has taken account of the long duration of the first two applicants' uninterrupted relationship with the third applicant, the quality of the ties already formed and the close emotional bonds forged with the third applicant during the first stages of his life, reinforced by the foster care arrangement adopted by the national authorities and not contested by the Government before the Court.

(b) Whether there was a violation of the applicants' right to respect for family life

(i) Whether there was an interference with the right to respect for family life

63. Having established that the applicants' complaint concerned their "family life" within the meaning of Article 8, the Court also considers that the refusal to recognise the first and second applicants as the third

applicant's parents, despite the Californian birth certificate to that effect, amounted to an interference with the three applicants' right to respect for that family life (see *Mennesson v. France*, no. 65192/11, § 49, ECHR 2014 (extracts)). Under Article 8 § 2, such an interference must be in accordance with the law, pursue one or more of the legitimate aims listed in the provision and be necessary in a democratic society in order to achieve the aim or aims concerned.

(ii) Whether the interference was in accordance with the law

64. The Court notes that there was no explicit legal provision in Icelandic law which established a general rule on how to determine who was considered a child's mother. However, the Supreme Court's judgment gave detailed reasoning as to why it considered that the general rule on maternity under Icelandic law was that the woman who gave birth to a child was considered its mother (see paragraph 23 above). In this regard, the Supreme Court reiterated the legal prohibition of surrogacy established in the fourth paragraph of section 5 of Act no. 55/1996 on Artificial Fertilisation and the Use of Human Gametes and Embryos for Stem Cell Research. Furthermore, the Supreme Court noted that in situations involving assisted conception treatment, the first paragraph of section 6 of Children Act no. 76/2003 provided that the woman who gave birth to a child was considered its mother, while the second paragraph provided that a woman who consented to her wife undergoing such treatment was considered the child's parent. Considering these provisions, and the ban on surrogacy, the Supreme Court considered that only the woman who gave birth to a child following artificial fertilisation could be considered its mother, and that consequently neither the first nor the second applicant could be considered the third applicant's mother under Icelandic law. Considering that this interpretation of domestic law is neither arbitrary nor manifestly unreasonable, the Court concludes that the refusal to recognise the first and second applicants as the third applicant's parents had a sufficient basis in law.

(iii) Whether the interference pursued a legitimate aim

65. According to the Government's submissions, the ban on surrogacy served to protect the interests of women who might be pressured into surrogacy, as well as the rights of children to know their natural parents. In the light of this, the Court finds that the refusal to recognise the first and second applicants as the third applicant's parents pursued the legitimate aim of protecting the rights and freedoms of others (see *Mennesson*, cited above, § 62, and *Paradiso and Campanelli*, cited above, § 177).

(iv) Whether that interference was necessary in a democratic society

(1) Relevant principles

66. The Court reiterates that in determining whether an impugned measure was "necessary in a democratic society", it will consider whether, in the light of the case as a whole, the reasons adduced to justify that measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 (see *Paradiso and Campanelli*, cited above, § 179, and the sources cited therein).

67. In cases arising from individual applications the Court's task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it. Consequently, the Court's task is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating the complex and sensitive matter of the relationship between intended parents and a child born abroad as a result of commercial surrogacy arrangements, which are prohibited in the respondent State (ibid., § 180, and the sources cited therein).

68. According to the Court's established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests. In determining whether an interference was "necessary in a democratic society" the Court will take into account that a margin of appreciation is left to the national authorities, whose decision remains subject to review by the Court for conformity with the requirements of the Convention (ibid., § 181).

69. The Court reiterates that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when deciding any case under Article 8 of the Convention. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (ibid., § 182). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I, and *A, B and C v. Ireland* [GC], no. 25579/05, § 232, ECHR 2010). There will usually be a wide margin of appreciation accorded if the State is required to strike a balance between competing private and public interests or Convention rights (see *Paradiso and Campanelli*, cited above, § 182, and the sources cited therein).

70. As regards the Court's recognition that the States must in principle be afforded a wide margin of appreciation regarding matters which raise delicate moral and ethical questions on which there is no consensus at European level, the Court refers, in particular, to the nuanced approach adopted on the issue of heterologous assisted fertilisation in *S.H. and Others v. Austria* ([GC], no. 57813/00, §§ 95-118, ECHR 2011), and to the analysis of the margin of appreciation in the context of surrogacy arrangements and the legal recognition of the parent-child relationship between intended parents and the children thus legally conceived abroad in *Mennesson* (cited above, §§ 78-79).

(2) Application of the principles to the present case

71. The Court notes that the three applicants' actual enjoyment of their family life was not interrupted by an intervention by the respondent State. On the contrary, the respondent State took measures to have the third applicant fostered by the first and second applicants, and it seems that their joint adoption of the third applicant was an option open to them until their divorce. Upon their divorce, the respondent State concluded a new foster care agreement with the first applicant, which was set on the condition that the second applicant continue to enjoy equal custody of him. Thus, the respondent State took steps to ensure that the three applicants could continue to lead a family life, despite the non-recognition of a parental link and despite the first and second applicants' divorce. Although the Court recognises that the non-recognition has affected the applicants' family life, the enjoyment of that family life was also safeguarded by the foster care arrangement being rendered permanent, which must be considered to substantially alleviate the uncertainty and anguish cited by the applicants (see paragraph 47 above).

72. Additionally, the Court notes that the respondent State granted the third applicant citizenship by a direct Act of Parliament, which had the effect of regularising and securing his stay and rights in the country. Actual, practical obstacles to the enjoyment of family life created by the non-recognition of a family link therefore seem to have been limited (see, for example, *Mennesson*, cited above, § 92).

73. The Court reiterates that the final decision which is the subject of the present assessment is the judgment of the Supreme Court of Iceland of 30 March 2017, wherein the Supreme Court rejected the applicants' claims to annul the refusal to register the parental link and oblige Registers Iceland to register the third applicant as the first and second applicants' son (see paragraphs 22 to 24 above). Prior to the rendering of the Supreme Court's judgment and subsequent to their divorce, the first and second applicants withdrew their application to adopt the third applicant of their own motion, and that adoption application was not the subject of judicial proceedings. Thus, no final determination has been made as to the first and second

applicants' right to adopt the third applicant. The issue before the Court is therefore limited to the matter of registration of a parental link, which was the subject of the applicants' judicial proceedings that were concluded by a final judgment of the Supreme Court of Iceland on 30 March 2017 (see paragraphs 22 to 24 above). The Government's objection that the applicants have not exhausted domestic remedies is accordingly dismissed.

74. The Court nevertheless notes the Government's submission that either the first or the second applicant may still apply to adopt the third applicant, as individuals or together with their new spouses. Although mindful of the practical problems that might arise due to the fact that only one of the first two applicants can be permitted to adopt the child, the Court takes this possibility into account in its holistic examination of the necessity of the interference, in particular as regards the Article 8 rights of the child, the third applicant.

75. Considering all of the above, in particular the absence of an indication of actual, practical hindrances in the enjoyment of family life, and the steps taken by the respondent State to regularise and secure the bond between the applicants, the Court concludes that the non-recognition of a formal parental link, confirmed by the judgment of the Supreme Court, struck a fair balance between the applicants' right to respect for their family life and the general interests which the State sought to protect by the ban on surrogacy. The State thus acted within the margin of appreciation which is afforded to it in such matters. There has accordingly been no violation of Article 8 of the Convention with regard to the applicants' right to respect for their family life.

(c) Whether there was a violation of the applicants' right to respect for private life

76. The Court observes that the arguments submitted by the applicants in relation to their complaint concerning respect for their "private life" are in principle the same as those submitted in relation to their complaint concerning respect for their "family life". In the light of this, the Court sees no reason to reach a different conclusion as to the former complaint. There has accordingly been no violation of Article 8 with regard to the applicants' right to respect for their private life.

II. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

77. The applicants complained that they had been discriminated against in the enjoyment of their right to respect for private and family life on account of their status, in breach of Article 14 of the Convention, taken in conjunction with Article 8. Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

78. The applicants submitted that there were known instances where other children born via a surrogate mother had been allowed to have the parentage of their intended parents registered, and referred to another Icelandic court case concerning surrogacy (see paragraph 36 above). They submitted that they had been discriminated against in this regard.

79. An examination by the Court of the material submitted to it does not disclose any appearance of a violation. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 8 admissible and the remainder of the application inadmissible;

2. *Joins to the merits* the Government's preliminary objection concerning the exhaustion of domestic remedies and *dismisses* it;

3. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 18 May 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Paul Lemmens
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Lemmens is annexed to this judgment.

P.L.
M.B.

CONCURRING OPINION OF JUDGE LEMMENS

1. It is not without some hesitation that I agreed with my colleagues that there has been no violation of Article 8 of the Convention insofar as that conclusion relates to the complaint about the alleged violation of the right to respect for private life (see paragraph 76 of the judgment). In this separate opinion, I would like to explain the reasons for my hesitation.

2. The judgment examines in detail the complaint concerning the right to respect for family life (see paragraphs 56-75). When it comes to the complaint regarding the right to respect for private life, it merely notes that the applicants' arguments relating to their private life are "in principle the same" as those submitted with respect to their family life, and observes that, "in the light of this", there is no reason to reach a conclusion that is different from the one with respect to family life (see paragraph 76 of the judgment).

It seems to me that private life and family life are conceptually different, and that complaints relating to these two aspects of Article 8 should therefore in principle be analysed independently from each other. Why not in this case?

3. Insofar as the applicants invoke a violation of their right to respect for *family life*, they complain about the refusal to register the first and the second applicant as the third applicant's parents (see paragraph 43 of the judgment). They argue that the State's interference has affected the stability of the "social relationship" existing between the three applicants (see in particular paragraph 47 of the judgment). On this issue, the Court finds that the non-recognition of a formal parental link, despite the Californian birth certificate to that effect, does not exceed the margin of appreciation afforded to the State. In order to come to that conclusion, it takes into account "the absence of an indication of actual, practical hindrances in the enjoyment of family life, and the steps taken by the respondent State to regularise and secure the bond between the applicants" (see paragraph 75 of the judgment).

The family-life complaint is thus basically considered from the point of view of the stability of the mutual enjoyment by parent and child of each other's company, which is indeed a fundamental element of family life (see, among many others, *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII; *K. and T. v. Finland* [GC], no. 25702/94, § 151, ECHR 2001-VII; and *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 202, 10 September 2019).

4. As the case-law shows, the right to respect for *private life* is usually concerned with another aspect of the situation arising from a gestational surrogacy agreement, namely the right of the child to the recognition of the legal parent-child relationship with the intended father (see *Mennesson v. France*, no. 65192/11, §§ 80, 96 and 99, ECHR 2014 (extracts), and *Labassee v. France*, no. 65941/11, §§ 38, 75 et 79, 26 June 2014), as well as with the intended mother (see *Advisory opinion concerning the recognition*

in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother [GC], request no. P16-2018-001, French Court of Cassation, § 46, 10 April 2019, and *D v. France*, no. 11288/18, § 54, 16 July 2020). That right is deemed to be part of the child's right to establish details of its identity as an individual human being (see *Mennesson*, cited above, § 96, and *Labassee*, cited above, § 75).

The Court has thus far limited the child's right to recognition of the legal parent-child relationship to relationships involving a biological link with at least one of the intended parents (see the *Advisory opinion* cited above, § 36). It has, however, indicated that "it may be called upon in the future to further develop its case-law in this field, in particular in view of the evolution of the issue of surrogacy" (ibid.).

It seems to me that future development should not at all be excluded. The negative impact which the lack of recognition of a legal relationship between the child and the intended parents has "on several aspects of that child's right to respect for its private life" (ibid., § 40, with an enumeration of a number of disadvantages for the child) applies to all children born through a surrogacy arrangement carried out abroad. Indeed, for the children the impact is the same, whether or not one or both of their intended parents has a biological link with them. In both situations, I wonder whether the legal limbo in which a child finds itself can be justified on the basis of the conduct of its intended parents or with reference to the moral views prevailing in society.

It is true that adoption is a means of recognising a parent-child relationship. However, as the facts of the present case show, adoption is not always a solution for all the difficulties which the child may be experiencing (see paragraph 74 of the judgment).

5. It is for the above reasons that I hesitated to agree with the conclusion adopted in paragraph 76 of the judgment.

What convinced me, however, was that this case is not the right one to deal specifically with the third applicant's right to respect for private life.

Indeed, the proceedings before the domestic courts dealt with the authorities' refusal to register the relationship between the three applicants. While the courts in their decisions referred to private and family life, their reasoning seems to have focused on the interference with family life. Following this approach on the part of the domestic courts, the applicants in their application to the Court relied explicitly on the right to respect for family life and did not mention the right to respect for private life.

In these circumstances, I agreed with the conclusion that there is in this case no reason to reach a different conclusion with regard to private life than in respect of family life.

6. The scope of the child's right to the establishment of a legal parent-child relationship, an element of its right to respect for private life, must be left for further consideration in another case.