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Austria - Constitutional Court case of 11 October 2012

The applicants are children born presumably in a surrogacy arrangement in Ukraine to two Austrian nationals. Even though the custody of the commissioning parents over the applicants was confirmed under the Austrian law, their parentage and consequently the Austrian nationality of the applicants was initially denied. The Court considered that the best interests of the child prevail in such a case over the prohibition of surrogacy under Austrian law, and confirmed the applicants' right to Austrian nationality.

Case name (in original language) : B99/12 ua
Case status: Decided
Case number: B99/12 ua
Citation:
https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09878989_12B00099_00/JFT_09878989_12B0
Date of decision: 11/10/2012
State: Austria
Court / UN Treaty Body: Constitutional Court of Austria (Verfassungsgerichtshof)
Language(s) the decision is available in: German
Applicant's country of birth: Ukraine
Applicant's country of residence: Ukraine
Legal instruments: European Convention on Human Rights (ECHR)
Key aspects: Acquisition of nationality, Birth registration, Burden of proof, Childhood statelessness, Determination/confirmation of nationality, LGBTIQ families , Respect for private and family life, Standard of proof, Surrogacy & reproductive technology
Relevant Legislative Provisions:

Article 8 ECHR

Facts

The two applicants are twins born in June 2010 in Ukraine. Their birth certificates issued by the local registry office in Ukraine list Ms. T. L. as the mother of the children and Mr. P. L. as the father, both of whom are Austrian nationals. In order to be able to leave the country with the children, Mr P.L. applied to the Austrian embassy in Kiev for the applicants to be issued with emergency travel documents, and submitted their Ukrainian birth certificates, translated into German and with an apostille legalisation. In the course of the conversation about the circumstances of the birth of the children, the responsible clerk at the embassy suspected that, contrary to the information provided by Mr. P. L., his wife did not give birth to the applicants, but instead they were born in a surrogacy arrangement. The L. couple were subsequently questioned by the Austrian Federal police, while still in Kiev, but no criminal proceedings were initiated. Due to the suspicion that the applicants were not born from Ms. T.L., but from an (unknown, Ukrainian) surrogate mother, proceedings were initiated in Austria to determine the nationality of the children.

The couple has always denied any involvement of a surrogate mother, and provided various pieces of evidence of T.L's pregnancy. However, T.L. refused to be examined by a doctor designated by the Austrian embassy to confirm that she has given birth.

In August 2011, the Austrian youth welfare agency applied to an Austrian court to determine who are the legal custodians of the applicants, and the L. couple was officially recognised as custodians of the twins under Austrian law. On 7 December 2011 the authorities determined that the applicants are not Austrian nationals, despite the L. couple having been recognised as custodians. The latter decision was appealed.

Legal arguments by the applicant

The applicants' argued that their constitutional right to equal treatment among nationals has been violated, as well as their rights to private and family life in line with Article 8 ECHR. It is not a given that they would be able to reside in the same household with their parents if their Austrian nationality is not recognised, as the relevant immigration procedures are complex, and involve the requirement of minimum income for the sponsor as well as other standards the family might not

meet.

They argued that decision to deny them Austrian nationality is arbitrary, as the suspicion of birth from surrogacy is based on mere speculation and alleged media reports, without any proof than in their specific case they were born from a surrogacy arrangement. Parents of the applicants have always denied any involvement of surrogacy in the birth of the applicants. According to the parents, Ms. T. L. became pregnant through artificial insemination with her husband's semen and gave birth to the applicants in a clinic in Ukraine by caesarean section. Their reason to undergo artificial insemination and childbirth in Ukraine was that Ms. T.L., who was herself born in Moscow, wanted to be as close as possible to her family, and have a trusted doctor from Moscow conduct the procedure, and Ukraine was the closest place where this could happen without having to apply for a visa.

The parents of the applicants argued that they fulfilled their obligation to cooperate in the procedure to clarify the nationality of the children. Such obligation cannot be understood to entail undergoing a gynaecological examination, or breaching confidentiality.

Legal arguments by the opposing party

The authorities insisted that based on their former experiences in comparable cases, they had good reasons to assume the applicants were born from a surrogacy arrangement. They argued that the Ukrainian births certificates of the applicants could not be considered as reliable evidence about motherhood, due to surrogacy being legal in Ukraine.

Decision & Reasoning

The Court reasoned as follows:

“Protection of family life [as derived from Article 8 ECHR] also includes the child's right to nationality based on descent from the parents (cf. ECHR 11.10.2011, Genovese case, Appl. 53.124 / 09). An encroachment on the right constitutionally guaranteed by Article 8 of the ECHR is unconstitutional if the decision that caused it lacked legal basis, was based on a legal provision that contradicts Article 8 ECHR, or if the authority, when issuing the decision, applied a constitutionally unobjectionable legal basis in a constitutionally unacceptable way. The latter only occurs if the authority has committed such a serious error that it would have to be

categorised as unlawful, or if it applied legal provision in an unconstitutional way, in particular one that contradicts Article 8 (1) ECHR and does not comply with criteria of Article 8 (2) ECHR (see VfSlg. 11.638 / 1988, 15.051 / 1997, 15.400 / 1999, 16.657 / 2002).

“The authority assumes that the question of legal motherhood of the applicants is to be exclusively determined on the basis of Austrian law […], whereby the unknown surrogate mother who is said to have given birth to the children would be the legal mother. According to the authority, if she is not an Austrian national and is not married to an Austrian national, the children she gave birth to - regardless of the nationality of the genetic parents - would not acquire Austrian nationality through descent.”

“4. The authority makes a mistake that touches upon constitutional issues when it considers that the Austrian public policy standards stand in the way of recognition of Ukrainian birth certificates and application of Ukrainian law relevant for the assessment of decent, solely because Ukraine allows surrogacy.”

“5. [The concept of] public policy includes the protected basic values of Austrian law (OGH 13.9.2000, 4 Ob 199 / 00v), i.e. the indispensable values that shape the Austrian legal system. The constitutional principles (especially human rights protected by the ECHR) play a key role here. [Those include] personal freedom, equality, the prohibition of ethnic, racial and religious discrimination, freedom of marriage, monogamy, the prohibition of child marriage and, in particular, protection of the best interests of the child."

“6. The position of the authority that the prohibition of surrogacy […] is part of public policy, and that therefore recognition of Ukrainian birth certificates and applicability of Ukrainian law through private international law is excluded because it allows surrogacy […] is unacceptable in light of the best interests of the child. It would obviously be contrary to the best interests of the child if, by refusing to recognise within the Austrian legal system foreign civil acts or documents legalised with an apostille about legal motherhood established abroad, the legal motherhood of the biological mother was denied to the child […], and instead the surrogate mother, who is neither biologically related to the child nor wants to or can establish a family relation with the child, would be forced into the legal role of the child’s mother.”

“In cases like this one, it is constitutionally excluded to base the assessment of the parentage (and consequently the nationality) of the child on Austrian law […]. Last but not least, the contrary would deny the child being under the custody of their biological and genetic parents (who are also part of the child’s factual family as “factual parents”), including the denial of any maintenance and property rights the children would derive from such custody. In addition, if the legal motherhood of the mother as designated by Austrian law is not recognised under the foreign legal system, [the children] do not acquire the nationality of the surrogate mother under the relevant foreign nationality law, as is the case in Ukraine where the applicants were born, resulting in the statelessness of the children.”

“In the light of Article 8 ECHR and the decisive importance that is attached to the best interests of the children […], in cases like the ones under review, the foreign legal system and thus the acquisition of Austrian nationality is decisive for the assessment of legal parenthood by descent […].”

“7. The authority has thus applied the relevant (Austrian) legal provisions in an unacceptable manner, and thereby violated the applicants’ right to respect for their private and family life.”

Decision documents

Verfassungsgerichtshof_11Oct2012.pdf

Outcome

The Court confirmed the applicant's entitlement to Austrian nationality, concluding that the best interests of the child prevail over the principle of prohibition of surrogacy.

Caselaw cited

ECHR, Genovese v Malta, application 53124/09, 11.10.2011.

VfSlg. 11.638 / 1988, 15.051 / 1997, 15.400 / 1999, 16.657 / 2002.