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Case Law Database

ECtHR - D.B. and others v. Switzerland

The case concerns two Swiss nationals in a registered same-sex partnership, who had a child in the United States through a surrogacy agreement. A US court had named both parents as the child's legal parents, but Switzerland only recognised the parent-child relationship of the genetic father and not the intended father. The intended father was unable to adopt the legally-recognised child of his registered partner as this option was, until January 2018, only open to married (heterosexual) couples. The Court found a violation of the child's right to respect for private and family life (Article 8 ECHR).

Case name (in original language) : Affaire D.B. et autres c. Suisse
Case status: Decided
Case number: nos. 58817/15 and 58252/15
Citation: European Court of Human Rights, D.B. and others v. Switzerland (application nos. 58817/15 and 58252/15), 22 November 2022
Date of decision: 22/11/2022
Court / UN Treaty Body: European Court of Human Rights
Language(s) the decision is available in: French
Applicant's country of residence: Switzerland
Legal instruments: European Convention on Human Rights (ECHR)
Key aspects: Birth registration, LGBTIQ families, Respect for private and family life, Surrogacy & reproductive technology
Relevant Legislative Provisions:

- Article 8, European Convention on Human Rights
- Article 14, European Convention on Human Rights

Facts

The first and second applicants, Swiss nationals, are a same-sex couple and legally registered partners. They entered into a surrogacy contract in the United States,

whereby an anonymous donor’s egg and the second applicant’s sperm were implanted into a surrogate’s uterus. Upon confirmation of pregnancy, a California court declared the first and second applicants to be the unborn child’s legal parents. The child (the third applicant) was born in 2011 in the USA, with US nationality, and the birth certificate reflected the court’s judgment.

Surrogacy is outlawed in Switzerland. In April 2011, the first and second applicants requested that Swiss authorities recognise the US judgment and copy the birth certificate into the relevant civil register. Their request was denied by the Register Office of the canton of St Gall. In 2013, the couple successfully appealed this decision, but the Federal Office of Justice then appealed the Administrative Court’s decision to the Federal Court. In May 2015, the Federal Court held that using surrogacy in California to circumvent the prohibition in Switzerland amounted to a material evasion of the law. It recognised the parent-child relationship of the genetic father (the second applicant), but not of the intended father (the first applicant).

In Switzerland, adoption was open only to married (heterosexual) couples until 1 January 2018, when it became possible to adopt the child of a registered partner. The applicants filed for adoption that day, which was granted on 21 December 2018.

The lack of legal recognition raised an issue under Article 8 (respect for private and family life) and Article 14 (prohibition of discrimination).

Legal arguments by the applicant

The applicants argued that, for seven years, domestic law had afforded them no possibility of recognising the parent-child relationship between the first and third parents. They argue that this invoked concrete obstacles, including the third applicant having no right of representation or power of decision over the third applicant which complicated his relationship with the child’s nursey, kindergarten and school, and required the consent of the second applicant for trips abroad. The applicants stated that adoption, in lieu of birth certificate recognition, was no remedy for the infringement of Article 8. The applicants argued that the refusal of recognition is not likely to ensure the protection of surrogate mothers; once surrogate motherhood has taken place, the child’s best interests must prevail and there is no longer any justification to protect the child from abstract commercialisation via refusal of recognition. The interference with the applicants’ protected rights did not therefore pursue any legitimate aim.

Furthermore, the applicants relied on Article 14 in conjunction with Article 8 to submit that the third applicant had suffered discrimination on the basis of birth (conception through surrogate motherhood) and as a child of a same-sex couple.

Legal arguments by the opposing party

The Government first argued that the case should be struck out as the dispute had been resolved – the situation complained of by the applicants had ceased to exist. It then justified the prior interference with private and family life as based on the pursuance of two of the legitimate aims listed in Article 8(2) of the Convention: the protection of health and the protection of the rights and freedoms of others, namely surrogate mothers and children born of surrogacy. It noted that the applicants had conceived the child through material evasion of domestic law, and recognising the birth certificate would render the national ban on surrogate motherhood largely ineffective. The Government argued that it had struck a fair balance between the interests of the applicants and of the State. The interference did not constitute a disproportionate threat to the child, who was sufficiently protected by the Swiss legal system. The child was not threatened with statelessness (having acquired Swiss nationality through the recognition of the genetic parent-child relationship), and the first applicant had certain rights over the child through his registered partnership with the second applicant. It argued there was an absence of concrete consequences resulting from not recognising the intended father. Furthermore, the Government argued that this limitation was within its margin of appreciation in respect of private and family life.

Decision & Reasoning

The Court considered that the consequences of the potential violation had not been ‘sufficiently removed’ for the Court to consider the dispute as resolved. The case additionally represents an issue of general interest, especially to other States parties, and is distinguishable from previous cases on the topic because it involved a same-sex couple in a registered partnership rather than a mixed-sex married couple.

The court considered that Switzerland’s refusal to recognise the US judgment concerning the parent-child relationship with the intended father was provided for by law. The extra-territorial surrogacy agreement amounted to a material evasion of the domestic prohibition on surrogacy. The refusal to accept parent-child relationships between children born through surrogacy abroad and their intended

parents is intended to discourage Swiss nationals from engaging with the practice extra-territorially, with the intended aim of protecting children and surrogate mothers. Therefore, the Court accepted, the interference at issue pursues two of the legitimate aims listed in Article 8 of the Convention, namely the protection of health and the protection of the rights and freedoms of others.

However, withholding recognition of the lawfully-issued foreign birth certificate without providing alternative means of recognising that relationship had not been in the best interests of the child. The Court emphasised that a child's right to respect for private life requires domestic law to provide a possibility of recognition of a legal parent-child relationship with the intended parent, and drew on the principles of *Mennesson v. France* (no 65192/11, ECHR 2014), that 'respect for private life requires that everyone be able to establish the details of his or her identity as a human being, which includes his or her filiation'. Without a definitive recognition of such a relationship, children can be left in a position of legal uncertainty regarding their identity in society and potentially be deprived of the chance to live and develop in a stable environment. The court found that Switzerland had overstepped its margin of appreciation by not making timely legislative provision for an alternative means, and thus found (by six votes to one) a disproportionate interference with the third applicant's right to respect for private life. Judge Elósegui dissented, arguing that Switzerland had been exposed to a form of retroactivity and no prejudice existed at the time of submission, Swiss legislature having resolved the problem by amending the law, and that the child's interests had been protected because their biological father was recognised.

The Court unanimously held that there was no violation of the right to respect for family life of the first and second applicants. The Court did not find that the non-recognition had in practice significantly affected the applicants' enjoyment of family life. Practical difficulties that the applicants would face as a result of evading the domestic ban on surrogacy were within the limits of compliance with Article 8, and were not an interference disproportionate to the aims pursued, namely the prohibition of surrogate motherhood.

The court unanimously held that there was no need to separately examine the complaint under Article 8 regarding the length of proceedings. By six votes to one, it also held that there was no need to examine separately the complaint under Article 14 in conjunction with Article 8 of the Convention. Dissenting, Judge Pavli argued that the third applicant had made an arguable claim of discrimination on the basis of

his parents’ sexual orientation in relation to the right to respect for private and family life.

The Court awarded 15,000 EUR in non-pecuniary damages.

Decision documents
Affaire D.B. et autres c. Suisse (FRENCH)
Outcome

The Court found by majority a violation of the right of the third applicant to respect for private life (Article 8). It unanimously found no violation of the intended and genetic fathers’ rights under Article 8, and by majority held that there was no need to rule separately on the complaint under Article 14.

Links to other relevant materials related to the case (blogs, analysis, articles, reports, etc.)

ECtHR's press release (English): https://hudoc.echr.coe.int/eng-press?i=003-7497177-10286969

Caselaw cited

- Mennesson v. France, no 65192/11, ECHR 2014
- D. v. France, no 11288/18, 16 July 2020
- Labassee v. France, no 65941/11, 26 June 2014
- Kaftaïlova v. Latvia, no 59643/00, 7 December 2007
- Konstantin Markin v. Russia, no 30078/06, ECHR 2012
- Karner v. Austria, no 40016/98, ECHR 2003-IX
- Paposhvili v. Belgium, no 41738/10, 13 December 2016
- Demir et Baykara v. Turkey, no 34503/97, ECHR 2008
- Blečić v. Croatia, no 59532/00, ECHR 2006-III
- Tănase v. Moldova, no 7/08, ECHR 2010