

Warsaw, 23<sup>rd</sup> July 2019

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**Ms. Ksenija Turković**  
**The European Court of Human Rights**  
**President of the First Section**  
Section I  
Council of Europe  
67075 Strasbourg-Cedex  
France

**Ref. *Segev Schlittner-Hay and Matan Schlittner-Hay against Poland***  
**Applications No. 56846/15 and 56849/15**

Pursuant to the letters from Ms. Renata Degener, the Deputy Section Registrar of the First Section of the European Court of Human Rights (hereinafter also referred to as “ECtHR”, “Court”) dated 18 June 2019 and 28 June 2019, granting leave to make written submission to the High Court by the 23 July 2019, the Helsinki Foundation for Human Rights (HFHR), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the Network of European LGBTIQ\* Families Associations (NELFA), The Child Rights International Network (CRIN), the Polish Society of Anti-Discrimination Law would like to respectfully present their written comments on the cases of *Segev Schlittner-Hay and Matan Schlittner-Hay against Poland* (Applications No. 56846/15 and 56849/15).

On behalf of the Helsinki Foundation for Human Rights and other interveners,

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**Amicus curiae brief**

**prepared by**

**the Child Rights International Network (CRIN)**

**the Helsinki Foundation for Human Rights (HFHR)**

**the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe)**

**the Network of European LGBTIQ\* Families Associations (NELFA)**

**the Polish Society of Anti-Discrimination Law**

**in the cases of**

**Schlittner-Hay v. Poland (Application no. 56846/15) and Schlittner-Hay v. Poland (Application no. 56849/15)**

**I. Introduction**

1. These written comments are submitted jointly by the Child Rights International Network (CRIN), the Helsinki Foundation for Human Rights, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the Network of European LGBTIQ\* Families Associations (NELFA) and the Polish Society of Anti-Discrimination Law.
2. The present case involves applicants who are children of a male same-sex couple, Mr. S. and Mr. H., born to a surrogate mother in California. The birth certificate of the applicants recorded Mr. S. and Mr. H. as parents in line with corresponding judgment of the Superior Court of California. Mr. S, who is the biological father of the applicants, is a citizen of Poland. According to Polish law, a child, whose one parent is Polish, acquires Polish citizenship. The applicants applied to Polish authorities for confirmation of their Polish citizenship but the application was dismissed. Polish authorities refused to recognize Mr. S and Mr. H. as parents of the applicants and suggested that under Polish law the parents of the applicants are the woman who gave birth to them and her husband. In their decisions, the Polish authorities argued that the surrogacy agreement is not valid in the Polish legal system, that accepting the judgment of the Superior Court of California would be against the principles of the Polish legal order, and that the birth certificate cannot have any legal effect.
3. The applicants argue that the Polish authorities breached their right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR) taken alone and together with the prohibition of discrimination under Article 14 ECHR. According to the applicants, the decisions of the Polish authorities were based on considerations relating to sexual orientation of their legal parents.
4. This submission offers a discussion on the following issues which are of relevance to consideration of the case at hand:
  - (a) whether the right to respect for private and family life under Article 8 ECHR obliges the States to recognize existing parental rights established under a foreign law; and

- (b) whether the prohibition of discrimination on grounds of sexual orientation under Article 14 ECHR obliges the States to recognize existing parental rights established under a foreign law law irrespective of sexual orientation.
5. The present written comments are focused only on legal aspects which, in our opinion, are relevant for the adjudication in the case pending before the Court. In turn, we do not refer to any factual circumstances of the case.

## II. Overview

6. Social and scientific advances are almost always faster than the legislator. When regulation lags behind, it is often the role of a court to address the new reality and find a new solution because strict or formalistic application of outdated law would lead to injustice. In such situations, the courts are guided by underlying principles of law and interpret the existing rules to find a just result. The case at hand combines both social and scientific aspects by addressing both new technology in reproductive science and equality of rights of marginalized lesbian, gay, bisexual, trans and intersex(LGBTI) community. For the Court, however, neither of these issues is entirely new as both have already been addressed individually.
7. Specifically the present case concerns the issue of whether Poland breached the rights of the applicants by refusing to recognize family ties to their parents, which were established under foreign law via surrogacy. Nevertheless, it should be emphasized that this case does not raise the question of whether the ECHR requires signatory States to allow same-sex couples to become de facto joint parents and to be legally recognized as such in their territory at birth. This would have been the case if the facts of the case involved a situation whereby the children were born in Poland and their parents sought to register them there, for the first time, as their children. Rather, the question raised is whether the ECHR requires its signatory States to recognize the links already legally and factually established among the members of a rainbow family (i.e. a family where persons of the same sex play the parental roles) in another country. This way the Court would be merely permitting the continuation – in law – of the factual parent-child relationship already established and enjoyed between children and both of their (legal) parents.
8. Article 53 of the ECHR provides that “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.” All contracting parties to the ECHR have also ratified or acceded to the United Nations Convention on the Rights of the Child (CRC) which must therefore inform the construction of relevant ECHR provisions. The interveners provide relevant provisions of the CRC for the Court’s attention within this submission to support the Court in this function.

### II.A. Breach of right to respect for private and family life

9. The issue of recognition of parental rights established under foreign law is essentially an issue of private international law. In Poland, the relevant conflict-of-laws rule is contained in Sec. 55 of the Private International Law Act, which states: “Determination and negation of the child’s origin shall be subject to the law of nationality of the child at the moment of birth.”<sup>1</sup> According to Sec. 2 of the Private International Law Act: “If statutory law specifies the law of one’s nationality as applicable, a Polish national shall be subject to Polish law, even if the law of another country recognizes them as its own national.”
10. This situation should be analyzed from the perspective of Article 3(1) of the Convention on the Rights of the Child (CRC)<sup>2</sup> which stipulates that: “In all actions concerning children, whether undertaken by public or

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<sup>1</sup> Act of 4 February 2011 Private International Law, O.J. 2011 No. 80, item 432.

<sup>2</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3., to which Poland is a signatory State.

private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Under the CRC, the best interests principle functions as a substantive right, a fundamental interpretive legal principle and a rule of procedure.<sup>3</sup> The obligation on State Parties includes: (i) to ensure that the child’s best interests are appropriately integrated and consistently applied in every action taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children; and (ii) to ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child’s best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.<sup>4</sup>

11. In this context it is also worthy to pay attention to other provisions of the CRC. Article 7 of the CRC stipulates that “[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.” In addition, Article 8 CRC protects the right of the child to preserve his/her identity including nationality, name and family relations as recognized by law without unlawful interference. What is more, Article 24. 3 of International Covenant on Civil and Political Rights stipulates the right of a child to acquire a nationality. Human Rights Committee in General Comment No. 17 explained that: “States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.”<sup>5</sup>
12. In order to determine whether the standards of the Article 8 ECHR were breached, the following elements must be considered: (i) existence of a family life between children and parents; (ii) whether conduct of State authorities amounts to an interference with this right; (iii) whether such interference is in accordance with law; and (iv) whether the interference is justified.
13. In *Gas and Dubois v. France*, the Court held that a same-sex couple and their child(ren) can together enjoy “family life”, within the meaning of Article 8 ECHR.<sup>6</sup> This follows the general approach of the Court, according to which biological ties are not an overriding factor in establishing family life and some evidence of real and constant relationship is normally required before such relationships are afforded the protection of Article 8 ECHR.<sup>7</sup> Accordingly, the Court has made it clear that the non-biological parent of a child in a rainbow family<sup>8</sup> can be considered a ‘parent’ for the purposes of Article 8 ECHR, provided that the relationship between the two resembles what is perceived to be ‘the norm’ of the nuclear family. Although CRC does not define terms such as “parents” or “family”<sup>9</sup>, they should not be interpreted as limited only to persons bound by genetic ties. According to the Polish law, persons may be legally recognized as parents of the child even if they do not have genetic connections with the child. For instance, the woman who gave

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3 UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3 § 1), CRC/C/GC/14, 29 May 2013, § 6.

4 *Ibid.* at § 14.

5 CCPR General Comment No. 17: Article 24 (Rights of the child) Adopted at the Thirty-fifth session of the Human Rights Committee, on 7 April 1989, § 8.

6 *Gas and Dubois v. France*, no. 25952/07, 2012, § 37. See, also, *X and Others v. Austria*, no. 19010/07, 2013, §§ 95-96; *Schalk and Kopf v. Austria*, no. 30141/04, 2010, § 94; *Oliary and others v. Italy*, no. 18766/11, 2015, § 103.

7 *J.R.M. v. the Netherlands*, no. 16944/90, 1993; *Nylund v. Finland*, no. 27110/95, 1999; *K. and T. v. Finland*, no. 25702/94, 2001.

8 Rainbow family is a family, where a child has (or several children have) at least one parent who identifies themselves as lesbian, gay, bisexual, trans, intersex or queer: <http://nelfa.org/inprogress/wp-content/uploads/2018/07/IDAHOT-Council-2018-cut-draft.pdf>

9 J. Tobin, *To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?*, “International and Comparative Law Quarterly” 2014, vol. 63, issue 2, pp. 326-327.

birth to a child is his/her mother, even if there are no genetic ties between them.<sup>10</sup> On the other hand, if a man agreed on the artificial insemination of his wife with a donor sperm, he would be presumed to be a father and he could not question his paternity<sup>11</sup> although it would be obvious that he is not a biological father. Also according to the case law of the European Court of Human Rights (ECtHR), the biological connection can become irrelevant if it is in the best interests of the child<sup>12</sup>. In addition, lack of genetic ties and of parental relationship legally recognized by the state does not automatically mean that given group of persons does not constitute family. It is also necessary to take into account, among others, the length of a relationship and the quality of bonds between a child and his/her factual parents<sup>13</sup>. Therefore, it is reasonable to conclude that a situation where children have lived together with their parents for all of their lives and have established parent-child relationships falls within the ambit of family life covered by Article 8.

14. As the Court has determined in previous decisions, a refusal by State authorities to recognise existing family ties established under foreign law generally establishes an interference in family life as well as private life.<sup>14</sup> Such non-recognition has far-reaching impact on life of both the child and the parents including among others access to medical information, consent to medical care, rights to act on behalf of the child, succession or nationality. In this context it is worth to note that according to the Polish law the transcription is obligatory, among others, when a Polish citizen applies for Polish identity documents. Thus, verification of nationality may arise as a key issue for the authorities deciding on transcription of the birth certificate. The negative decision in case of confirmation of the nationality may transfer to refusal of transcription of birth certificate, and finally, the Polish citizen would be unable to obtain, for example, an identity document which is necessary to make use of many citizen's rights.
15. As regards justification of the interference, Article 8 ECHR offers several grounds of which the following two are relevant: the "protection of morals" – with the specific aim of supporting and encouraging the family in the traditional sense which "is, in principle, a weighty and legitimate reason"<sup>15</sup> – and "the protection of the rights of others", in this case, "others" being read as referring to "children". In *Wagner v. Luxembourg*<sup>16</sup>, at issue was the refusal of the Luxembourg authorities to recognise the Peruvian court decision pronouncing the full adoption by Ms. Wagner – a Luxembourg national – of her (non-biological) child, JMWL, of Peruvian nationality. The refusal was the result of the absence in the Luxembourg legislation of provisions allowing an unmarried person to obtain full adoption of a child. The Court held that this refusal amounted to an unjustified interference with the right to respect for Ms Wagner's and her child's family life and, thus, amounted to an infringement of Article 8 ECHR. The Court, in particular, noted that "[b]earing in mind that the best interests of the child are paramount in such a case ... the Court considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention."<sup>17</sup>
16. The same reasoning was more recently transposed into the context of the cross-border legal recognition of surrogacy arrangements. In *Menesson v. France*<sup>18</sup>, the Court found that the contested refusal of France to recognise a surrogacy agreement entered into in the US, and the subsequent refusal to legally recognise the parent-child relationship as legally established abroad, amounted to a breach of Article 8 ECHR.

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10 In this regard it is worth to note, that egg and embryo donation is permitted in Poland under special conditions set in the Act on treatment of infertility.

11 Article 68 of the Family and Guardianship Code.

12 *I.S. v. Germany*, no. 31021/08, 2014.

13 *Paradiso and Campanelli v. Italy*, no. 25358/12, 2017, §§ 149-158.

14 See *Wagner v. Luxembourg*, no. 76240/01, 2007, § 123. See, also, *Negreponis-Giannisis v. Greece*, no. 56759/09, 2011, § 58 which involved the cross-border legal recognition of an adoption lawfully concluded in another country (the US), albeit of an adult.

15 *Karner v. Austria*, no. 40016/98, 2003, § 40.

16 *Wagner v. Luxembourg*, no. 76240/01, 2007.

17 *Wagner v. Luxembourg*, no. 76240/01, 2007, § 133.

18 *Menesson v. France*, no. 65192/11, 2014. See, also, *Labassee v. France*, no. 65941/11, 2014 and *Laborie v. France*, no. 44024/13, 2017.

However, unlike in *Wagner v. Luxembourg*, in this case the Court found that there was a breach of Article 8 ECHR as regards the children's right to private life only. In particular, the Court found that, on the facts of the case, the lack of recognition of the parent-child relationship did not disproportionately affect the applicants' ability to enjoy their family life in a practical sense, and, thus, did not amount to a breach of their right to family life. There was, nonetheless, a breach of the right to private life of the children, since "respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship."<sup>19</sup> The "legal uncertainty" caused as a result of the non-recognition in the second State is liable to have negative repercussions on the children's definition of their personal identity. In addition, in *Foulon and Bouvet v France*<sup>20</sup>, the ECHR confirmed the above standard also in relation to the case of the father who applied for the transcription of the foreign birth certificate of a child bringing up together with a partner of the same sex.

17. What is more, the Court further clarified this issue in its first Advisory Opinion under the newly introduced Protocol 16 attached to the ECHR.<sup>21</sup> According to the Court, the right to respect for private life, within the meaning of Article 8 ECHR, of a child born abroad through gestational surrogacy required that domestic law provide a possibility of recognition of the legal parent-child relationship with the intended non-biologically related parent, designated in the birth certificate legally established abroad as the legal mother. The circumstances, which arose in the present case, are exactly what the Court is attempting to prevent via publishing of the Advisory Opinion.
18. The Court accepts that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment.<sup>22</sup> It goes without saying that the protection of the interests of the child is also a legitimate aim.<sup>23</sup> However, such justification would most likely fail, because – to use the reasoning employed in *Marckx v. Belgium* – "in the achievement of this end recourse must not be had to measures whose object or result is ... to prejudice the" rainbow family, given that the members of a rainbow family can – as established in *Gas and Dubois v. France* – enjoy family life. Accordingly, the members of rainbow families who enjoy family life must "enjoy the guarantees of Article 8 on an equal footing with the members of the traditional family."<sup>24</sup>
19. Similarly, a justification based on the need to protect the rights of others, namely the rights of the children of rainbow families, would also be bound to fail. There has been considerable social, scientific, and psychological research, which argues that the successful raising of a child is not dependent upon the sexual orientation of his or her parents.<sup>25</sup> Moreover, the Court has pointed out in its case-law that "there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount."<sup>26</sup> The Court further emphasized the importance of the right of the child to maintain a personal relationship and direct contact with both his/her parents.<sup>27</sup> The Court has also noted that "family ties may only be severed in very exceptional

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19 *Mennesson v. France*, no. 65192/11, 2014, § 96.

20 *Foulon and Bouvet v France*, no. 9063/14, 10410/14, 2016.

21 ECtHR Advisory Opinion Request No P16-2018-001 (10 April 2019).

22 Karner, § 40 cited above.

23 *X and Others v. Austria*, cited above, § 138.

24 *Marckx v. Belgium*, no. 6833/74, 1979, § 40.

25 See, inter alia, paras 47-52 of the Explanatory Memorandum by Mr Jonas Gunnarsson included in Report 'Private and family life: achieving equality regardless of sexual orientation' (Doc. 14620), drafted on 21 September 2018. The Report led to the adoption, by the Parliamentary Assembly of the Council of Europe (PACE), of Resolution 2239 (2018) 'Private and family life: achieving equality regardless of sexual orientation', adopted by PACE on 10 October 2018 (both documents are available online <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=25166&lang=EN>>; the sources referred to in this website <<https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-wellbeing-of-children-with-gay-or-lesbian-parents/>>; the American Psychological Association Policy Statement on Sexual Orientation, Parents, and Children <<http://www.apa.org/about/policy/parenting.aspx>> (2004).

26 *Neulinger and Shuruk v. Switzerland*, no. 41615/07, 2010, § 135.

27 *Ibid.*

circumstances and that everything must be done to preserve personal relations”.<sup>28</sup> Accordingly, the best interests of the child seem to require that the familial ties he or she has legally established with his parents in another country should be maintained in another State. Same-sex couples should, therefore, continue to be legally recognized as the joint parents of their children in another State, not despite the children’s best interests, but exactly because this is required, if the children’s best interests are taken into account.

#### II.B. Relevant case-law from the Supreme Administrative Court of Poland

20. To provide a domestic context, it is important to underline that in 2018 the Supreme Administrative Court of Poland (SAC) in several judgements departed from the restrictive jurisprudence in cases concerning rights of children of LGBTI families. Judgments of the Supreme Administrative Court of 30 October 2018 (ref. nos. II OSK 1868/16, II OSK 1869/16, II OSK 1870/16, II OSK 1871/16) are of particular relevance in determination of this case. The SAC ruled that authorities have to confirm Polish citizenship of four children raised by homosexual couple. They were all born in the USA by surrogates and birth certificates of all four children indicated that their father was T.K. – Polish citizen. In case of two children born in California there was information about a second father – J.E. In case of two other children, born in Texas, there was no such information since the law of that state did not allow to indicate two persons of the same sex as parents.
21. The SAC underlined that a child of a Polish citizen has a right to acquire Polish citizenship. Taking into account that the American documents evidenced that the applicants were children of a Polish citizen, the deliberations of administrative authorities and regional administrative courts with regards to same-sex marriages and adoption were irrelevant. The SAC reminded that according to the Polish law “parents” are defined as father and mother – that is the woman who gave birth to a child. In the present case the applicants proved that they faced obstacles that are difficult to overcome with regard to determination of identity of biological mother, as they were born by anonymous surrogates. In this situation, the authorities should have applied the provision according to which a child acquires the citizenship of his/her father if the mother is unknown. The SAC noticed that in case of two children, the birth certificates indicated as second parent another man, however in this regard the birth certificate had no legal effects under the Polish law. In this situation, the Court adopted a factual presumption that the biological mothers of the children were unknown.
22. Moreover, the SAC underlined that the right to citizenship is a human right. Thus, the law in this area should be interpreted in accordance with the principle of human dignity, equality and non-discrimination. In this regard the Court invoked, among others, Article 15 of the Universal Declaration of Human Rights (“Everyone has the right to a nationality”) as well as provisions of the CRC. According to the latter, the child “shall be registered immediately after birth” and shall have the right to acquire nationality (Article 7). Moreover, authorities are obliged to respect the nationality of the child (Article 8). The CRC prohibits all forms of discrimination of the children, also based on the status of the parents. Therefore, in the light of the CRC the fact that the child was born by a surrogate is irrelevant for his/her legal status. Every human being is born with an inherent and inalienable dignity and has the right to citizenship if one of his/her parents is a Polish citizen. The Court also held that the refusal of confirmation of citizenship violated Article 8 of the ECHR.
23. The SAC did not share the argument that the confirmation of the complainant children’s citizenship would violate fundamental principles of the legal order in Poland. The SAC underlined that authorities did not indicate any value which could be violated by the confirmation of citizenship of a child of a Polish citizen. Similar conclusion was contained in another judgement of 10 October 2018 of the SAC in case of

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<sup>28</sup> *Neulinger and Shuruk v. Switzerland*, no. 41615/07, 2010, § 136.

transcription of foreign birth certificate of child raised by a same-sex couple<sup>29</sup>. The SAC also held that transcription would not violate fundamental principles of the legal order, referring in this context to the Court of Justice of the European Union (CJEU) judgment in the case of Coman<sup>30</sup>. The Supreme Administrative Court ruled that the abstract concept of “fundamental principles of the legal order” should not be invoked to impose disproportionate limitations of the rights of the child. Finally, the SAC underlined that refusal of transcription would be also inconsistent with the international standards of protection of the rights of the child, in particular – Article 3 CRC and Article 8 ECHR.

#### II.C. Relevant case-law from other national jurisdictions

24. Similar reasoning was also used by other national courts. The Constitutional Court of the Czech Republic ruled that: “Non-recognition of foreign decision, which determined parental rights to a child of two persons of the same sex in a situation where family life was already established both factually and legally on a basis of surrogate arrangement, for a reason that Czech law does not allow parenthood of two persons of same sex, is in violation of best interest of the child protected under Art. 3 para. 1 of the Convention on the Rights of the Child.”<sup>31</sup> The case concerned a male same-sex couple, which was recognized as parents of a child via surrogate agreement by the Superior Court of California. One of the couple was a Czech national who requested Czech authorities to confirm Czech citizenship of their child. The Czech authorities recognised the Californian judgment and confirmed citizenship of the child, however, refused to recognize parental rights of the second parent. In the ensuing proceedings, the Constitutional Court of the Czech Republic duly considered previously invoked public order exception and considered that protection of traditional family is a legitimate goal which, however, cannot always prevail.<sup>32</sup> As a result, the previous decisions were overruled and the status of the second parent was recognised.
25. Courts in other countries have also followed the established trend. The Italian Court of Appeals of Trento recognized a Canadian ruling, which established parental rights of a non-biological father to children born via surrogacy.<sup>33</sup> As a result, for the first time in Italy two men were recognised as legal parents.
26. In Germany, the Federal Supreme Court overruled decisions of the lower courts and recognised male same-sex couple as legal parents of a child born via surrogacy on a basis of Californian judgment.<sup>34</sup> The German court emphasized that decision of foreign authorities in these matters must be respected as part of a child’s welfare to be able to rely on the parents to have continuous responsibility for its well-being.
27. The Spanish Supreme Court in its judgment of February 6, 2014, about a married male same-sex couple who became parents in USA through a surrogacy process, ruled that foreign birth certificates of minors born via surrogacy are ineffective in Spain. Although, the parent-child relations established by virtue of agreements prohibited by the Spanish legal system are not recognised, the established de facto relations between adults and the minor in whose family this is created must be established, promoted, protected and integrated, all in the best interests of the child. In addition, parent-child relationships in cases of children born by application of the technique of surrogate pregnancy must be protected in any case with application of the institutions for the protection of childhood and family provided by Spanish law.<sup>35</sup>

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29 Judgment of the Supreme Administrative Court, Poland, dated 10 October 2018, ref. no. II OSK 2552/16.

30 CJEU, dated 5 June 2018, C-673/16 Coman, ECLI:EU:C:2018:385.

31 Award of the Constitutional Court of the Czech Republic dated 29 June 2017, file no. I. ÚS 3226/16, § 55.

32 Ibid. § 43.

33 Order of Court of Appeals of Trento dated 23 February 2017.

34 Judgment of German Federal Court (Bundesgerichtshof) dated 10 December 2014, case no. XII ZB 463/13.

35 Spanish Supreme Court Order 6/2/2014, Fifth legal basis.



## II. D. Discrimination on grounds of sexual orientation

28. Article 14 ECHR does not explicitly list sexual orientation as a protected status. However, as the ECHR is a living instrument<sup>36</sup>, in a series of cases, the Court has expressly stated that the list of grounds in Article 14 ECHR is non-exhaustive and that the concept of one's sexual orientation is included among the "other" grounds protected by Article 14 ECHR.<sup>37</sup> The inclusion of sexual orientation in Article 14 ECHR as a prohibited ground of discrimination is thereby clear. It should be noted that present case is centered around alleged discrimination on the basis of the parent's sexual orientation. The Committee on the Rights of the Child has addressed non-discrimination on the basis of birth under art. 2 CRC in its General Comment No. 7 (para 12): "Young children may also suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values, or if their parents are refugees or asylum-seekers. States parties have a responsibility to monitor and combat discrimination in whatever forms it takes and wherever it occurs - within families, communities, schools or other institutions."<sup>38</sup>
29. Article 14 ECHR is not a freestanding provision and, thus, requires the discrimination complained of to be experienced with regards to the enjoyment of one of the rights provided by the ECHR. In the context of this case the Article 14 ECHR should be analyzed in conjunction with Article 8 ECHR.
30. According to the Court, Article 14 ECHR affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations.<sup>39</sup> In *Wagner v. Luxembourg* the Court held that: "In any event, the Court considers that the second applicant [Note: the adopted child] cannot be blamed for circumstances for which she is not responsible. It must be noted that, because of her status as a child adopted by a Luxembourg unmarried mother who has not obtained recognition in Luxembourg of the family ties created by the foreign judgment, she is penalised in her daily existence." As Judge Villiger very rightly noted in his dissenting opinion in the *Gas and Dubois v. France* case, "how can children help it that they were born of a parent of a same-sex couple rather than of a parent of a heterosexual couple? Why should the child have to suffer for the parents' situation?".<sup>40</sup> Accordingly, the children of rainbow families should not be "penalised in [their] daily existence"<sup>41</sup> simply because of their association with their parents who are of homosexual sexual orientation.
31. What is more, penalizing the children of same-sex couples is an ineffectual way of deterring same-sex couples from having a family. The desire to have a child – in same-sex couples which have such a desire – is very strong, as can be gathered from the fact that having a child together is not naturally possible and, thus, the couple often has to undergo through cumbersome and costly procedures. Hence, same-sex couples are unlikely to be discouraged from having a family because of the legal difficulties that they will face, and, thus, State policies that harm children for the sake of regulating the sexual behavior of their parents should be condemned.
32. In a ruling on repeal of a provision prohibition adoption of children by same-sex couples, Constitutional Court of the Czech Republic emphasized that: "This statutory limitation does not stand when considered in view of human dignity as a basic objective standard of humanity and foundation of other basic rights. Provided that this rule is based on exclusion of certain group of people from exercise of a certain right only

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36 *Tyrer v. the UK*, no. 5856/72, 25 April 1978, § 31.

37 See, for instance, *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, 21 December 1999, § 28; *Fretté v. France*, no. 36515/97, 26 February 2002; *Kozak v. Poland*, no. 13102/02, 2 March 2010, §§ 91-92; *X v. Turkey*, no. 24626/09, 9 October 2012, § 50.

38 Committee On The Rights Of The Child, General Comment No. 7 (2005) Implementing child rights in early childhood.

39 See *Mazurek v. France*, no. 34406/97, § 46, ECHR 2000-II.

40 Dissenting opinion of Judge Villiger in *Gas and Dubois v. France*, no. 25952/07, 2012.

41 *Wagner v. Luxembourg*, no. 76240/01, 2007, § 158.

because they have decided to enter registered partnership<sup>42</sup>, it effectively turns them into second-class people and creates a groundless stigma which evokes a notion of their inferiority.<sup>43</sup>

### II.C. Importance of the present case in the field of protection of rights of LGBTI families

33. The decision of the Court in present case will play a predominant role for ongoing public debate on the rights of LGBTI families in Poland, but also in other European countries. Also the judgment of the Court will be the significant guideline for Polish national courts dealing with similar cases.
34. According to data obtained by the HFHR the Polish Commissioner for Human Rights received complaints about two other pending cases of confirmation of Polish citizenship of a child of LGBTI family born by a surrogate mother. At present both proceedings are pending before the SAC. Despite that in 2018 the SAC delivered several judgments in favor of children of same-sex couples (see paras 20-23 above), there is a lack of the well-established case-law and practice of the authorities in the mentioned area. Because of that in April 2019 the SAC considering the case of transcription of birth certificate of a child raised by same-sex couple formulated a significant legal issue that needs to be determined by the panel of seven judges of the SAC. The panel of 3 judges of SAC asked whether the Article 104.5 (terms and conditions of mandatory transcription of foreign certificates) and Article 107.3 (conditions of refusal to transcribe the foreign documents) of the Law on the civil registration certificates taken together with the Article 7 of the Private International Law Act (principle of legal order clause) permit to transcribe the foreign birth certificate of a child in which there are two persons of same-sex indicated as parents<sup>44</sup>. The date when the panel of seven judges will pass the ruling is not yet known, but their decision will be binding for other panels of judges of the SAC dealing with similar cases in the future.
35. Moreover, in 2017 the Vice-General Prosecutor of Poland decided that prosecutors have to participate in each proceeding of transcription of foreign marriage certificates of same-sex couples<sup>45</sup>. What is more, the Regional Prosecutor of Kraków brought an action against the transcription of foreign birth certificate with data of two females as parents. In a complaint lodged to the Provincial Administrative Court in Kraków the Prosecutor underlined that transcription of the mentioned birth certificate is contrary to the principles of the Polish legal order. It should be noted that the transcription of this birth certificate was the consequence of reopening the administrative proceeding due to execution of the judgment of 10 October 2018 of the SAC (cited above, see para 23.). In the judgment of 4 June 2019, the Provincial Administrative Court in Kraków dismissed the Prosecutor's complaint<sup>46</sup>. In the oral reasoning of the verdict the Court stressed that the transcription was necessary to protect the rights of the minor (the judgment is not final, also the reasoning in writing is not yet available).

### **III. Conclusions**

36. Bearing in mind the arguments presented, we submit the following conclusions:
37. The ECtHR has the opportunity to develop standards for the protection of rights of children of same-sex families. The decision in the present cases will be of great importance for LGBTI families in Poland and in Europe.

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42 Czech law does not allow same-sex couples to marry but allows them to enter „*registered partnership*“ instead.

43 Award of the Constitutional Court of the Czech Republic dated 14 June 2016, file no. Pl. ÚS 7/15, § 46.

44 Judgement of the Supreme Administrative Court, Poland, ref. no II OSK 1330/17.

45 Website of the National Prosecutor of Poland, available at: <https://pk.gov.pl/dzialalnosc/dzialalnosc-cywilna-i-administracyjna/niedopuszczalne-jest-zarejestrowanie-w-polsce-malzenstwa-zawartego-przez-osoby-tej-samej-plci/>

46 Ref. no III SA/Kr 233/19.

38. The question of legality of surrogacy or legal recognition of same-sex relationships have to be distinguished from the issue of a status of a child born by a surrogate mother. The principle of human dignity forbids treating children in an unfair way in order to “punish” them for their parents’ actions or using them as means to dissuade persons from concluding surrogacy agreements. The UN Special Rapporteur on the sale and sexual exploitation of children has underlined that States are also obliged to “Protect the rights of all surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law”<sup>47</sup>.
39. The refusal of confirmation of nationality of a minor should be analyzed from the perspective of the child’s right to protection of family life and his/her identity, and in the context of the best interests of the child.

On behalf of the Helsinki Foundation for Human Rights and other interveners,

*Piotr Kłodoczny, Ph. D.*

Secretary of the Board

Helsinki Foundation for Human Rights

*Maciej Nowicki*

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Helsinki Foundation for Human Rights

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<sup>47</sup> Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, 15 January 2018, A/HRC/37/60, p. 19, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement> (access: 29 January 2019).