



Child's right to private life violated by lack of provision in Swiss law, until 2018, for alternative means of recognising children born to same-sex couples through surrogacy

In today's **Chamber** judgment¹ in the case of [D.B. and Others v. Switzerland](#) (applications nos. 58817/15 and 58252/15) the European Court of Human Rights held,

- by a majority of six votes to one, that there had been a **violation of Article 8 (right to respect for private life of a child born through surrogacy)** of the European Convention on Human Rights, and
- unanimously, that there had been **no violation of Article 8 (right to respect for family life of the intended father and the genetic father)**.

The case concerned a same-sex couple who were registered partners and had entered into a gestational surrogacy contract in the United States under which the third applicant had been born. The applicants complained in particular that the Swiss authorities had refused to recognise the parent-child relationship established by a US court between the intended father (the first applicant) and the child born through surrogacy (the third applicant). The Swiss authorities had recognised the parent-child relationship between the genetic father (the second applicant) and the child.

The Court stated that the chief feature which distinguished the case from those it had decided before was that the first two applicants were a same-sex couple in a registered partnership.

Regarding the third applicant, the Court noted that, at the time he was born, domestic law had afforded the applicants no possibility of recognition of the parent-child relationship between the intended parent (the first applicant) and the child. Adoption had been open to married couples only, to the exclusion of those in registered partnerships. Not until 1 January 2018 had it become possible to adopt the child of a registered partner. Thus, for nearly seven years and eight months, the applicants had had no possibility of securing definitive recognition of the parent-child relationship. The Court therefore held that for the Swiss authorities to withhold recognition of the lawfully issued foreign birth certificate in so far as it concerned the parent-child relationship between the intended father (the first applicant) and the child born through surrogacy in the United States, without providing for alternative means of recognising that relationship, had not been in the best interests of the child. In other words the general and absolute impossibility, for a significant period of time, of obtaining recognition of the relationship between the child and the first applicant had amounted to a disproportionate interference with the third applicant's right to respect for private life under Article 8. Switzerland had therefore overstepped its margin of appreciation by not making timely legislative provision for such a possibility.

Regarding the first and second applicants, the Court first observed that the surrogacy arrangement which they had used to start a family had been contrary to Swiss public policy. It went on to hold that the practical difficulties they might encounter in their family life in the absence of recognition under Swiss law of the relationship between the first and third applicants were within the limits of compliance with Article 8 of the Convention.

A legal summary of this case will be available in the Court's HUDOC database ([link](#)).

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Principal facts

The applicants are three Swiss nationals. The first and second applicants were born in 1973 and 1976 and are a same-sex couple. They have been registered partners since 2011. The third applicant is a child who was born via gestational surrogacy in 2011 in the United States and also has US nationality.

In July 2010 the first and second applicants entered into a gestational surrogacy contract in the United States. An embryo created from an anonymous donor's egg and the second applicant's sperm was implanted in a surrogate's uterus. Once the pregnancy was confirmed the California court delivered a judgment declaring the first and second applicants to be the unborn child's legal parents. When the third applicant was born, in 2011, a birth certificate reflecting the judgment was issued in the United States.

In April 2011 the applicants asked the Swiss authorities to 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 July 2013 the applicants appealed to the St Gall Cantonal Home Affairs Department, which decided to allow the first and second applicants to be registered as the child's fathers. A few days later the Federal Office of Justice (FOJ) challenged that decision in the Saint-Gall Cantonal Administrative Court. That court dismissed the FOJ's challenge after weighing up the interests at stake, namely the prohibition of surrogacy in Switzerland and the good of the child. It held that both of those principles were part of Swiss public policy and in essence took the view that the child should not have to bear the adverse consequences of the choice – regrettable though it was – that his parents had made. The FOJ appealed to the Federal Court.

In May 2015 the Federal Court allowed the FOJ's appeal and reversed the judgment of the cantonal court. It held that using surrogacy in California to circumvent the prohibition in place in Switzerland had amounted to a material evasion of the law. It went on to recognise the California judgment in so far as it concerned the parent-child relationship between the child (the third applicant) and his genetic father (the second applicant) but withheld recognition of the relationship declared by the US court between the child (the third applicant) and the intended father (the first applicant). It was the Federal Court's view that, notwithstanding the non-recognition of a parent-child relationship between the non-genetic intended parent and the child, the child's position would be sufficiently protected by the Swiss legal system and would be compatible with the principle of the best interests of the child.

In January 2018 an amendment to the Civil Code came into force which legalised the adoption of a registered partner's child. The applicants filed for adoption that day, and the cantonal authorities granted the adoption on 21 December 2018.

In September 2021 Swiss voters approved an amendment to the Civil Code legalising "civil marriage for all" in Switzerland.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life) of the Convention, the applicants complained of the Swiss authorities' refusal to recognise the parent-child relationship established in the United States between the intended parent (the first applicant) and the child (the third applicant). They argued that adoption in lieu of recognition of the birth certificate was no remedy for what they regarded as an infringement of their right to respect for private and family life.

They also complained under Article 8 of the duration of the proceedings which had ultimately led to the establishment of a legal parent-child relationship.

Relying on Article 14 (prohibition of discrimination) in conjunction with Article 8, they also submit that the third applicant suffered discrimination.

The applications were lodged with the European Court of Human Rights on 20 November 2015.

Judgment was given by a Chamber of seven judges, composed as follows:

Georges Ravarani (Luxembourg), *President*,
María Elósegui (Spain),
Darian Pavli (Albania),
Anja Seibert-Fohr (Germany),
Peeter Roosma (Estonia),
Andreas Zünd (Switzerland),
Frédéric Krenc (Belgium),

and also Milan Blaško, *Section Registrar*.

Decision of the Court

Article 8

Complaint concerning refusal to recognise a parent-child relationship between the intended father and the child born through gestational surrogacy

The Court found that there had been an interference with the third applicant's right to respect for his private life. It was also prepared to accept that there had been an interference with the exercise of the right to respect for family life *vis-à-vis* all the applicants.

The Court went on to note that surrogacy was prohibited in Switzerland. It accordingly took the view that the refusal to recognise the US judgment concerning the parent-child relationship between the first and third applicants had, for the purposes of Article 8 of the Convention, been in accordance with the law.

The Court also noted that Switzerland's refusal to recognise parent-child relationships between children born through surrogacy abroad and their intended parents stemmed from a concern to discourage Swiss nationals from going outside the country to use a reproductive method which it had prohibited on its territory, the aim being, as it saw the matter, to protect children and surrogate mothers. The Court therefore accepted that the interference at issue had been in pursuance of 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.

The Court also pointed out that the situation of the applicants in this case was different from that of the applicants in its previously decided cases against France. The chief distinguishing feature of the present case was that the first two applicants were a same-sex couple in a registered partnership whereas the applicant parents in the cases against France had been different-sex married couples.

Nevertheless it was of the opinion that the principles expounded in the French cases were applicable to the present case; it stated in particular that the child's right to respect for private life required that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended parent. It also stated that the margin of appreciation afforded to States was limited where the principle of establishing or recognising parentage was itself at issue, and that the interests of the child could not depend on the parents' sexual orientation alone.

Right to respect for private life of the third applicant (the child born through surrogacy)

At the time of the third applicant's birth, domestic law had afforded the applicants no possibility of recognition of the parent-child relationship between the intended parent (the first applicant) and

the child. Adoption had been available to married couples only, to the exclusion of those in registered partnerships. Not until 1 January 2018 had it become possible to adopt the child of a registered partner. Once it had, the applicants had filed for adoption and had been granted it by a decision of 21 December 2018. Thus, for nearly seven years and eight months (from the application for recognition made on 30 April 2011 until the adoption granted on 21 December 2018), the applicants had not had any possibility of securing definitive recognition of the parent-child relationship. Such a time-frame was incompatible with the principles already laid down by the Court in other cases and, in particular, with the best interests of the child, in so far as it might put the child in a position of legal uncertainty regarding his or her identity within society and deprive him or her of the chance to live and develop in a stable environment.

The Court held that to withhold recognition of the lawfully issued foreign birth certificate in so far as it concerned the parent-child relationship between the intended father (the first applicant) and the child born through surrogacy in the United States, without providing for alternative means of recognising that relationship, had not been in the child's best interests. In other words the general and absolute impossibility, for a significant period of time, of obtaining recognition of the relationship between the child and the first applicant had amounted to a disproportionate interference with the third applicant's right to respect for private life under Article 8. Switzerland had therefore overstepped its margin of appreciation in the case by not making timely legislative provision for such a possibility. **There had been a violation of the third applicant's right to respect for his private life.**

Right to respect for family life of the first and second applicants

The Court observed that the surrogacy arrangement which the first and second applicants had used to start a family had been contrary to Swiss public policy. It took the view that it had been neither arbitrary nor unreasonable for the Federal Tribunal to hold that using surrogacy in California to circumvent the prohibition in place in Switzerland had amounted to a material evasion of the law. What was more, the first and second applicants had not alleged that they had been unaware of the Swiss law prohibition against surrogacy, and they had acted in such a way as to present the competent authorities with a *fait accompli*. Furthermore the Swiss authorities' non-recognition of the birth certificate had not, in practice, significantly affected their enjoyment of family life. Accordingly, the Court concluded that the practical difficulties which the applicants might encounter in their family life in the absence of recognition under Swiss law of the relationship between the first and third applicants were within the limits of compliance with Article 8 of the Convention. **There had been no violation of the first and second applicants' right to respect for family life.**

Other Articles

The Court unanimously held that there was no need to rule separately on the complaint under Article 8 of the Convention concerning the duration of the proceedings which had ultimately led to recognition of a parent-child relationship. It also held by six votes to one that there was no need to rule separately on the complaint under Article 14 read in conjunction with Article 8.

Just satisfaction (Article 41)

The Court held by six votes to one that Switzerland was to pay the third applicant 15,000 euros (EUR) in respect of non-pecuniary damage and EUR 20,000 in respect of costs and expenses.

Separate opinions

Judge Krenč expressed a concurring opinion. Judge Elósegui expressed a dissenting opinion. Judge Pavli expressed a partially dissenting opinion. These opinions are annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.