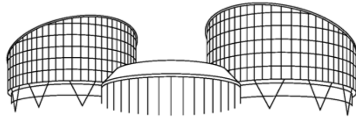

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
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ECHR 152 (2021)
18.05.2021

Refusal to recognise couple as parents of child born via surrogacy not a violation

In today's **Chamber** judgment[1] in the case of Valdís Fjölnisdóttir and Others v. Iceland (application no. 71552/17) the European Court of Human Rights held, unanimously, that there had been:

no violation Article 8 (right to respect for private and family life) of the European Convention on Human Rights

The case concerned the refusal to recognise a parental link between Ms Fjölnisdóttir and Ms Agnarsdóttir and X. The latter had been born to them via a surrogate mother in the United States, but neither of the first two applicants is biologically related to him. They had not been recognised as the child's parents in Iceland, where surrogacy is illegal.

The Court found that despite the lack of a biological link between the applicants, there had been "family life" in the applicants' relationship. However, the Court found that the decision not to recognise the first two applicants as X's parents had had a sufficient basis in domestic law and, taking note of the efforts on the parts of the authorities to maintain that "family life", ultimately adjudged that Iceland had acted within its discretion in this case.

Principal facts

The applicants, Valdís Glódís Fjölnisdóttir, Eydís Rós Glódís Agnarsdóttir and X, are Icelandic nationals who were born in 1978, 1977 and 2013 respectively and live in Kópavogur (Iceland). The third applicant's application was lodged on the authority of his legal guardian, M.

Ms Fjölnisdóttir and Ms Agnarsdóttir were a married couple who, via a surrogacy agency in the United States, were to be the intended parents of a child born by way of gestational surrogacy. The third applicant was born via that procedure in California in 2013. Upon their return to Iceland three weeks after the birth, the first and second applicants applied for the registration of the third applicant in the national register as an Icelandic citizen and as their son. Following enquiries, the applicants submitted documents to the effect that the third applicant had been born via surrogacy and that the surrogate mother had waived her rights to the child.

However, on 18 June 2013 Registers Iceland refused to register X. It stated that the child had been born in the USA to a surrogate mother who was a US citizen and was not thus automatically entitled to Icelandic citizenship. As X was considered to be an unaccompanied minor in Iceland, the authorities took custody of him but placed him in foster care with the first two applicants.

The Registers Iceland decision was upheld by the Ministry of the Interior on appeal, referring to, among other things, the lack of basis in Icelandic law for granting the child citizenship. The applicants appealed to the courts. In the meantime, X was given Icelandic citizenship on the basis of the recent Act no. 128/2015 on the Granting of Citizenship. However, the first two applicants were not registered as his parents.

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.

The first and second applicants applied to adopt X, but the application was put on hold owing to the ongoing parental proceedings. However, in May 2015 they divorced and subsequently withdrew their application for adoption as they were no longer eligible to adopt together.

On 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. It found that in Iceland the birth mother was to be the mother, and the authorities did not have an obligation under the circumstances to recognise the applicants as parents according to the foreign birth certificate. The court stated that the interference with the third applicant's private and family life had been necessary to protect morality and the rights of others, especially given the ban on surrogacy in Iceland.

The applicants appealed to the Supreme Court. That court upheld the judgment on 30 March 2017, except that unlike the District Court it found that no "family life" within the meaning of the Court's case-law had existed between the applicants at the time when Registers Iceland's decision had been made. It found the actions of the authorities to have been in accordance with the Constitution.

Following their divorce, X was put into foster care with each of the first two applicants alternately, for a year each time, while enjoying equal access to the other. Ultimately, after the Supreme Court had given judgment, Ms Fjölnisdóttir and her new spouse were able to foster the child permanently in 2019 with equal access for Ms Agnarsdóttir and her new spouse. At the time of application, M. was still X's legal guardian.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) in conjunction with Article 8 of the European Convention on Human Rights, the applicants complained, in particular, 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 rights.

The application was lodged with the European Court of Human Rights on 25 September 2017.

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

Paul **Lemmens** (Belgium), *President*,
Georgios A. **Serghides** (Cyprus),
Robert **Spano** (Iceland),
Georges **Ravarani** (Luxembourg),
María **Elósegui** (Spain),
Darian **Pavli** (Albania),
Anja **Seibert-Fohr** (Germany),

and also Milan **Blaško**, *Section Registrar.*

Decision of the Court

Article 8

The Court firstly had to ascertain whether the relationships in question in this case had amounted to "family life" at the time of the events, in particular when the Supreme Court judgment had been delivered. The Court noted that surrogacy was unlawful on the territory of Iceland and that under Icelandic law the woman who gave birth was considered to be the mother.

It could not, however, be overlooked that X had been in the uninterrupted care of the first and second applicants since his birth. The first two applicants had argued that they had become X's

parents, and the Government had not contested the quality of their bond. The Court concluded that there had been "family life" between the applicants.

As noted by the Court, the Supreme Court had concluded on the basis of the relevant Icelandic law, that as Ms Fjölnisdóttir and Ms Agnarsdóttir had not given birth to X, neither of them could be considered his mother. The Court did not find this interpretation to be either arbitrary or unreasonable. It thus concluded that the refusal to recognise the first two applicants as X's parents had had a sufficient basis in law.

Concerning the necessity of the measure in a democratic society, the Court was mindful of the discretion ("margin of appreciation") given to States in this area, and that the actual enjoyment of family life had not been interrupted in the applicants' specific case. On the contrary, the authorities had put X in the foster care of the other two applicants and kept open the option of joint adoption for them while they had remained married. The authorities had also granted X citizenship. In short, the State had taken steps to safeguard the applicants' family life.

Given the above, the Court accepted that the State had acted within its discretion in this matter, with the aim of protecting its ban on surrogacy. There had been no violation of the applicants' right to respect for family life.

Other articles

The applicants' complaints under Article 14 were rejected as manifestly ill-founded as there did not appear to have been a violation.

Separate opinion

Judge Lemmens expressed a concurring opinion, which is annexed to the judgment.

The judgment is available only in English.

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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.