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

FIRST SECTION

DECISION

Applications nos. 56846/15 and 56849/15
S.-H.
against Poland

The European Court of Human Rights (First Section), sitting on 16 November 2021 as a Chamber composed of:

Ksenija Turković, *President,*
Krzysztof Wojtyczek,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, *judges,*

and Renata Degener, *Section Registrar,*

Having regard to the above applications lodged on 5 November 2015,

Having regard to the decision not to have the applicants' names disclosed;

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having regard to the comments submitted by the Helsinki Foundation for Human Rights on behalf of four other non-governmental organisations, Ordo Iuris, the Institute of Psychology of the Polish Academy of Sciences and the European Centre for Law and Justice, who were granted leave to intervene by the President of the Section,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr S. and M. S.-H., were both born in 2010 in California, USA and live in Ramat-Gan, Israel. They have dual Israeli and US nationality. They were represented by Mr P. Knut and Ms K. Gierdal, lawyers practising in Warsaw.

2. The Government were represented by their Agent, Mr J. Sobczak of the Ministry of Foreign Affairs.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Background to the cases

4. The applicants' parents are Mr S. and Mr H., a same sex couple residing in Israel. They both have Israeli citizenship. In addition, Mr S. has Polish citizenship. In 2010 both men entered into a gestational surrogacy agreement with a certain K.C., a married woman and US citizen.

5. In accordance with the surrogacy agreement, the children were conceived *via* assisted reproduction technology using Mr S.'s gametes and an egg from a donor. When the surrogate mother was found to be carrying twins, Mr S., Mr H., K.C. and her husband applied to the Superior Court of California in the County of San Diego in order to determine custody rights and legal parenthood.

6. On 7 September 2010 the Superior Court of California gave judgment and declared Mr S. and Mr H. the natural, joint and equal parents of the twin babies carried by K.C. who were due to be born on or about 20 October 2010. It also declared Mr S. the biological father of the twins. The judgment further specified the particulars that were to be entered on the birth certificate and stated that Mr S. should be recorded as the father/parent and Mr H. as the mother/parent.

7. The applicants were born on 26 September 2010 in Sonora, California, and their birth certificates were drawn up in accordance with the terms stated above.

2. Administrative proceedings

8. On 20 July 2012 Mr S. applied on behalf of both applicants as their curator ad litem to the Mazowiecki Governor ("the Governor") for confirmation of the applicants' Polish citizenship.

9. On 26 July 2012 the Governor asked the applicants to provide additional documents, namely their parents' marriage certificate, documents relating to the recognition of paternity, as well as information on the citizenship of the applicants' mother.

10. On 26 September 2012 the applicants' lawyer submitted a certified copy of the Superior Court of California judgment of 7 September 2010 together with a certified translation thereof. At the same time, he refused to provide any additional documents and asked the authorities to issue a decision on the basis of the material already at their disposal.

11. On 22 October 2012 the Governor again asked the applicants to provide full copies of their Polish birth certificates in order to determine their filiation and family relationship with Mr S. and Mr H. The applicants' lawyer replied that all relevant information had already been provided and again asked the administrative authority to issue a decision based on the evidence already at their disposal.

(a) First-instance decision

12. On 5 December 2012 the Mazowiecki Governor gave two decisions refusing the applications. The Governor noted at the outset that the applicants had failed to submit copies of their birth certificates as issued by a Polish civil registry office (*Urząd Stanu Cywilnego*). He further held that, under the Polish legal system, a child's mother was the woman who had given birth to that child. The Polish legal system did not allow for the concept of surrogacy. In view of those considerations, the documents provided and the Polish legal system, the Governor found that the applicants' mother was K.C., that is, the woman who had undertaken to conceive and give birth to them. At the same time, given the principle of presumption of paternity in Polish law, the applicants' father was K.C.'s husband – D.C.

13. The Governor further found that on the date of the applicants' birth Mr S. had not been their parent. The original birth certificate which indicated Mr S. as their father and Mr H. as the other parent was of no relevance since it was contradictory to the judgment of the Superior Court of California, which clearly stated that K.C. and D.C. were the children's biological parents.

(b) Second-instance decision

14. On 12 December 2012 the applicants' representative appealed to the Minister of the Interior (*Minister Spraw Wewnętrznych* – "the Minister").

15. The Minister instructed the applicants' representative to institute proceedings under Article 1148 of the Code of Civil Procedure ("the CCP") in order to determine whether the Superior Court of California judgment of 7 September 2010 was to be recognised in the Polish legal system. The applicants' lawyer replied that the Californian judgment did not need to be recognised in Poland and refused to institute any proceedings in that regard.

16. On 28 February 2013 the Minister upheld the first-instance decision and agreed with the findings made by the Governor that, under the Polish legal system, K.C. and D.C. were the applicants' parents. On the date of their birth Mr S. had not been their parent. It further held that the applicants' original birth certificates had no evidentiary value, even though they indicated Mr S. and Mr H. as their parents, since these documents contravened the principles of the Polish legal order.

17. The Minister noted that the applicants had failed to institute proceedings under Article 1148 of the CCP in order to determine whether the judgment of the Superior Court of California of 7 September 2010 was applicable in Poland. Moreover, transposing the legal effects of the Californian judgment into the Polish law would contravene the principles of the Polish legal system (*godzi w polski system prawny*).

(c) Administrative courts

18. The applicants' representative appealed. In particular, he alleged a breach of Articles 8 (2) and 34 of the Polish Constitution.

19. On 4 July 2013 the Warsaw Regional Administrative Court (*Wojewódzki Sąd Administracyjny*) gave judgment, dismissing the applicants' appeal. The court agreed with the findings made by the administrative authorities. It confirmed that the legal effects of the judgment of the Superior Court of California contravened the principles of the Polish legal system. In order for that judgment to be applicable in Poland it should have been confirmed by a Polish civil court in a separate procedure, pursuant to Article 1148 of the CCP.

20. The court further held that, under the relevant domestic provisions, the applicants' mother was K.C. The Polish legal system did not recognise surrogacy. It was also not possible to grant parental rights to persons who were not the biological mother, her husband or a man who had acknowledged his paternity, the only exception being an adoption procedure. Consequently, an administrative authority could have only referred to the Californian judgment had the applicants submitted a decision given by a Polish court confirming that the judgment was in accordance with the Polish legal system. However, no such document had been submitted.

21. The court confirmed that the original birth certificates submitted by the applicants, even though they were not entered in the Polish civil register, remained valid documents. At the same time, it noted that those birth certificates indicated two persons of the same sex as the applicants' parents. They therefore had to be examined in the light of all available evidence in the case.

22. On 15 August 2015 the applicants appealed to the Supreme Administrative Court. They maintained that Mr S., a Polish national, was the children's biological father. In that regard, they relied on the judgment of the Superior Court of California and DNA test results. They also relied on the Court's judgments in the cases of *Mennesson v. France* (no. 65192/11, ECHR 2014 (extracts)) and *Labassee v. France* (no. 65941/11, 26 June 2014).

23. On 6 May 2015 the Supreme Administrative Court dismissed their cassation appeal. The court noted that for the determination of Polish citizenship, the children's genetic link to Mr S. was of no relevance: a child

who had one Polish parent and one foreign parent acquired Polish citizenship at birth. However, the court observed that the term "parent" carried a legal meaning. Pursuant to the relevant provisions of the Family and Custody Code, a child's mother was the woman who had given birth to that child. If the child was born during her marriage there was a legal presumption that the child's father was the mother's husband. This presumption could only be rebutted by bringing an action for denial of paternity.

24. The court further held that surrogacy agreements were not recognised in the Polish legal system as they ran counter to the principles of community life. It also noted that the Polish legal system had not attributed parental rights to "so called partner relationships". For that reason, accepting the judgment of the Superior Court of California would have been against public policy principles (*klauzula porządku publicznego*). Likewise, the applicants' birth certificates could not have any legal effect. These certificates indicated Mr S. as the applicants' father and Mr H. as the applicants' mother/parent. Since the certificates indicated the two men as parents, and by that confirmed the surrogacy agreement, they ran counter to the basic principles of the Polish legal system. Mr S. could not therefore be considered to be the applicants' parent. Lastly, the court noted that the cases of *Mennesson* and *Labassee* related to different sets of facts.

B. Relevant legal framework and practice

1. Domestic law and practice

(a) Constitutional provisions

25. The Constitution of the Republic of Poland of 1997 contains the following provisions relating to family and acquisition of Polish citizenship:

Article 8

"1. The Constitution shall be the supreme law of the Republic of Poland.

2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise."

Article 18

"Marriage, being the union of a man and a woman, as well as family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."

Article 32

"1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social or economic life for any reason whatsoever."

Article 34

"1. Polish citizenship shall be acquired by birth to parents who are Polish citizens. Other methods of acquiring Polish citizenship shall be specified by statute.

2. A Polish citizen shall not lose Polish citizenship except by renunciation thereof."

Article 47

"Everyone shall have the right to legal protection of his private and family life, of his [her] honour and good reputation and to make decisions about his [her] private life."

(b) Code of Civil Procedure

(i) Foreign documents

26. Article 1138 of the Code of Civil Procedure ("the CCP"), in so far as relevant, reads:

"Foreign official documents shall have the same probative value as Polish official documents ..."

(ii) Recognition of foreign judgments and decisions

27. Article 1145 of the CCP reads as follows:

"Foreign judgments and decisions given in civil cases shall be recognised by operation of law, unless [the] obstacles referred to in Article 1146 exist."

28. Article 1146 § 1 (7) of the CCP, in so far as relevant, reads as follows:

"... a judgment shall not be recognised if recognition would be contrary to the fundamental principles of the legal order of the Republic of Poland (public policy clause)."

29. Under Article 1148 of the CCP, anyone who has legal interest may lodge an application with a court in order to determine whether a foreign court's decision or judgment is to be recognised.

(c) Family and Custody Code

(i) Child's mother

30. Article 61^9 of the Family and Custody Code ("the FCC"), reads as follows:

"The mother of a child is the woman who gave birth to him or her."

(ii) Paternity

31. With respect to children born out of wedlock, Article 85 of the FCC provides for the presumption that a man who had intercourse with the mother no more than 300 and no less than 181 days before the birth of a child is the father.

32. As regards children born during marriage, Article 62 §§ 1 and 3 of the FCC provide, in so far as relevant:

> "1. If a child is born during marriage, or within 300 days of its termination or annulment, it shall be presumed that he or she is the child of the mother's husband. This presumption shall not apply if the child was born more than 300 days after a judicial separation.
>
> ...
>
> This presumption may only be rebutted as the result of an action for denial of paternity."

33. An action for denial of paternity may be brought by the mother's husband (within six months of learning that his wife has given birth to the child) or the child (within three years of reaching majority). Paternity may at any time be challenged by a prosecutor for reasons of the child's best interests or the protection of the interests of the public.

(iii) Adoption

34. Only a married couple may adopt jointly (Article 115 § 1 of the FCC). Adoption of the other spouse's child (second-parent adoption) is provided for under Article 1211 of the FCC. There are no provisions relating to second-parent adoption for unmarried couples.

(d) Private International Law Act

35. Section 7 of the Private International Law Act of 4 February 2011 (*ustawa prawo prywatne międzynarodowe*) provides as follows:

> "Foreign law shall not apply where application thereof would have effects contrary to the fundamental principles of the legal order of the Republic of Poland."

(e) Polish Citizenship Act

36. At the material time, acquisition of Polish citizenship was regulated by the Act of 15 February 1962 on Polish citizenship (*ustawa o obywatelstwie polskim* – hereinafter "the 1962 Act"). The relevant provisions read as follows:

Article 4

"Acquisition of Polish citizenship by birth occurs when:

1. both parents are Polish citizens, or

2. one of the parents is a Polish citizen and the other parent is unknown, his or her citizenship is undetermined or he or she has no citizenship."

Article 6

"1. The child of parents of whom one is a Polish citizen and the other a citizen of another State acquires Polish citizenship by birth ..."

Article 7

"1. Changes with regards to filiation with one or both of parents or their citizenship shall be taken into consideration when determining the child's citizenship, if these changes occur within twelve months of the child's birth ...

2. Changes with regards to establishing paternity, resulting from a court's decision following an action for denial of paternity or an action for annulment of recognition [of paternity], shall be taken into account when determining the child's citizenship, unless the child has reached [the age of] majority. ..."

37. On 15 August 2012 the Act of 2 April 2009 on Polish citizenship (*ustawa o obywatelstwie polskim* – hereinafter the "the 2009 Act") entered into force, repealing the 1962 Act. The 2009 Act contains similar provisions relating to acquisition of Polish citizenship.

(f) Civil Status Records

(i) 1986 Law

38. Section 73(1) of the Law on Civil Status Records (*prawo o aktach stanu cywilnego* – "the 1986 Law") of 29 September 1986, as applicable at the material time, provided that a foreign civil status certificate could be entered in the Polish civil register *ex officio* or on application by the person concerned.

(ii) 2014 Law

39. On 1 March 2015 the Law on Civil Status Records of 28 November 2014 (*prawo o aktach stanu cywilnego* – "the 2014 Law") entered into force, repealing the 1986 Law. Pursuant to section 104(5), transcription of a foreign civil status certificate for a Polish citizen is obligatory in particular if he or she is applying for a Polish identity document or national identification ("PESEL") number. At the same time, under section 107(3), the director of the civil Status Registry will refuse to register a foreign civil status certificate if transcription would be contrary to the fundamental principles of the legal order of the Republic of Poland.

2. Relevant domestic practice

(a) Supreme Court

40. On 20 November 2012 the Supreme Court, sitting as a bench of seven judges, adopted a resolution (*uchwała*) (III CZP 58/12) holding that a

foreign civil status certificate was the sole evidence of the events stated therein, even if it had not been registered in the Polish civil register.

41. In its decision (*postanowienie*) of 8 May 2015 (III CSK 296/14), the Supreme Court held that an accurate and literal transcription of the content of a foreign civil status certificate had to be done taking into account the meaning of all its individual elements. They should be recorded in the Polish civil register not only in accordance with their wording, but also their function. Entries included in a foreign civil status certificate should therefore be transcribed in such a manner that they retain a meaning that is not only literal, but also functional.

(b) Administrative Courts

42. On 10 October 2018 the Supreme Administrative Court examined a cassation appeal (II OSK 2552/16) in the case of two women living in a same sex relationship. Both were Polish nationals seeking to register a foreign birth certificate in Poland, with one of them recorded as the "mother" and the other as the "parent". The court held that the authorities could not invoke the public policy clause (section 107(3) of the 2014 Law) to refuse obligatory transcription under section 104(5), as such practice was in breach of the child's best interests. Furthermore, obligatory transcription under section 104(5), applied for the sole purpose of protecting the rights of a child by giving him or her the right to confirm his or her identity, was not contrary to the fundamental principles of the legal order.

43. On 30 October 2018 the Supreme Administrative Court delivered four judgments (II OSK 1868/16, II OSK 1869/16, II OSK 1870/16, II OSK 1871/16) in the cases of four children born *via* anonymous surrogates in the USA. Two birth certificates issued in the state of California indicated the details of a Polish father and his male partner, the other two issued in Texas indicated only the Polish father and an anonymous surrogate mother. In all four cases, the court found that the fact that the children had been born through surrogacy was of no relevance for the acquisition of Polish citizenship. The court held that a human being was born with natural and inalienable dignity and was entitled to citizenship if one of the parents was a Polish citizen. Acquisition of citizenship was an issue of public law and the family law provisions relating to filiation were thus not applicable.

44. On 2 December 2019, the Supreme Administrative Court, sitting as a bench of seven judges, adopted the following resolution (II OPS 1/19):

> "Section 104(5) of the 2014 Act, in conjunction with section 7 of the Private International Law Act of 4 February 2011, does not allow for transcription of a child's foreign birth certificate indicating persons of the same sex as [the child's] parents."

45. The court further explained that in a Polish birth certificate it was not possible to indicate instead of the child's father a "parent" who was a woman, since such transcription would contravene the fundamental

principles of the Polish legal order. At the same time the court stressed that given the child's best interests, the administrative authorities should apply the legal provisions in such a manner as to issue Polish documents and the PESEL number solely on the basis of a foreign birth certificate.

46. Following this resolution, in several judgments the Regional Administrative Courts confirmed that transcription of a foreign birth certificate indicating same-sex parents contravened the fundamental rules of the legal order of Poland. At the same time, the courts repeated that acquisition of Polish citizenship was not linked to transcription of a birth certificate (the Łodz Regional Administrative Court's judgment of 5 February 2020 III SA/Łd 617/19, and the Szczecin Regional Administrative Court's judgment of 19 March 2020 II SA/Sz 1075/19).

47. On 10 September 2020 the Supreme Administrative Court delivered judgments (II OSK 1390/18) in two cases concerning a Polish citizen whose son was born through surrogacy in the USA. The US birth certificate indicated the details of the Polish father and an anonymous surrogate mother. In the first case, relating to confirmation of the child's Polish citizenship, the court dismissed a cassation appeal lodged by the Minister of the Interior. The court held that the fact that the child had been born *via* a surrogate mother was of no relevance for the acquisition of Polish citizenship by him on the basis of his father's citizenship. The application of Polish family law to determine the child's filiation would have amounted to an unacceptable challenge to the probative value of the US birth certificate. In the second case, concerning transcription of the US birth certificate, the court dismissed the father's cassation appeal. It concurred with the administrative authorities that transcription would have contravened the fundamental rules of the legal order of Poland. Even though the certificate had not indicated as parents two people of the same sex, but a father and an anonymous surrogate mother, transcription would nevertheless have required including information about surrogacy in the civil register. At the same time, the court stressed that refusal of transcription should not lead to a situation in which a Polish citizen was not able to obtain identity documents and a PESEL number.

3. European Union law

48. Directive 2004/38/EC ("the 2004 Directive") of the European Parliament and the Council of 29 April 2004 regulates the right of citizens of the European Union (EU) and their family members, including those who are not EU citizens, to move and reside freely within the territory of the EU Member States. The 2004 Directive applies to all Union citizens and their family members who move to or reside in a Member State other than that of which they are a national (Article 3). Article 2 contains the following definition:

"'Family member' means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relative in the ascending line and those of the spouse or partner as defined in point (b);"

49. As is apparent from the relevant ECJ case-law, although the 2004 Directive does not directly apply to EU citizens who move back to their Member State of nationality after having exercised their free movement rights, such situations are nonetheless, covered directly by the free movement provisions (see, most recently, Case C-673/16, Coman v. Inspectoratul General pentru Imigrări (June 5, 2018)).

COMPLAINTS

50. The applicants complained under Article 8 taken alone and in conjunction with Article 14 of the Convention that the domestic authorities had not recognised their legal parent-child relationship with their biological father and had based the decisions not to confirm their Polish citizenship on considerations relating to their parents' sexual orientation.

THE LAW

A. Joinder of the applications

51. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly.

B. Complaints under Article 8 of the Convention

52. The applicants complained that the Polish authorities had not recognised their legal parent-child relationship with their biological father lawfully established abroad, and on those grounds had refused to confirm the acquisition of Polish citizenship by descent. They relied on Article 8 of the Convention, which reads, in so far as relevant, as follows:

"1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' arguments

(a) The Government

53. The Government submitted from the outset that the applications were incompatible *ratione materiae* with the provisions of the Convention. They stressed that the facts of the case did not fall within the ambit of Article 8 of the Convention. The right to acquire a particular nationality was not as such guaranteed by the Convention except in cases of arbitrary denial of citizenship, or because of the serious consequences on the private life of the individual.

54. In the Government's view, the present case did not concern an arbitrary denial of citizenship. The refusal had resulted from the findings made by the domestic authorities which had implemented the applicable provisions in order to establish the applicants' filiation. Moreover, there had been no serious consequences on the applicants' private life rendering them stateless. The applicants already had dual Israeli and US nationality and lived in Israel. Furthermore, there was no reason for the applicants to fear visits to Poland. The lack of official recognition of their intended parents in Poland had no impact on their stay in the country. In that regard, the Government also argued that contrary to the applicants' submissions, they faced no obstacles with regard to their entry and stay in Poland since, as family members of an EU citizen, they enjoyed their freedom of movement by moving to and taking up genuine residence in accordance with the conditions laid down in Article 7 (1) of Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 (see paragraphs 48 and 49 above).

55. The Government further maintained that the applicants had not availed themselves of a number of domestic remedies, as required by Article 35 § 1 of the Convention. Firstly, they submitted that the applicants should have made an application to the Constitutional Court challenging section 7 of the Private International Law Act with reference to Article 1146 § 1 (7) of the CCP read in connection with Article 61^9 of the FCC as to its compatibility with Article 47 of the Polish Constitution (see paragraphs 25, 28, 30 and 35 above). Secondly, they should have lodged an application for transcription of the foreign birth certificates under section 73(1) of the 1986 Law. Thirdly, they had failed to institute civil proceedings under Article 1148 of the CCP, as instructed by the Minister of the Interior, for recognition of the Californian judgment in Poland. Lastly, they could have had recourse to the remedies provided for by the FCC, and could have brought an action for denial of paternity and then for recognition of Mr S.'s paternity.

56. In any event, in the Government's view the applications were manifestly ill-founded.

(b) The applicants

57. The applicants submitted that the circumstances of the case fell within the ambit of "private and family life". In their view, they had been denied Polish citizenship solely on discriminatory grounds, namely the sexual orientation of their parents, one of whom was their biological father. They noted that the domestic authorities had relied on the fact that their birth certificates indicated two men as their parents and that they had been conceived in execution of a surrogacy arrangement.

58. Furthermore, they disagreed with the Government as regards the lack of serious consequences on their private life. They submitted that the domestic decisions had affected their private and family life. They were Polish Jews whose family members had been killed in the Holocaust and this heritage was extremely important to them. They had visited Poland with their parents, but were afraid of returning since Mr. S's paternity was not recognised by the Polish authorities. Because of Israel's difficult geopolitical situation, the family were considering moving to Europe, but as their ties to their biological father had been called into question, they were unable to reside in Poland on the basis of being a family member of an EU citizen. Moreover, they could not move to the US since their parents did not have US citizenship and minors could not act as green card sponsors for the purposes of family reunification.

59. The decision of the Polish authorities had not only concerned denial of citizenship but had also called into question the legal parent-child relationship established abroad. The fact that the Polish authorities had considered that the applicants' legal parents were the surrogate mother and her husband fell within the ambit of "family life" and had directly affected the applicants' relationship with their biological father. As the parent-child relationship was not recognised in Poland, this situation would affect the applicants' ability to enjoy their family life if they decided to live there.

60. The applicants also disagreed with the Government as regards the exhaustion of domestic remedies. Firstly, they stressed that their case did not concern the compatibility of legal provisions with the Constitution, but the application and erroneous interpretation of domestic law. A constitutional complaint was therefore not an effective remedy. Moreover, they referred to the composition of the Constitutional Court, arguing that it included judges appointed in a defective procedure. Secondly, they noted that, pursuant to the resolution of the Supreme Administrative Court of 2 December 2019 (II OPS 1/19; see paragraphs 44-46 above), in Poland it was not possible to register a foreign birth certificate indicating persons of the same sex as the child's parents. Thirdly, they maintained that, as confirmed by the Supreme Court in its

decision of 8 May 2015 (see paragraph 41 above), the administrative authorities and administrative courts were competent to examine and determine the applicability of a foreign judgment without the need to institute proceedings under Article 1145 of the CCP. Lastly, actions for denial and recognition of paternity were not relevant in their case. They submitted that the Polish authorities were in no position to question parenthood established under the laws of another country. In that regard, they relied on the Supreme Administrative Court's judgments of 30 October 2018 (see paragraph 43 above), holding that Polish family-law provisions were irrelevant for the establishment of paternity already established under US law.

2. The Court's assessment

61. The Court will first consider the objection of lack of jurisdiction *ratione materiae*.

(a) General principles

62. The Court reiterates at the outset that the question of the applicability of a Convention right falls within the Court's jurisdiction *ratione materiae* and that the relevant analysis should normally be carried out at the admissibility stage unless there is a particular reason to join this question to the merits (see *Denisov v. Ukraine* [GC], no. 76639/11, § 93, 25 September 2018). It finds that no such particular reasons exist in the present case.

63. The Court further reiterates that, in order to reach the conclusion that a complaint is compatible *ratione materiae* with Article 8 of the Convention, the measure complained of must attain a certain level of seriousness and be carried out in a manner causing prejudice to personal enjoyment of the right to respect for one's private and/or family life (ibid., §§ 110-14). Conversely, once a measure is found to have seriously affected the applicant's private life, the complaint is to be deemed compatible *ratione materiae* with the Convention.

64. The Court notes that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity which includes the legal parent-child relationship...; an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned (see *Mennesson v. France*, no. 65192/11, §§ 46,96, ECHR 2014 (extracts), and *Labassee v. France*, no. 65941/11, §§ 38,75, 26 June 2014).

65. Moreover, while the provisions of Article 8 do not guarantee the right to acquire a particular nationality or citizenship, the Court has previously stated that it cannot be ruled out that an arbitrary denial of

citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual (see *Genovese v. Malta* no. 53124/09, § 30, 11 October 2011, and *Ramadan v. Malta*, no. 76136/12, § 85, 21 June 2016). Various approaches to the examination of the issues relating to denial or revocation of citizenship are set out in the recent judgment of *Usmanov v. Russia* (no. 43936/18, §§ 52-54, 22 December 2020).

(b) Application of the above principles to the present case

66. The first question to be determined by the Court is whether the refusal to recognise the legal parent-child relationship with the applicants' biological father and the ensuing refusal to confirm the acquisition of Polish citizenship by descent affected the applicants private life thus rendering Article 8 applicable.

67. In order to answer that question, the Court considers it appropriate to employ a consequence-based approach and to examine whether the impugned decisions had sufficiently serious negative consequences for the applicants (compare *Denisov*, §§ 107-109, and *Usmanov* §§ 59-62, both cited above). It is further for the applicants to show convincingly that the threshold was attained in their case (see *Denisov*, cited above, § 116).

68. The applicants contended that they were Polish Jews whose family members had been killed in the Holocaust and that this heritage was extremely important to them. Allegedly, due to Israel's difficult geopolitical situation, the family were considering moving to Europe (see paragraph 58 above). However, the Court has not been provided with any specific information or details about the family's plans to relocate to Poland and it does not appear that such a move was imminent. Whatever the degree of potential risk to the applicants' family or private life, the Court considers that it must determine the issue having regard to the practical obstacles which they have had to overcome on account of the lack of recognition in Poland of the legal parent-child relationship between the applicants and their legal parents (see *Mennesson*, cited above, § 92).

69. As regards the direct consequences of the refusal to confirm the acquisition of Polish citizenship, the Court observes that the applicants have never lived in Poland. Since birth they have been living in Israel as a family unit with their intended parents. They already have dual US/Israeli citizenship and the domestic decisions did not render them stateless (compare *Ramadan*, cited above, § 92, and *Ahmadov v. Azerbaijan*, no. 32538/10, § 46, 30 January 2020). In addition, they have not alerted the Court to any negative consequences or practical difficulties which they might encounter in their chosen country of residence, resulting from the Polish courts' refusal to confirm the acquisition of Polish citizenship.

70. Furthermore, in the circumstances of this case the Court notes that the applicants can benefit, in the State where they live, from the legal

parent-child relationship with their biological father where the recognition of that relationship is not put into doubt. Moreover, it cannot be said that the decisions of the Polish authorities left them in a legal vacuum both as to their citizenship and as to the recognition of the legal parent-child relationship with their biological father (see, conversely, *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, § 209, 14 December 2017).

71. In that connection, the present case must be clearly distinguished from *Mennesson* and *Labassee*. The Court reiterates that in the above-mentioned case it expressly held that a lack of possibility of recognition of the legal relationship between a child born *via* surrogacy abroad and the intended father, where he was the biological father, entailed a violation of the child's right to respect for his or her private life (see *Mennesson*, §§ 100-01, and *Labassee*, § 79, both cited above). In the present case it is true that the Polish authorities refused to give effect to the foreign birth certificates establishing the legal parent-child relationship between the applicants and their biological father, Mr S. However, this link is recognised in the country where the family resides.

72. Moreover, as pointed out by the Government, pursuant to the 2004 Directive (see paragraph 48, 49 and 54 above) the applicants, as family members of an EU citizen, are entitled to free movement within the EU and enjoy the right to move and reside in the territory of another Member State.

73. The Court is mindful that the domestic decisions have clearly had some repercussions on the applicants' personal identity. In addition, on a more practical level, as the situation stands to date, the applicants must have experienced some obstacles resulting from the fact that they do not have Polish (and consequently European) citizenship (compare *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 156, 28 June 2007). Nevertheless, it does not appear that the negative effect which the impugned decisions had on the applicants' private life crossed the threshold of seriousness for an issue to be raised under Article 8 of the Convention. Moreover, the applicants did not set forth, either to the Court or in the domestic proceedings, any other specific personal circumstances indicating that these decisions had had a serious impact on their private life.

74. In so far as the applicants specifically alleged that the domestic decisions had also affected their family life, the Court observes that these arguments are in principle the same as those submitted in relation to the complaint concerning respect for their "private life". The applicants saw a link between the domestic authorities' refusal to give effect to their foreign birth certificates and their right to respect for their family life. The Court does not accept their contentions. Even taking into account their complaint that the domestic authorities determined *de novo* their legal parentage in accordance with the principles of Polish family law, considering that they do not live in Poland, the Court is unable to find any factual basis for

concluding that there has been an interference with the right to respect for family life in the present case.

75. Furthermore, the Court observes that it does not appear that so far the family has had to overcome any practical obstacles on account of the Polish authorities' decisions (compare *Mennesson*, §§ 87-95, and *Labassee*, §§ 66-73, both cited above, and *Valdís Fjölnisdóttir and Others v. Iceland* no 71552/17, § 75, 18 May 2021). Most importantly, since the applicants' family resides in Israel, the inability to obtain confirmation of acquisition of Polish citizenship has not prevented them from enjoying, in the country where they live, their right to respect for their family life. The applicants and their intended parents all have Israeli citizenship, and their legal relationship is recognised in Israel. It does not appear that the fact that the applicants are not recognised as Polish citizens would have any bearing on their family life, for example in the event of their intended parents' death or separation. Thus, any potential risk to their family life should be regarded in this particular case as purely speculative and hypothetical and could only possibly materialise if they took up residence in Poland.

76. In view of the above considerations, the Court finds that Article 8 of the Convention is not applicable. The Government's objection in this regard should therefore be upheld. The complaint is therefore incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) of the Convention and must be rejected in accordance with Article 35 § 4.

77. Given the reasons set out above and its conclusion drawn therefrom (see paragraph 76 above), the Court finds that is not necessary to examine the plea of non-exhaustion raised by the respondent State.

C. Complaint under Article 14 in conjunction with Article 8 of the Convention

78. The applicants complained that they had been discriminated against in the enjoyment of their right to respect for private and family life on account of their status as children of same-sex parents. Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

79. The Court reiterates that Article 14 only complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to that extent it is autonomous – there can be no room for its application

unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Sommerfeld v. Germany* [GC], no. 31871/96, § 84, ECHR 2003 VIII (extracts).

80. As the Court has already found the applicants' complaint under Article 8 of the Convention to be incompatible *ratione materiae* with that provision (see paragraph 76 above), Article 14 cannot apply either.

81. It follows that the complaint under Article 14, taken in conjunction with Article 8 of the Convention, must be rejected as being incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 35 §§ 3 (a) and 4.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 9 December 2021.

{signature_p_2}

Renata Degener Section Registrar	Ksenija Turković President