WRITTEN OBSERVATIONS

Submitted to the European Court of Human Rights

In the case

A.D.-K. and others v. Poland

(Application n° 30806/15)

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1. In the case of *A.D.-K. and others v. Poland* (No. 30806/15), Mrs. A.D.-K., Polish (first applicant), and Mrs. S.D.-K., British (2nd applicant), live in a registered partnership in the United Kingdom. In 2011, the second gave birth to a daughter (3rd applicant). On the basis of Article 8 of the Convention and Articles 8 and 14 together, the applicants complain of the refusal of the Polish authorities in 2012 to transcribe into the Polish civil registries the British birth certificate mentioning the 2nd applicant as "mother" and the first applicant as "parent" of the child.

2. While the adults applicants consider themselves victims of discrimination based on their homosexuality; they do not see any unfairness in the fact that the child is deprived of her father. Indeed, the European Court of Human Rights (ECHR) is asked to oblige a State to transcribe, namely, to include in its legal order, a birth certificate legally established abroad on which there is a double feminine filiation.

3. The *European Center for Law and Justice* (ECLJ) points out that the applicants, in challenging the fact that nature - which is based on the difference of the sexes, in particular in procreation and filiation - remains a reference for human standards, manipulate the interest of the child and the right to respect for private and family life for ideological and militant purposes. While a dual female parentage objectively contravenes the rights and interests of the child (I), the refusal to transcribe such a birth certificate is legitimate on the part of the State with regard to the very purpose of an act of birth and to the obligations granted by Poland under the Convention (II).

Preliminary remarks

4. One must first underline that the Court regularly recalls the competence of the States regarding filiation, particularly when it comes to transcribing a birth certificate established abroad. In fact, in the case of *Paradiso and Campanelli v. Italy*, it has admitted "the State's exclusive competence to recognise a legal parent-child relationship – and this solely in the case of a biological tie or lawful adoption – with a view to protecting children".[1] "Recognize" here is synonymous with "transcribe" since this case related to the refusal to transcribe a birth certificate established abroad after a surrogacy agreement.

5. In addition, States have no absolute obligation to transcribe, towards a person who has no genetic connection with the child, the child's birth certificate, even if legally established abroad. The acknowledgment by the Court of the importance to the biological basis of filiation and the reality principle is another lesson in surrogacy cases.[2]

6. In the light of the Court's case-law on the subject, the ECLJ considers that in this case the refusal of transcription does not infringe the rights of adults (1st and 2nd applicants) in the scope of Article 8 taken in each of its components, private life and family life, invoked by them. On the one hand, the right to respect for private life includes, according to them, a right *to be considered as parents*: the jurisprudence is nevertheless clear and consistent: "*the Convention*

[1] *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, 24 January 2017

[2] In *Paradiso and Campanelli*, the refusal to transcribe the birth certificate (as well as the withdrawal of the child) was not condemned for none of the members of the sponsoring couple were genetically linked to the child; in *Mennesson and Labassée v. France* (Nos. 65192/11 and 65941/11, 26 June 2014), France was condemned, but only in that it did not transcribe the foreign birth certificate with respect to the biological father.

does not recognise a right to become a parent",[3] nor the right to procreate[4] or to adopt.[5] At most there is a "*right to respect for decisions to become or not to become a parent*"[6] and a "*right to respect for (the) decision to become genetic parents*".[7] In any event, the 1st and 2nd applicants remain "parents" of the child by virtue of the foreign act which, it is recalled, remains.
On the other hand, it is clear from the Mennesson case that the refusal to transcribe "*necessarily affects (the) family life*" of all the applicants but that "*whatever the degree of the potential risks for the applicants' family life, the Court considers that it must determine the issue having regard to the practical obstacles which the family has had to overcome*".[8] It concluded that the applicants' right to respect for family life was not disregarded even though they were permanently resident in France where the transcription of the foreign birth certificate was requested and refused. A fortiori, the solution should be the same in this case, especially since the applicants and the child live in the State which issued the birth certificate whose transcription is requested in Poland. Under Article 8, as in *Mennesson*, only the interests of the child should be considered. This is her "birth certificate", not an "act of parenthood" that adults could request against Poland.

I. THE DOUBLE FEMININE FILIATION, A VIOLATION OF THE RIGHTS OF THE CHILD

7. The fact that something is legal in a jurisdiction does not mean that it is inherently good.[9] Thus, a birth certificate indicating two adults of the same sex as "parents" distorts the birth certificate from its primary purpose, which is to account for the very fact of birth, in order to have the interests of the adults prevail over the best interests of the child. However, it is the latter that must guide any decision concerning the child.[10] The Convention on the Rights of the Child (CRC) of 1989[11] in Article 3-1 states that "*the best interests of the child shall be a primary consideration*". It follows from this international treaty and from the case-law of the Court that, contrary to the applicants' assertion, the best interests of the child lie in the establishment of a plausible birth certificate based on biological reality and reflecting the real origin of any child coming into the world (A). It is the interest of the child thus understood that is reflected in the European and international consensus on filiation (B).

[3] *Paradiso and Campanelli v. Italy* [GC], *op. cit.*, § 215.
[4] *Šijakova and others v. the Former Yugoslav Republic of Macedonia*, No. 67914/01, 6 mars 2003, § 3; *S.H. v. Austria*, No. 57813/00, (dec.) 15 November 2007, § 4.
[5] *Fretté v. France*, No. 36515/97, 26 February 2002, § 32; *Emonet and others v. Switzerland*, No. 39051/03, 13 December 2007; *Paradiso and Campanelli v. Italy* [GC], *op. cit.*, § 141.
[6] *Evans v. The United-Kingdom* [GC], No. 6339/05, 10 April 2007, § 71; *S.H. v. Austria*, No. 57813/00, 1 April 2010, § 58.
[7] *Dickson v. The United-Kingdom* [GC], No. 44362/04, 4 December 2007, § 66.
[8] *Mennesson v. France*, *op. cit.*, § 87 and 92.
[9] *Annen v. Germany*, No. 3690/10, 26 November 2015. For example, even though some States allow surrogacy, it is still recognised as contrary to the rights of children and women : Human Rights Council, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, A/HRC/37/60, §§ 65 et 68, 15 January 2018.
[10] *Mennesson v. France*, *op. cit.*, § 99.
[11] Convention signed and ratified by the United Kingdom on 19 April 1990 and 16 December 1991 and by Poland on 26 January 1990 and 7 June 1991.

A. The best interests of the child, a justification of the refusal to register the double feminine parentage

The interest of the child to be recognized in his dual maternal and paternal affiliation

8. Article 7-1 of the CRC, which states that "*The 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*", aims at protecting the child by guaranteeing his filiation. Except for insurmountable obstacles, a child has the right to know the identity of his father and mother, that is, of the man and the woman who conceived him and gave birth to him. Any other interpretation of the term "parents" would have the effect to deprive the child of the content of the right enunciated here. According to the jurisprudence of the ECHR, the child has the right "*to a 'normal family life' (...) (including) the establishment of his double maternal and paternal affiliation*".[12]

9. Reality does not allow to have a double filiation of the same sex: filiation necessarily flows from a man and a woman. Although filiation does not always correspond to the truth (adoption[13] / medical assistance to procreation), it must be plausible so that the child can become part of a history. Filiation towards two persons of the same sex is a serious anomaly that causes injustice and suffering for the child. Poland is being reproached by the applicants its respect for the reality of human begetting and its desire to give its children a plausible filiation in conformity with international law and the interests of the child.

10. In the present case, the facts presented do not make it possible to know how the third applicant was conceived, whether the identity of her father is known or whether he is an anonymous sperm donor. But anyway, this child is issued from a man and a woman. As a result, she has the right to know her parents, including her father, and all his family, and to establish her parentage towards him. To accept the transcription of the British birth certificate would amount to deny the child's right to have her paternal affiliation established and therefore to know her father. This would make lawful and legitimate this manipulation of filiation that makes this child fatherless. The fact that English law permits such false filiation cannot compel Poland to do the same. On the contrary, it is the duty of the Court to reiterate to States "*the importance of biological parentage as a component of identity*"[14] and to prevent violations of children's rights. Indeed, if the desire to have a child is profoundly human, the human nature that gives birth to the desire to become a parent has also placed in the child the need to be raised and loved by his true parents.

The importance of biological parentage to access one's origins

11. The ECHR has recognized the importance of biological filiation: it has deduced from the right to identity a right to know the truth about one's ascendants which implies that every child should be able to access his origins, thus knowing the identity of his biological parents. For the Court, "*the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life*".[15] It has thus held that "*Matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth*

[12] Nathalie Bettio, Le « Droit à l'enfant » nouveau droit de l'Homme, *Revue du droit public et de la science politique en France et à l'Étranger*, 2010-2-008, 0301 No. 2, p. 473. See ECHR, *Marckx v. Belgium*, No. 6833/74, 13 June 1979 (maternal filiation); *Johnston v. Ireland*, no. 9697/82, 18 December 1986 (paternal filiation).
[13] *X. v. Belgium and the Netherlands*, No. 6482/74, 10 July 1975.
[14] *Mennesson v. France*, *op. cit*., § 100.
[15] *Jäggi v. Switzerland*, No. 58757/00, 13 July 2006, § 37. See also *Odièvre v. France* [GC], No. 42326/98, 13 February 2003, § 29; *Gaskin v. The United-Kingdom*, No. 10454/83, 7 July 1989, § 39.

concerning important aspects of one's personal identity, such as the identity of one's parents".[16] In addition, "*an individual's interest in discovering his parentage does not disappear with age, quite the reverse.*"[17]

12. For the Court, it is therefore important that the civil status be in conformity with the (biological) reality so that the filiation of the child enables him to know his identity. Moreover, in a pragmatic way, depriving a child of his biological parentage concerning one of his parents deprives him of useful information in medical and genetic matters, in particular for the prevention and the obtaining of appropriate medical care;[18] it also deprives him of half of his material and immaterial inheritance.

13. In the present case, the ECHR is required to demand States to transcribe to the civil status a false filiation with regard to a woman who does not have a biological link with the child, which does not respect the requirement of transparency and truth concerning the child's origins. It would be inappropriate, however, for the Court to ignore the biological facts by requiring the execution of the will of the 1st and 2nd applicants which serves their interests - to be recognized both as mothers - but harms that of the child. However, the Court has already pointed out that the interest of the child must take precedence over those of the intended parents and their desire to be parents, in particular with regard to the importance of the biological links of a child in the development of his personal identity. In this case, only the interests of the child as stated must be considered and not that of the partner of the biological mother of the child with whom she has no biological link.[19]

14. Thus the refusal of the Polish State to recognize a false filiation is justified as it is in the best interests of the child both regarding her right to have a paternal and maternal filiation and her right to have access to her origins.

B. The European consensus on filiation, reflecting the best interests of the child

15. There is a real consensus among the Council of Europe Member States that a child can have only one female parentage, which reflects the reality and interest of the child in this matter, as was just explained. On the one hand, as studies from different origins show, there is a consensus on the fact that the woman who gives birth is the legal mother, her marital status being of little importance. This is based on the fundamental and secular adage of Roman law *mater semper certa est*.[20] On the other hand, whereas only 18 of the 47 Council of Europe Member States allow adoption by the spouse in a homosexual couple ("second-parent adoption"), it is

[16] *Jäggi v. Switzerland*, *op. cit*., § 40.
[17] *Jäggi v. Switzerland*, *op. cit*., § 40.
[18] Kavot Zillén, Jameson Garland, Santa Slokenberga, *The Rights of Children in Biomedicine: Challenges posed by scientific advances and uncertainties*, submitted 11 January 2017 (Commissioned by the Committee on Bioethics for the Council of Europe), p. 24-25.
[19] *Paradiso and Campanelli v. Italy* [GC], *op. cit.*, § 141 et 215; *Mennesson v. France*, *op. cit.*, § 100.
[20] This principle is in force in the Member States of the International Commission on Civil Status: see Frédérique Granet, *La maternité de substitution et l'état civil de l'enfant dans des États membres de la CIEC*, February 2014; Nigel Lowe, "A study into the rights and legal status of children being brought up in various forms of marital or nonmarital partnerships and cohabitation", 2008, CJ-FA (2008) 5, p. 28; Hague Conference on Private International Law, *Study of Legal Parentage and the issues arising from International Surrogacy Arrangements* (Prel. Doc. No 3 C of March 2014); Clotilde Brunetti-Pons (eds) et al., *Le « droit à l'enfant » et la filiation en France et dans le monde*, Rapport final de la Mission de recherche Droit et Justice, CEJESCO de l'Université de Reims, 2017.

significant that only 10 Member States allow automatic recognition of a status of "co-parent" to same-sex persons.[21]

16. Can the Court reasonably criticize Poland for not including in its own civil status registers a foreign birth certificate that does not respect the principles elaborated within the Council of Europe itself and reflecting this consensus? Indeed, such an act is not in conformity with the 'Report on Principles Concerning the Establishment and Legal Consequences of Parentage – "The White Paper"' written by the European Committee on Legal Co-operation (CDCJ) and adopted in May 2004 whose Principle 1 concerning the establishment of maternal affiliation states: "*The woman who gives birth to the child shall be considered as the mother.*"[22] Only one woman, in this instance the woman who gave birth, can claim to be recognized as a mother by birth. In addition, the establishment of a filiation relationship with the mother's partner is a very controversial provision: in 2011, the CDCJ decided to withdraw Principle 17 § 3 of the draft "Recommendation on the rights and legal status of children and parental responsibilities" which recommended to the Member States the establishment of maternal affiliation for the woman who is the spouse, registered partner or concubine of the mother of a child conceived by artificial procreation. This draft recommendation was finally rejected by the Committee of Ministers because it did not sufficiently respect the natural structure of the family.

17. Although the situation was legally created abroad, the lack of consensus shows that this issue is very controversial and requires caution. Indeed, if "*there are areas in which the national legislature is better placed than the European Court to bring about change in institutions concerning the family, relations between adults and children, and the concept of marriage*"[23], the same is true when it comes to transcribing a false foreign civil act. It is likely that a decision that would condemn Poland in this case would be badly received by the States, which might see it as a sign of interference by the Court in their democratically determined legislative decisions on filiation with the aim of protecting the interests of the children. It should be remembered that at the beginning of April 2019, Italy reinstated on the official forms the words "father" and "mother" instead of the mentions "parent 1" and "parent 2" that had been introduced in 2015. In any case, atypical family situations are rarely in the interest of the child and therefore cannot be imposed on society. As acknowledged by the Court, "*the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront*".[24] Yet, this is precisely what Poland is committed to, in calling for the protection of public order and in refusing to transcribe the British act. Indeed the latter allows to dispose of the history of a child who is therefore the victim of a real injustice.

II. THE LEGITIMACY OF THE REFUSAL OF TRANSCRIPTION OF A BIRTH ACT CONTRARY TO THE RIGHTS OF THE CHILD

18. In addition to the ground of protection of the rights and freedoms of others (the child in this case), that of the defense of order (Article 8 § 2) justifies the lawful invocation of public order (A) to refuse the transcription of the birth certificate of the third applicant. Such a refusal is also balanced, given the wide margin of appreciation available to States in this area (B).

[21] ILGA, 10th Rainbow Index, May 2019.
[22] European Committee on Legal Co-operation, 'Report on Principles Concerning the Establishment and Legal Consequences of Parentage – "the White Paper"', May 2004, CJ-FA (2006) 4 f, p. 7.
[23] *Gas and Dubois v. France*, No. 25951/07, 15 March 2012, concurring opinion of Judge Costa joined by Judge Spielmann.
[24] *X, Y and Z v. The United Kingdom*, [GC], No. 21830/93, 22 April 1997, § 47.

A. The legitimacy of the invocation of public policy in relation to the transcription of a foreign civil status document

The civil status, an instrument of general interest

19. The current case questions the nature, role and reliability of the civil status. Is its role that of realising the personal desires of adults, like a "parenthood act" or does it serve the interests of children and of general interest? This second possibility prevails, as the Court "*fully accepts*" it in *A.P., Garçon and Nicot v. France*: "*safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil-status records and, more generally, ensuring legal certainty, are in the general interest*".[25]

20. Civil status has a double function, as a place of preservation of the past and as a proof and means of identifying people in the *present*.[26] It corresponds to "*facts*" and "*events*".[27] The birth certificate, which forms part of it, first responds to the first of the civil status functions and its content therefore flows directly from reality: The fact that it contains objective characteristics on the child and his parentage, which will serve as reference his whole life,[28] is the subject of a certain consensus.[29] Being by nature a legal instrument written and authenticated by state officials, the veracity of the contents of a birth certificate is of great importance. There can be no right to a birth certificate mentioning filiation not in accordance with the natural truth about the origin of the child. Thus, the UN offers a "standard" form indicating the "mother" and "father" of the child.[30] The fact that the registration of civil status events meets objectives of general interest justifies the invocation of public order in the matter of transcription of such an act.

Invoking public order, a possibility provided for in international law and in Polish law

21. The possibility of invoking a public order clause is widely accepted in the legislation of different countries in order to protect themselves against foreign practices contravening the fundamental principles of their own legal order. This is provided for in the private international law of the family, particularly regarding recognition.[31] Regarding the refusal to transcribe a birth certificate, the ECHR admitted for its part the "*objection on grounds of international public policy, which is specific to private international law. It does not seek to call this into question as such*"[32]. However, the Court checks that the state has not used such a clause abusively. Regarding Polish law, Article 107 § 3 of the Act of 28 November 2014 on civil status records provides in substance that the transcription of a foreign civil status document must be

[25] ECHR, *A.P., Garçon and Nicot v. France*, Nos. 79885/12, 52471/13 and 52596/13, 6 April 2017, § 132. See also: United Nations Children's Fund, *A Passport to Protection, a Guide to Birth Registration Programming*, UNICEF, New York, 2013, p. 9.

[26] Irène Théry, Anne-Marie Leroyer, *Filiation, origines, parentalité - Le droit face aux nouvelles valeurs de responsabilité générationnelle*, Paris, Odile Jacob, 2014, p. 69.

[27] See official definitions of "civil status": United Nations, Department of Economic and Social Affairs, Statistics Division, 2001, p. 50; United Nations, Department of Economic and Social Affairs, Statistics Division, 1998, p. 9.

[28] UNICEF, Every Child's Birth Right: Inequities and Trends in Birth Registration, 2013, p. 4.

[29] See UNICEF, *A Passport to Protection*, *op. cit.*, p. 138.

[30] *Ibid*, p. 122-123.

[31] See for example Regulation (EC) No 2201/2003 on the jurisdiction, recognition and enforcement of judgments in matrimonial matters and on parental responsibility (Brussels 2bis), Article 22: "A judgment given in matters of divorce, separation cancellation or annulment of marriage is not recognized: (a) where the recognition is manifestly contrary to the public policy of the requested Member State" and Article 23: "A judgment given in matters of parental responsibility is not recognized: (a) if the recognition is manifestly contrary to the public policy of the requested Member State in the best interests of the child."

[32] *Mennesson v. France*, *op. cit.*, § 84.

refused if it contravenes fundamental principles of the Polish legal order. Although the applicants submitted their application in 2012, it is important to point out that Article 7 of the law of 4 February 2011 on private international law contains a public order clause stipulating that foreign law does not apply if the effects are contrary to the fundamental principles of the Polish legal order. That is precisely the case in the present case since, while the effect of the transcript is to allow the establishment of a Polish birth certificate, the content of the latter would result from the application of the English law of parentage which is fundamentally contrary to Polish law.

The guiding principles of family law, a component of public order

22. Family law in an area of predilection for the use of public order. International law gives special importance to the family by recognizing it as "*a fundamental unit of society*",[33] "*the natural and fundamental group unit of society*"[34] "*for the growth and well-being of all its members and particularly children*"[35], it is "*founded primarily by the marriage between a man and a woman*."[36] Similarly, the Polish Constitution strongly states that "*Marriage as a union of a man and a woman, family, maternity and parenthood are under the protection and care of the Republic of Poland*" (Article 18). The Polish Constitutional Court has ruled that this is the foundation of the principles of state policy on marriage and family[37] and that marriage and family are values with a particularly high place in the hierarchy of constitutional values.[38] It also held that the inadmissibility of the adoption of a child by a homosexual person or a same-sex couple is one of the principles of the Polish legal system.[39]

The remarkable coherence of Polish family law

23. In view of the above, the invocation of public order by the Polish authorities seems legitimate, all the more so since the Polish legislation relating to the family is coherent and based on the natural reality which is contrary to a double feminine filiation. For the Court, the consistency (or potential inconsistency) of a State's domestic legal and administrative practices is "*an important factor*" to be considered in the assessment of a case under Article 8.[40]

24. The applicants wish to oblige Poland to accept this situation which is contrary in every respect to its legal system. There is no legal framework governing same-sex relationships: marriage is the union of a man and a woman according to the Polish Constitution (Article 18) and the concept of registered partnership does not exist. As a result, same-sex couples cannot adopt either together or the spouse's child, and medical assistance for procreation is not open to single women or to same-sex female couples.[41] While all birth certificates are based on the

[33] Article 16 of the 1961 European Social Charter.
[34] Article 16 § 3 of the 1948 Universal Declaration of Human Rights; article 23 §§ 1 and 2 of the 1966 International Covenant on Civil and Political Rights; article 10 § 1 of the 1966 International Covenant on Economic, Social and Cultural Rights; Preamble of the 1989 Convention on the Rights of the Child; article 16 of the 1996 (revised) European Social Charter; article 33 of the 1989 Charter of Fundamental Rights of the European Union; article 44 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
[35] Preamble of the 1989 Convention on the Rights of the Child.
[36] *Paradiso and Campanelli v. Italy* [GC], No. 25358/12, 24 January 2017, joint concurring opinion of judges De Gaetano, Pinto De Albuquerque, Wojtyczek and Dedov, § 3.
[37] Polish Constitutional Court, 10 July 2000, SK 21/99, III.8.
[38] Polish Constitutional Court, 18 May 2004, K 16/04, III.4.
[39] Polish Constitutional Court, 18 April 2018, S 2/18.
[40] *Christine Goodwin v. The United Kingdom* [GC], No. 28957/95, 11 July 2002, § 78.
[41] ILGA, Rainbow Index, May 2019.

natural "father" and "mother" model, the mother is the woman who gives birth (Family and Guardianship Code, art 61) and the father (a man) is designated through application of the presumption of paternity if the mother is married or through recognition. The Polish authorities cannot transcribe an act contrary to the fundamental principles of their public policy and to the biological truth which the Polish law considers pragmatically. The Grand Chamber of the Court, in *S. H. and others v. Austria*, considered it legitimate that "*the basic principle of civil law – mater semper certa est – should be maintained by avoiding the possibility that two persons could claim to be the biological mother of one and the same child*".[42] This judgment of the Grand Chamber allows us to conclude that "*nature can (...) remain the norm of reference, an objective reference point and external to the man*" and to his individual will.[43] Moreover, in the eyes of the Polish authorities, this child was born out of wedlock. However, Article 2 of the European Convention on the Legal Status of Children Born out of Wedlock states that "*Maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child*."

25. It should be noted, however, that on 10 October 2018, the Polish Supreme Administrative Court ruled that a foreign birth certificate mentioning two women as parents must be transcribed.[44] But this must not be overestimated: is it really the beginning of an evolution? First, this is recent case law.[45] Second, it appears from a letter from the Minister of the Interior and Administration, dated 3 June 2019,[46] that the refusal to transcribe a birth certificate such as that of the third applicant is the result of the desire to maintain the conformity of civil status with the guiding principles of family law, which are the basis of the coherence of Polish law. Moreover, in the judgment of 10 October 2018, the facts were different, as the Polish Court pointed out, since a Polish woman gave birth to the child, which is not the case in the current case. It is therefore not certain that the Polish courts would now adopt a solution contrary to that given in the case brought before the ECHR in which the courts applied the principle "the mother is the woman who gives birth": the Polish woman having not given birth, she is not a mother under Polish law.

The gendered nature of filiation, basis of the absence of discrimination

26. While the 1st and 2nd applicants complain of a discrimination on the grounds of their homosexuality, it is important to underline that filiation is not linked to "sexual orientation" but to the naturally sexual nature of procreation, which excludes such discrimination. In the case of *Boeckel and Gessner-Boeckel v. Germany*, the Court also found that the applicants' situation, two women linked by a registered partnership, complained of the refusal to register one as parent on the birth certificate of the child to whom the other had given during their partnership, was not comparable to that of a married heterosexual couple with regard to the mentions on the birth certificate of a child.[47]

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[42] *S.H. and others v. Austria*, [GC], No. 57813/00, 3 November 2011, § 104.
[43] Commentaire de l'affaire *S. H. et autres c. Autriche*, CEDH, GC, no. 57813/00, 3 novembre 2011. Commentary by PhDs in law Claire de La Hougue and Grégor Puppinck, *European Centre for Law and Justice*, 1 January 2012.
[44] Supreme Administrative Court of Poland, II OSK 2552/16, 10 October 2018.
[45] Still in 2014, the Supreme Administrative Court of Poland judged a transcription possible only if it was not contrary to the Polish legal order: II, OSK 1298/13, 17 December 2014.
[46] https://www.rpo.gov.pl/sites/default/files/Odpowiedź%20MSWiA%203%20czerwca%202019.pdf :
The Minister indicates his refusal to take any initiative that would have the effect of modifying the official forms with "parent 1" and "parent 2" mentions in place of "father" and "mother".
[47] *Boeckel and Gessner-Boeckel v. Germany*, No. 8017/11, dec., 7 May 2013, §§ 30-31.

27. Moreover, insofar as that the transcript allows for a Polish birth certificate, compelling Poland to transcribe a birth certificate such as the one at issue here would amount to inserting an element of inconsistency that would precisely bring discrimination towards children: this would lead to the situation in which a child born in Poland of a woman in a relationship with another woman would have a birth certificate indicating as mother the woman who gave birth and an unknown father, while a child born abroad under the same conditions could have a Polish birth certificate mentioning two women following the transcription of the foreign birth certificate. Polish legislation is therefore perfectly coherent.

B. The proportionality of the use of public order

28. A "*margin of appreciation (is) entrusted to the State in the regulation of relations of filiation*"[48] and its extent may vary according to various factors, as the Court regularly reminds.[49] As the Court admitted in the *Mennesson* case, the State enjoys a wide margin of appreciation regarding the recognition of a situation created abroad,[50] it should be the same in the current case. Indeed, if the affiliation of an individual can be regarded as a particularly important aspect of his existence or identity, which would restrict the margin of appreciation left to the State, this should be broader. The fact that the applicants' claims go in the opposite direction of the consensus (see I.B) clearly shows that they raise delicate moral or ethical questions.[51]

29. While the Court admits the public order argument, it still checks whether "*the domestic courts duly took account of the need to strike a fair balance between the interest of the community in ensuring that its members conform to the choice made democratically within that community and the interest of the applicants – the children's best interests being paramount – in fully enjoying their rights to respect for their private and family life*".[52] In the current case, assuming an interference with the applicants' rights, it is proportionate because Poland has struck a fair balance between the various interests involved. With respect to the protection of the rights and freedoms of others, it has in fact taken into account the best interests of the child (see I.): in this case, what is at stake is not only about the protection of the interest of the child of the current case (the first concerned with regard to her own civil status), but also the interest of every future children, the Court having admitted the relevance of measures aimed at the "*the legitimate aim of (…) protecting children – not merely the child in the present case but also children more generally*" [53] in following the principle: "*progress in biology and medicine should be used for the benefit of present and future generations*".[54] Secondly, as for the defense of order, Poland has taken into account the general interest of the integrity and consistency of registers and civil status documents (see II.A.).

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[48] *Shavdarov v. Bulgaria*, *op. cit.*, § 56. (Free translation)

[49] See *Dickson v. The United Kingdom*, [GC], No. 44362/04, 4 December 2007, § 78; *S.H. and others v. Austria*, *op. cit.*, § 94; *Paradiso and Campanelli v. Italy*, [GC], *op. cit.*, § 182.

[50] *Mennesson v. France*, *op. cit.*, § 79: "*This lack of consensus reflects the fact that recourse to a surrogacy arrangement raises sensitive ethical questions. It also confirms that the States must in principle be afforded a wide margin of appreciation, regarding the decision not only whether or not to authorise this method of assisted reproduction but also whether or not to recognise a legal parent-child relationship between children legally conceived as the result of a surrogacy arrangement abroad and the intended parents*."

[51] *Ibid*.

[52] *Ibid*, § 84.

[53] *Paradiso and Campanelli v. Italy* [GC], *op. cit.*, § 197.

[54] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, Oviedo, 4.IV.1997.

30. If the current fact were to constitute an interference with the applicants' right to private and family life, its scope would be minimal. A parallel can be made with the *Paradiso and Campanelli* case, where Italy was not sentenced for failing to transcribe the foreign birth certificate mentioning the sponsors of a surrogacy agreement as parents. *A fortiori*, should it be the same in this case. While the absence of a biological link played a part in the Court's assessment, it should be noted that in the current case there isn't a biological link between the child and the Polish woman either. In the *Paradiso and Campanelli* case the applicants were Italian, living in Italy and prevented from living with the child since he was removed and placed for adoption. In the present case, the applicants do not live in Poland, but in the United Kingdom, whose right was applied to write the birth certificate. The absence of a transcription in Poland therefore has no impact on the applicants' family life: they are not prevented from living together and the Polish applicant has as many parental rights as the mother of the child. The applicants refer to a flawed situation in that the legal position of the child is different in Poland where she has an unknown mother and father and in the United Kingdom where she has two legal parents. It is incorrect to state that the foreign birth certificate has not been transcribed neither in full nor in part, and that the child can validly rely on it in Poland.[55] Moreover, such an argument is not admissible in that it would lead to having to accept any situation which is legal abroad (e.g. polygamy). As for the impact on inheritance, it is only a potentiality. The applicants still complain about the child's uncertainty as to Polish nationality. She necessarily possesses the British nationality of her biological mother, of the state in which she was born and resides; she is not stateless. She therefore necessarily has British identity papers that allow her to travel. The Convention does not guarantee any right to a particular nationality[56] and the Court strictly assesses the impact of a refusal to grant nationality on private and family life.[57] The child is not, however, deprived of any means of acquiring Polish nationality: this can be done, for example, through an uninterrupted residence of 3 years on Polish territory (Polish Nationality Act, article 30.1.1).

Conclusion

31. For the ECLJ, the Polish State's refusal to transcribe the British birth certificate into the Polish civil status registers does not violate the applicants' rights under the Convention. If the Court were to condemn Poland, however, the consequences on filiation would be harmful. Indeed, this would be tantamount to asserting that maternal affiliation is no longer based on the tangible fact of childbirth, but only on a person's desire to be a mother. Filiation cannot be based on a mere will, changing by definition, which is not protective of the child.[58] If the Court were to accept a filiation of pure convenience established according to one's individual will, it would amount to giving filiation a perfectly subjective definition, independent of reality, contrary to the principle of unavailability of the state of the person. It would also allow to have the story of a child at one's disposal. It should be remembered that the law of parentage and the civil status are rooted in the objective reality that every person is born at a particular place and

[55] According to the Code of Civil Procedure (Article 1138), the foreign act is evidence of the facts found until proven otherwise. See also Polish Supreme Court, 23 July 2015, I CSK 725/14; Administrative Court of the Voivodeship - Poznań, 5 April 2018, II SA / PO1169 / 17.

[56] *Genovese v. Malta*, No. 53124/09, 11 October 2011, § 30; *Ramadan v. Malta*, No. 76136/12, 21 June 2016, §§ 85-86.

[57] *Ramadan v. Malta*, *op. cit.*, § 89-92; *K2 v. The United Kingdom*, No. 42387/13, 7 February 2017, § 62.

[58] See the excesses of filiation exclusively dependent on the will with abandoned adopted children in the United States, who are readoptable for a certain amount:
https://www.lemonde.fr/blog/jprosen/2014/07/05/le-marche-de-ladoption-doccasion-aux-usa-574/
https://www.liberation.fr/societe/2014/06/22/etats-unis-cede-enfant-adopte-10-ans-3-500-hors-taxe_1047727

time of a man and a woman. More generally, human rights are not intended to satisfy individual desires and make them prevail over the interests of third parties and society, as well as over the sexual reality of human nature. Neither law nor society is responsible for the fact that two women cannot both be mothers of the same child. It is nature that is heterosexual; and it is not up to law to create a "false reality" in which begetting would be asexual.

32. Moreover, a review of the preparatory works of Article 8 reveals that those provisions had a very different original meaning and purpose from those sought by the applicants in this case. In the wake of the Second World War and its atrocities, the authors of the Universal Declaration of Human Rights and the European Convention wanted to guarantee the "inviolability" of individuals and families, to protect the "sanctity of the home" and to guarantee the "natural rights that stem from marriage and parenthood". The ECLJ highlights that in order to maintain the principles of stability and coherence, international law must be interpreted according to these universally accepted principles, and not only according to the latest societal demands of Western Europe: "*Human rights are not values that should be adapted to local cultures and identities*". [59]

33. Finally, the ECLJ draws the Court's attention to the fact that it runs the risk of increasing the number of applications from people complaining of having been deprived of their filiation and a part of their identity, like these people conceived by medically assisted procreation with anonymous donation of sperm[60] who are currently complaining to the Court of the deprivation of access to their paternal genetic origins: here is the proof, were it necessary, that to be amputated of a part of one's genetic filiation is problematic to build one's own identity and constitutes an injustice causing serious sufferings. It is therefore incumbent upon the Court to uphold the child's best interests to have a parentage based on biological reality and to be able to know his or her origins.

34. Rather than seeing an infringement of the applicants' rights in the present case, the primary consideration of the child's interest leads to see, in Poland's refusal, a higher level of protection of the rights and interests of children than that which is practiced in the United Kingdom.

[59] Jean-Yves Le Drian, French Minister of Foreign Affairs, before the General Assembly of the United Nations, 26 September 2018.
[60] *Gauvin-Fournis v. France*, No. 21424/16 and *Silliau v. France*, No. 45728/17, communicated on 5 June 2018.