WRITTEN OBSERVATIONS

submitted to the European Court of Human Rights

in the case of

O.H. and G.H. v. Germany

(Application no. 53568/18 & 54741/18)

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Introduction

It is the position of the *European Centre for Law and Justice* (ECLJ) that in this instance, there was no violation of the applicants' right to respect for their private and family life contrary to Article 8 of the Convention, nor the occurrence of discriminatory conduct contrary to Article 14 of the Convention. Indeed, the ECLJ contends that in dealing with a sensitive question, the German State clearly acted within its margin of appreciation to protect several legitimate interests. In these written observations, the ECLJ will explain why States deserve a wide margin of appreciation in cases of this nature and how the German authorities correctly applied existing international law and legal principles when evaluating the merits of the dispute.

Preliminary Statements

The present application comes on the heels of a "key case", as the Court considers it, which must specifically be addressed: *A.P., Garçon and Nicot v. France*. This case is important for several reasons as we shall develop, but the first to point out is the rapid pace at which this case has been processed by the Court. Upon receiving it in November, 2018, the Court immediately ascribed it an importance level of 3 and requested observations from the German government only three months later, in February, 2019. This expedited timeline is indicative of a general attitude of alacrity to extend the subjectivist thinking embraced in *Christine Goodwin* and *A.P., Garçon and Nicot.*

In light of the decision rendered in *A.P., Garçon and Nicot*, the ECLJ assesses that:

a. The legal reasoning employed by the Court on Article 8 since the *Christine Goodwin* judgment has led to serious contradictions and inconsistencies that need to be rectified (**Section I**).

b. Law is based upon objective reality. When confronted with complex situations, as in this instance, it is imperative for the Court to rely on factual evidence and core principles and to grant a wide margin of appreciation to Contracting States (**Section II**).

c. If the Court were to hold that a female-to-male transsexual, having voluntarily utilized her female reproductive organs to become pregnant and bear a child, possesses a fundamental right to be legally recognised as the father of said child, rather than the mother, a multitude of serious consequences would result. Not only would such a decision destabilise and inject incoherence into Germany's domestic laws on parentage (**Section III**), but it would also violate the rights of children under international law (**Section IV**), greatly undermine the Court's legal credibility, and effectively dissolve the very principles the Court is meant to protect (**Section V**).

d. There was no violation of Article 14 in this case because the first applicant was in fact, under German law, treated like any other person (*i.e.* woman) who gives birth to a child. To the contrary, the first applicant is actually seeking preferential treatment by requesting a designation of legal paternity when the applicant differs biologically from other legal men and voluntarily utilised those differences to conceive and bear a child, capacities which by definition legal fathers do not and cannot possess.[1]

e. A proportionate solution in this case would be to add, at the margin of the document, that the mother effected a change in civil status and now appears as a man on all personal identity papers. In its current form, the "Personenstandsgesetz" (PStG) could allow for such a change. According to it, several types of changes can currently be added to the margin of civil status

[1] See BGH, 6 September 2017, XII ZB 660/14, ¶ 32, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.
py?Gericht=bgh&Art=en&nr=79598&pos=0&anz=1

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documents.[2] Thus, it is possible that O.H.'s change in status could be acknowledged without falsifying other facts the document is intended to record.

I. ECHR Precedent on Transsexualism Has Created Untenable Legal Situations for the Contracting States

It is imperative to observe that the legal quandary in this case is a direct consequence of the ECHR's prior judgments on transgender issues. Prior to the controversial *Christine Goodwin* decision in 2002, the Court held consistently that Contracting States did not commit violations of Article 8 by refusing to amend their birth registers to reflect the new gender identity of post-operative transsexuals.[3] In the case of *X, Y and Z v. The United Kingdom*, concerning the establishment of a relationship between a transsexual and the child of a partner conceived through artificial insemination with a donor, the Court affirmed the need for a wide margin of appreciation under Article 8, noting that "*transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States . . .*"[4] This position was echoed by the Grand Chamber a year later in the judgment of *Sheffield and Horsham v. The United Kingdom*.[5] Thus, the Court wisely followed its prior decisions and again held that no violation of Article 8 had occurred.

The case of *Christine Goodwin v. The United Kingdom* marked a sharp turning point in the Court's jurisprudence on transsexualism.[6] The Grand Chamber concluded that the United Kingdom's ongoing refusal to grant complete legal recognition to post-operative transsexuals violated Article 8, noting the existence of "*clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals*."[7] At the same time, however, the Court expressly limited the scope of its holding to transsexual persons who had undergone gender reassignment surgery, noting specifically that any domestic legal difficulties resulting from its decision "[*would be*] *both manageable and acceptable if confined to the case of fully achieved and post-operative transsexuals*."[8] Furthermore, the Court acknowledged that it was necessary for States to retain a wide margin of appreciation "*in resolving . . . the practical problems created by the legal recognition of post-operative gender status . . .*" as well as in "*determin*[ing] *inter alia the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected . . .*"[9]

Since *Christine Goodwin*, the focus of cases before the Court has shifted from legal recognition itself to the types of requirements States may impose as a condition of such recognition, particularly as they pertain to the institutions of marriage and the family. For nearly fifteen years, the Court repeatedly upheld the standard crafted in *Christine Goodwin*, concluding in a trio of cases that respondent States acted within their margin of appreciation in denying the

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[2] Adrian de Silva, *"Negotiating the Borders of the Gender Regime, Developments and Debates on Trans(sexuality) in the Federal Republic of Germany"*, Gender Studies, 2018, p. 85: *"If the person announcing the child's birth was unable to name the child's first names, they had to be announced within a month's time. The names were then recorded on the margin of the birth entry"*.

[3] *Rees v. The United Kingdom*, No. 9532/81, 10 October 1986; *Cossey v. The United Kingdom*, No. 10843/84, 27 September 1990; *Sheffield and Horsham v. The United Kingdom*, GC, Nos. 22985/93, 23390/94, 30 July 1998.

[4] *X, Y and Z v. The United Kingdom*, GC, No. 21830/93, 22 April 1997, ¶ 52.

[5] *Sheffield and Horsham v. The United Kingdom*, ¶ 57.

[6] *Christine Goodwin v. The United Kingdom*, GC, No. 28957/95, 11 July 2002.

[7] *Id*. ¶ 85.

[8] *Id*. ¶ 91.

[9] *Id*. ¶¶ 85, 103.

requests of married transsexuals to have their civil status changed following gender reassignment surgery.[10] Most notably, in the Grand Chamber judgment of *Hämäläinen v. Finland* the Court held that the government's refusal to recognise the gender reassignment of a married transsexual absent a conversion of the marriage into a registered same-sex partnership (as then required by Finnish law), did not violate either Article 8 or Article 14. The Grand Chamber reiterated that the complex and sensitive nature of the issues involved, combined with the clear lack of consensus among European States concerning same-sex marriage, necessitated a wide margin of appreciation within which the position of the Finnish government was found to reside.[11]

Nevertheless, in *A.P., Garçon and Nicot v. France*, the Court inexplicably abandoned the logical limits fashioned by the Grand Chamber in *Christine Goodwin*, concluding for the first time that certain conditions governing the legal recognition of transsexual persons--specifically that of establishing irreversibility of transformation of appearance--could constitute violations of Article 8.[12] This decision effectively reverses the principle established in *Christine Goodwin* that while States have a positive obligation to legally recognise the gender of post-operative transsexuals, the exact means and requirements for obtaining such recognition lie squarely within their margin of appreciation.[13] Indeed, under this ruling, States no longer have the ability to ensure that an individual's physiological characteristics align, to the greatest extent made possible by modern medical science, with the gender status he or she desires to have recognised as an objective legal fact (*i.e.* a statement of truth under the law). In the context of parental status, the ECLJ foresaw nearly two years ago, in the aftermath of the *A.P., Garçon and Nicot* judgment, that this change in policy could produce the exact situation now facing the Court: a biological woman who has assumed a male civil status but who has retained her reproductive organs and used them to have a child.[14] The decision in *A.P., Garçon and Nicot*, therefore, brings the Court to a crucial tipping point on multiple issues pertaining to sexual identity, marriage, children's rights, and the importance of truth as a legal and cultural value. As will be explained in succeeding sections, a decision by the Court to follow the subjectivist reasoning of *A.P., Garçon and Nicot* in adjudicating this case would carry serious repercussions for European society by undermining the trustworthiness of public records, the rights of children to know and trace their origins.

II. The Court's Own Principles Require a Wide Margin of Appreciation in this Case

The areas of private and family life inherently invoke a host of moral, ethical, social, and religious concerns, thus inviting widespread disagreement not only as between separate cultures, but also within each individual society. Recognising this reality, it has long been the established principle of the ECHR to grant Contracting States a wide margin of appreciation in fulfilling their requirements under Article 8.[15] This is particularly true of any "positive obligations" identified by the Court in relation thereto.[16]

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[10] *Parry v. The United Kingdom*, No. 42971/05, 28 November 2006; *R. and F. v. The United Kingdom*, No. 35748/05, 28 November 2006; *Hämäläinen v. Finland*, GC, No. 36515/97, 16 July 2014.
[11] *Hämäläinen v. Finland*, ¶¶ 75, 87-88.
[12] *A.P., Garçon and Nicot v. France*, Nos. 79885/12, 52471/13 and 52596/13, 6 April 2017, ¶ 135.
[13] *Christine Goodwin v. The United Kingdom*, ¶ 103.
[14] Priscille Kulczyk, "Towards a Fundamental Right to 'Choose One's Own Sex'?" ECLJ, (available at: https://eclj.org/family/echr/towards-a-fundamental-right-to-choose-ones-sex).
[15] *Rees v. The United Kingdom*, ¶ 35; see also *Fretté v. France*, No. 36515/97, 26 February 2002, ¶ 41.
[16] *Hämäläinen v. Finland*, ¶ 67.

In determining the margin of appreciation, the Court traditionally considers a number of important factors. These include whether an integral aspect of an individual's identity is at stake; whether a general "consensus" or "common approach" to the issue can be found among the Contracting States; whether the question raises sensitive issues of a moral or ethical nature; and whether the case requires the State to strike a balance between competing interests.[17] When no consensus can be found among the Contracting States, the case concerns sensitive moral and ethical issues, or the State is required to strike a balance between competing interests, the margin granted by the Court will usually be a wide one.[18]

Applying these factors to the present case, the Court should grant Germany a wide margin of appreciation for three reasons. First, there is a strong negative consensus among the Contracting States concerning the modification of a child's birth certificate to reflect the gender change of his or her parent, regardless of whether that change is consummated before or after the child's birth. As of May, 2019, only 4 out of the 47 Council of Europe States recognise the gender identity of transsexual parents on their child's birth certificate.[19] In the other 43 States, including Germany, the legal characterization of parent-child relationships -- *i.e.* designations of maternity and paternity -- is based solely on the genetic and biological facts surrounding the child's birth.[20] Furthermore, although there has been recent movement in member States towards the elimination of sterilisation and reassignment surgery as prerequisites to a change in civil status, Western nations are still largely divided over the best ways to regulate the gender change process and resolve the various subsidiary issues resulting therefrom. Over three-fourths of European States still require transsexuals to obtain a mental health diagnosis before receiving legal recognition of their assumed gender, approximately half require the dissolution of an existing marriage, and only a small handful (5), base their recognition procedures exclusively on the self-determination of the individual.[21] Even in regard to the stipulation of gender reassignment surgery, which has now been eliminated in about two-thirds of the Contracting States, the vast majority of these developments have occurred within the last few years, thus indicating that the law in this area is still very much in a transitional stage.[22]

Second, the German State should be granted a wide margin of appreciation because this case requires the government to strike a balance between competing public and private interests, with the prevailing consideration being continued coherency of domestic laws governing parenthood and legal succession. As the Court itself has noted, the coherence (or potential incoherence) of a State's domestic legal and administrative practices is "*an important factor*" to consider in carrying out an assessment under Article 8.[23] As they now stand, Germany's domestic laws on parenting and the legal recognition of transgender persons are logically consistent and strike a satisfactory balance between the rights of transgender individuals as acknowledged by this Court and those belonging to both their children and the general community.

Furthermore, Germany retains a policy of permitting only natural procreation, thus excluding ovum donations in order to produce a child. "*According to guidelines which are binding on all medical professionals, access to ART services is granted to all married couples, but it is granted to cohabiting heterosexual couples only under exceptional circumstances*"[24]

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[17] *Id*.; see also *Christine Goodwin v. The United Kingdom*, ¶ 85; *Fretté v. France*, ¶¶ 41-42; *X, Y and Z v. the United Kingdom*, ¶ 44.

[18] *Hämäläinen v. Finland*, ¶ 67.

[19] Transgender Europe (TGEU), "Trans Rights Europe & Central Asia Map & Index 2019," 30 April 2019, (available from https://tgeu.org/trans-rights-europe-central-asia-map-index-2019/).

[20] *Id*.; see also Bürgerliches Gesetzbuch [BGB] [Civil Code], §§ 1591-92, *translation at* https://www.gesetze-im-internet.de/ englisch_bgb/; TSG § 11, *translation at* https://www.gesetze-im-internet.de/tsg/index.html.

[21] Transgender Europe (TGEU), "Trans Rights Europe & Central Asia Map & Index 2019," 30 April 2019.

[22] *A.P., Garçon and Nicot v. France*, (Ranzoni, J., dissenting), ¶ 10.

[23] *Christine Goodwin v. The United Kingdom*, ¶ 78.

[24] No. 3.1.1. of the Guideline of the Medical Chamber, Bundesärztekammer 2006.

Therefore, we see here the consistency of the German State in sticking to natural procreation, therefore forbidding surrogacy, egg donation and registering a female to male transgender person as the father of the child born through her. Germany upholds with coherence the important principle: *mater semper certa est.*

Third, Germany should be granted a wide margin of appreciation due to the sensitive moral, ethical issues contained in this case. When asked to resolve disputes capable of upsetting long-established societal norms and the traditional view of vital social institutions (such as marriage or the family), it is vital for the Court to recall the intended purpose of the Convention and conduct its analysis on the basis of core principles. This is particularly true with regard to the rights protected under Article 8. In recent years, the Court has elected to abandon the proposition espoused by the Convention authors that the family -- and not the individual--is the foundational element of a free society. In its place, the Court has decreed the pre-eminence of individual rights (i.e. the idealised notions of individual will) over the natural definitions of gender, marriage and parenthood that form the basis of all human society. This line of thinking directly underlies the current claim by the first applicant that the refusal of German authorities to amend the second applicant's birth certificate--in contravention of established biological fact--violates the right to respect for private and family life.

An examination of the *travaux préparatoires* underlying Article 8, however, reveals that these provisions contained an original meaning and purpose quite different from that sought by the applicant in this case. In the aftermath of World War II and the horrific atrocities committed by the Nazi regime, the authors of the Universal Declaration on Human Rights and the European Convention wanted to guarantee the "inviolability" of persons and families, protect the "sacred character of the home," and secure the "natural rights which flow from marriage and parenthood." The ECLJ stresses that to maintain stability and coherency, international law must be interpreted according to these universally accepted principles, and not merely the latest Western-European social trends. To that end, the ECHR should engage in a measure of self-restraint and abide by the view of the Court's new president that the Convention provides "*a minimum level of protection*"[25] rather than a license to establish "new rights" never foreseen by the Convention authors nor universally acknowledged as fundamental by the Contracting States.

III. Inalienability of Civil Status: The Need for (and International Recognition of) Objective Definitions on Gender and Parentage

The specific information registered on birth certificates is related to the civil status of a person and is meant to establish certain legal facts concerning that person that will serve as a reference for the entirety of his or her lifetime.[26] Given its status as a legal document, written and validated by officers of the State, the truthfulness of a birth certificate's content is a matter of great importance. Chapter 1 of Germany's "Personal Status Law" ("Personenstandsgesetz", former s.2) describes the purpose of the domestic birth registration system as being to document the factual information surrounding a child's birth as a historical event. The registrar, therefore, is charged with the task of accurately recording the facts that establish the most basic elements of a person's civil status.[27]

[25] Linos-Alexandre Sicilianos, "Sur l'affaire Lambert, il appartient à l'Etat de faire ses choix", *Le Monde*, 1 June 2019.
[26] UNICEF, *Every Child's Birth Right: Inequities and Trends in Birth Registration*, 2013, (available from https://www.un.org/ruleoflaw/files/Embargoed_11_Dec_Birth_Registration_report_low_res.pdf), p. 4.
[27] Adrian de Silva, *"Negotiating the Borders of the Gender Regime, Developments and Debates on Trans(sexuality) in the Federal Republic of Germany"*, Gender Studies, 2018.

In reviewing international views on the purpose and function of birth registration, it is telling that the United Nations, in its comprehensive report on birth registration programmes, provides a standardised form that contains fields for the characteristics of the child's "father" and "mother" without making any further reference to the parents' sex or gender status whatsoever.[28] Indeed, close inspection of the form reveals the inherent (and correct) assumption that the biological facts surrounding a child's entrance into the world, *i.e.* the appropriation of maternity and paternity, are self-evident and not subject to the idealisations of an individual's will. Similar assumptions can be seen in the work of the World Health Organisation, which possesses a "maternal health" department and is engaged in multiple endeavours to protect the postnatal health of children and that of their "mothers," i.e. the women who gave birth to them. In the WHO's latest *Recommendations On Maternal Health,*[29] discussing various issues connected with postnatal care, the terms "the mother" and "the woman" are used as synonyms and are clearly based on objective biological definitions. Indeed, the right to the forms and standards of care identified in this document, and by the medical community in general, are derived from biological truth and proven risks associated with the events of pregnancy and delivery. The classification of gender roles and functions is not based on will or feeling, but rather on objective facts to ensure that a person receives the fundamental rights possessed by them as a consequence of the biological characteristics or unique status--*e.g.* pregnancy--that set them apart from the rest of society.

The idea that a person can request substantive modification of his or her civil status without demonstrating that the existing information is objectively incorrect thus carries dramatic consequences for both the understanding of a person's rights under the legal system and the internal coherence of the system itself. If the biological mother of a child were permitted to legally assume a status of paternity in the birth registry and list the same on the child's birth certificate, immense difficulties would develop in maintaining accurate records of biological and familial relations. This is particularly true if individuals revert back and forth between the sexes whenever their mind happens to change. Indeed, how does the Court know that the first applicant in this case will continue to permanently identify as a man and not change statuses again in two years, or ten years? What could prevent multiple changes to the birth certificate depending on the mere will of the parents? Although there is not information to qualify O.H.'s behaviour as constituting "gender incongruence,"[30] the fact that O.H. started and then stopped gender conversion -and may yet start it again- reveals a situation of continuous uncertainty ripe for confusion and further obfuscation of the truth in the future.

Truth is the gold standard of all law and justice. There cannot be a positive obligation upon States to issue civil status documents that deliberately falsify certain unchangeable aspects of a person's physical identity. In the present case, permitting applicant O.H. to be legally registered as the father of G.H. would have the effect of depriving G.H. of a legal mother. Despite the legal change in gender status executed by O.H., the objective fact of biological femininity remains, as evidenced by the pregnancy and birth of G.H. Furthermore, what if the anonymous donor of the sperm used by O.H. to conceive G.H. wanted to reveal his identity and be recognised as the legal, biological father of the child? If the German government were forced to comply with O.H.'s request, such recognition would be completely impossible, given the requirement under existing German law that a child be descended from only one mother and one father. This would be true even if Germany decided to require--as does Victoria State in

[28] UNICEF, *A Passport to Protection: A Guide to Birth Registration Programming*, December 2013 (available from www.refworld.org/pdfid/52b2e2bd4.pdf), pp. 122-23.

[29] WHO, Recommendations on Maternal Health, Guidelines approved by the WHO guidelines Committee, updated May 2017.

[30] WHO, ICD-11 for Mortality and Morbidity Statistics, Version April 2019. According to this report, gender incongruence is "*characterized by a marked and persistent incongruence between an individual's experienced gender and the assigned sex.*"

Australia--the compulsory identification of anonymous sperm donors as the biological father of any child conceived through the donation.[31] Ultimately, the first applicant's request does not correspond with the reality of the circumstances surrounding G.H.'s birth, and thus should not be recognised as a legal fact. Doing so would create confusion for States on how to maintain accurate records and elevate an individual's (non-existent) right to self-determination of gender over the competing interests of the child and that of the public interest in preserving the both the integrity of the family unit and the national public records system.

IV. Permitting Arbitrary Changes to Parental Status Would Violate Children's Rights Under International Law

The first applicant's claims come into direct conflict with the rights of G.H. under the United Nations Convention on the Rights of the Child (UNCRC) of 1989, which Germany respectively signed and ratified in 1990 and 1992 and is obliged to uphold as a matter of international law.

First, granting O.H. legal fatherhood of G.H. would violate the child's rights under Article 3-1 of that Convention. Article 3-1 provides that: "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*." It is in the interest of the child to be given a birth certificate that is based upon reality, and which reflects accurately the biological role played by each parent in his or her conception and birth, regardless of the relationship the child establishes with his or her parents later.

Second, the first applicant's claims also come into conflict with Article 7-1 of the UNCRC, 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.*" The purpose of this article is to protect the filiation of the child. Unless truly impossible for reasons which could not have been predicted, a child has the right to learn the identities of his or her biological father and mother, *i.e.* the man and the woman who in fact conceived and brought the child into the world. Any other interpretation of the term "parents" would effectively deprive the child of the substance of the right provided here. If paternity and maternity can be appropriated according to the gender category desired by the will of one or both parents, the article only means that a child has the right to know who *wishes* to be his or her mother and father, not who they are in fact.

Third, Articles 9 and 10 of the UNCRC refers to the right for the child to keep contact with "both parents." Indeed, paragraph 3 of Article 9 reads as follows: "*States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests*." Allowing a parent to erase and replace the biological designation of maternity and paternity recorded on his or her child's birth certificate would clearly contravene the intent of this provision and the child's best legal interests. Moreover, situations involving an anonymous donation procedure, such as the one here, present an enhanced problem because the child has already been purposefully deprived of one parent. In this case, G.H. is already without knowledge of his biological father since O.H. used sperm from an anonymous donor to conceive. Consequently, if Germany were required to recognise the assumed paternity of O.H. on G.H.'s birth certificate, the latter would be completely deprived of a legal mother and ascribed a legal

[31] Assisted Reproductive Treatment Act 2008, Victorian Current Acts.

"father" who is not genetically male and thus can never actually father a child in the objective, scientific meaning of the term.[32]

Furthermore, a ruling in favor of the applicants would undermine children's rights as articulated by the ECHR in interpreting Article 8 of the Convention. In *Phinikaridou v. Cyprus*, the Court ruled that: "*Respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality. . . . This includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents.*"[33] In the present application, the first applicant underwent artificial insemination using the sperm of an anonymous donor to become pregnant and have a child, biological functions which are impossible for men to perform. As such, granting O.H. legal recognition as the father of G.H. would conflict with the respect for private life of the child and create a false reality in direct contradiction of the child's biological origins. That permitting such a revision would cause incongruence with the Court's case law on children's rights is affirmed by statements made by the Grand Chamber in *Odièvre v. France*. There the court said: "*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 concerning important aspects of one's personal identity, such as the identity of one's parents*."[34] It surely cannot be the case, in a legal system founded on universal principles of natural law (as the Convention indeed is), that a person who accepts the sperm of a man and carries out the resulting pregnancy can demand on the basis of mere will the right to conceal her child's biological origins in order to validate a self-perception that is fundamentally untrue.

Moreover, the Court has repeatedly emphasised that in some circumstances personal interests held by parents may be subordinated to those of the child. In *Fretté v. France*, the Court observed that "*where a family tie is established between a parent and a child, 'particular importance must be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent'*."[35] Similarly, in the case of *Paradiso and Campanelli v. Italy*, the Court acknowledged the legitimate desire of the applicants to become parents but in light of the weighty interests at stake in the case (violation of family and adoption laws through the use of surreptitious surrogacy agreements) rightfully subjected this interest to those of children and the public welfare. The Grand Chamber noted that Article 8 does not guarantee the right to become a parent, and that consequently the means available to couples for achieving that end could be limited in the face of other fundamental interests.[36] Given the importance of a child's biological ties to the development of his or her personal identity,[37] it similarly follows that preserving the legal recognition of those ties for the benefit of the child ought to supersede the desire of a transgender parent to obtain legal recognition of the parental status corresponding to that assumed by him or her, rather than to the biological facts surrounding the child's existence.[38] The Convention protects the right to found a family and to respect for one's family life, but it does not recognise a right to ignore or invert the truth. There is

[32] See Priscille Kulczyk, "Towards a Fundamental Right to 'Choose One's Own Sex'?"; see also BGH, XII ZB 660/14, ¶¶ 9-10, 26. (discussing the biological origins of parental status and the need to keep legal designations aligned with this reality).

[33] *Phinikaridou v. Cyprus*, No. 23890/02, 20 December 2007, ¶ 45.

[34] *Odièvre v. France*, GC, No. 42326/98, 13 February 2003, ¶ 29.

[35] *Fretté v. France*, ¶ 42 (quoting *E.P. v. Italy*, No. 31127/96, ¶ 62, 16 November 1999).

[36] *Paradiso and Campanelli v. Italy*, GC, No. 25358/12, 24 January 2017, ¶¶ 141, 215.

[37] *Mennesson v. France*, No. 65192/11, 26 June 2014, ¶ 100.

[38] *See* BGH, XII ZB 660/14, ¶ 26 (wherein the German Federal Court of Justice arrives at exactly this same conclusion).

no entitlement to self-determination of one's parental status, no matter how much a person wishes it to be so.

V. Cultural Redefinition of Gender Dissolves the Rights the Convention and the Court were Created to Protect

It is outside the proper role of the Court in upholding the rights and liberties secured by the Convention to dictate how European States must resolve situations that create pure legal fictions, such as the recognition of a child's mother as his or her biological father in the birth registry. The Convention was written to ensure the protection of timeless, universal rights rooted in the principle of objective truth, and as such it would be anathema to the spirit of its provisions for the Court to disregard biological facts and require the deliberate falsification of official government records in the name of individual rights.

Abandoning the objective criteria of biology for the subjective perception or wishes of an individual can only lead to injustice, as is already being illustrated in cases where male-to-female transgender athletes are allowed to compete with biological women in competition and allegedly set new records. For example, in April, 2019 a transgender powerlifter named Mary Gregory, who was born biologically male but identifies as female, exceeded the existing World Records for women of Gregory's age and weight category in the squat, bench press, and deadlift disciplines. Upon discovering Gregory's status a biological male, however, competition organiser announced that no female records had been broken because Gregory did not meet the required physiological criteria for competing in the female category.[39] Similarly, at the 2018 World Championships for Master Track Cycling, a male-to-female transsexual possessing the biology and physiological traits of a man was permitted to compete alongside biological women, ultimately claiming victory in the women's 35-44 sprint.[40] As these examples illustrate, unlimited respect for personal perceptions of gender identity does not promote greater equality, but actually creates situations of gross inequality and leads to injustice.

By definition, the binding nature of human rights means they cannot be the result of mere individual will or cultural opinions. Thus, to depend on cultural mentalities for the definitions of realities such as marriage and family deprives the rights associated with these institutions of their binding force, i.e. changes their very nature, by substituting an extrinsic perception of evolving "morality", which by definition is always relative, and never certain. Once redefined by individual will, the right to marry and found a family derives its value and strength not from timeless principles, but from the prevailing opinions of the day; it becomes contingent on political and social winds and must necessarily renounce any claims of universality. Furthermore, because the universal nature of human rights presupposes and requires a universal understanding of man, and the rights to marry and found a family require a universal concept of biological sex and gender roles, the transformation of these rights into subjective freedoms, dependent entirely on the evolution of social thinking, destroys both their universality and their intrinsic contributions to the health and common good of human society.

[39] Press Release, 100% Raw Powerlifting Federation, 1 May 2019, (available at https://rawpowerlifting.com/wp-content/ uploads/2019/05/Transgender-statement-05.2019.pdf).
[40] CyclingNews, "McKinnon is first transgender woman to win world title," 16 October 2018, (available at: www.cyclingnews.com/news/mckinnon-is-first-transgender-woman-to-win-world-title/).

Conclusion

The judgment to be rendered by the Court in this case could serve as the final step toward the adoption of absolute subjectivism. Indeed, the Court has already established that in its opinion the biological characteristics of a person do not necessarily determine his or her true sex.[41] Should the Court determine that there was a violation of Article 8 in this instance, it will be forced to admit that it is no longer possible to maintain concrete definitions of masculinity and femininity or to distinguish between them; the objective definition based on biological criteria will have effectively been dissolved. Under such a scenario the Court could never again under any circumstances define what it means to be "male" or "female" according to traditional gender roles. To do so would be completely incompatible with the fight against "discrimination" in which the Court has recently been engaged.[42]

The Court would thus find itself in the absurd situation where an institution created to qualify legal disputes and assess their merits under specific legal provisions would be unable to define the key terms upon which resolution ultimately depends. In the end, the Court is left with nothing to stand on but the affirmations or claims of the applicant(s) in any particular case and thus becomes, in the absence of concrete standards, compelled to oblige their will. The truth of the matter here is that if the present applicant were asked to prove objectively the designation of paternity sought on G.H.'s birth certificate, no such proof could be provided. The only evidence upon which the applicant can rely is self-perception and the "prevailing social attitudes" of fathers; *i.e.*, certain external behaviours that tend to be typical of father figures. Thus, the determination of law, of right and of justice, would be left to pure personal appreciation.

[41] *Christine Goodwin v. The United Kingdom*, ¶100.

[42] "*On the one hand, the Court has repeatedly held that differences based on sex require particularly serious reasons by way of justification and that references to traditions, general assumptions or prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation." Khamtokhu and Aksenchik v. Russia*, Nos. 60367/08 and 961/11, 24 January 2017, ¶ 78.