WRITTEN OBSERVATIONS

submitted to the European Court of Human Rights

in the case

R.F. and others v. Germany

(n° 46808/16)

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1. In the *R.F. and others v. Germany* case (application No 46808/16), two German women entered a registered partnership as authorized in German law. One of them (the third applicant) gave birth to a child (the first applicant) through assisted reproductive technology (ART) involving an ovum of her partner (the second applicant), fertilized by an anonymous donor's sperm and implanted in her womb. On the basis of article 8 and articles 8 and 14 combined of the Convention, the applicants complain before the Court that the German jurisdictions refused to register the second applicant as the legal and second parent of the child. To do so, she had to adopt the child in accordance with section 9.7 of the Law on Registered Partnerships of 16 February 2001 (Lebenspartnerschaftsgesetz). Section 1591 of the German Civil Code (Bürgerliches Gesetzbuch – BGB) provides that the mother of a child is the woman who gave birth.

2. The Court already had to deal with the absence of recognition of one of the members of a couple as the legal parent of the other member's child. Therefore, in the case *X,Y and Z v. The United Kingdom* of 22 April 1997,[1] the Grand Chamber had found that there had not been any violation of the rights resulting from the Convention in the case of a transsexual (woman to man) seeking acknowledgment as the father of his 'partner's child who was conceived through artificial insemination with sperm donation. Once again, in the *Boeckel and Gessner-Boeckel v. Germany* case,[2] a chamber concluded on 7 May 2013 that the application was inadmissible based on facts very similar to the present one (see I. below). However, the current application presents a novelty lying in the presence of a genetic link between the child and the applicant who did not give birth, as for the applicant who *did* give birth, she has no genetic link to the child (subject to the genetic contribution of mitochondria). Within this context, the European Centre for Law and Justice (ECLJ) wishes to share with the Court the following observations.

I. THE INADMISSIBILITY OF THE APPLICATION

3. The question of the admissibility of the application arises particularly in the present case as the applicants achieved the expected result, namely that the second applicant has the status of second parent of the child delivered by her partner, through adoption which is the solution set out in German law in this situation.

4. Similarly, in the *Boeckel and Gessner-Boeckel v. Germany* case,[3] the applicants, two women living in a registered partnership, complained that the German authorities denied the registration of the other partner as second parent on the birth certificate of the child delivered by the other one, even though they had obtained the acknowledgment of this status through adoption. They argued that the presumption of legitimacy provided for in section 1592 of the BGB, appointing the man married to the mother as the father of the child, should apply *mutatis mutandis* to the woman living in a registered partnership with the mother of the child at the time of the birth, as the presence of a genetic link between the child and the man is irrelevant. The Court had considered whether the applicants could still claim to be victims of a violation of their rights under the Convention or not.[4] After considering that it was still possible given the nature of the complaint and the fact that the applicant had had to go through adoption to be acknowledged as

[1] *X, Y and Z v. The United Kingdom* [GC], No 21830/93, 22 April 1997.
[2] *Boeckel and Gessner-Boeckel v. Germany*, No 8017/11, Decision on its admissibility, 7 May 2013.
[3] *Boeckel and Gessner-Boeckel v. Germany, op. cit*.
[4] *Boeckel and Gessner-Boeckel v. Germany, op. cit*., § 26.

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second parent, the Court concluded that there had been no violation of article 8 and articles 8 and 14 combined, and therefore declared the application inadmissible as manifestly ill-founded.

5. To the extent that the facts and issues of the present case are similar, the same reasoning should be applied *mutatis mutandis* by the Court, and that, even in the presence of a genetic link between the second applicant and the first applicant, which differentiates the two cases: indeed, whether a genetic link exists or not is irrelevant within the mechanism of presumption of legitimacy, as it applies to the mother's husband, whether the child be his or not. However, as the application has been communicated, its substantive examination should be carried on.

II. THE EXISTENCE OF AN INTERFERENCE UNDER ARTICLE 8

6. The contested measure is the absence of recognition, by the German Courts, of the partner of the wife who gave birth as second and legal parent of the child, in presence of a genetic link between her and the child. To that end she had to adopt the latter. It is therefore essential to wonder whether the measure interferes with the rights of the applicants under the Convention, especially in article 8 invoked in this case, protecting the right to respect for private and family life.

7. While the contested measure appears to mainly affect the relationship between the first and the second applicants, it is important to note that the facts of the case relate to some form of surrogacy.[5] Therefore, the Court, which was not concerned up to now in cases regarding surrogacy, with the question of whether the surrogate mother has any rights towards the child she has borne, may need to adjudicate the status of the surrogate mother regarding the third applicant and legal parent of the child, which will be transposable to all surrogate mothers.

8. The Court regularly points out that the "*concept of "private life" under article 8 is "a wide notion"*" covering the right to autonomy, the right for an individual to establish and develop relationships with other human beings, the right to "personal development", the right to self-determination, the right to respect for the decision to become or not to become a parent, the right to have the decision to become a genetic parent respected, as well as matters relating to access to heterologous artificial reproductive techniques for in vitro fertilization, eugenic abortion or sexual identification, orientation and life.[6] In the *X. v Switzerland* case, the Court considered that emotional links between an adult and a child are part of the life and of the social identity of individuals, and can therefore fall within the scope of private life even without any biological or legal link.[7]

9. It is also necessary to wonder whether the relationship between the applicants and the child could fall under the definition of family life under article 8, which aims to preserve a comprised family unit. This was the Court's conclusion in the *Boeckel and Gessner-Boeckel v. Germany*

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[5] *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, § 7: "*we understand gestational surrogacy as the situation in which a woman (the surrogate mother) carries in pregnancy a child implanted in her uterus to whom she is genetically a stranger, because the child has been conceived from an ovum provided by another woman (the biological mother).*"
[6] See in particular *Costa and Pavan v. Italy*, No 54270/10, 28 August 2012, § 55-56; *S.H. and others v. Austria* [GC], No 57813/00, 3 November 2011, § 80-82.
[7] *X. v. Switzerland*, No 8257/78, 10 July 1978.

case.[8] As stated in the *Paradiso and Campanelli v. Italy* case regarding surrogacy, "*the Court accepts, in certain situations, the existence of* de facto *family life between an adult or adults and a child in the absence of biological ties or a recognised legal tie, provided that there are genuine personal ties.*"[9] To admit the non-existence of a *de facto* family life, the Court relied on *"the absence of any biological tie between the child and the intended parents, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective, (...) in spite of the existence of a parental project and the quality of the emotional bonds*."[10] In the present case, it is necessary to primarily note that there is a genetic link between the first and the second applicant, as well as a link which could be described as "biological" between the latter and the third applicant who delivered him and who is therefore his legal mother, as well as a parental project and personal emotional links between the applicants.

10. Therefore, while the adult applicants cannot rely either on a right to be a parent[11] or on a right to adopt,[12] which the Convention does not guarantee, the Court however, *did* acknowledge the existence of a right for the child to know his or her origins and to establish his or her filiation as an element of his or her right to personal identity if the biological parent wishes it: in the *Mennesson v. France* case, in which a genetic link between the father and the child existed, the Court stressed "*the importance of biological parentage as a component of identity*" and stated that it was inconsistent with the *"the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof*".[13] Given the nature of the links between the applicants, it cannot be denied that the contested measure interferes to a certain extent with the rights guaranteed by Article 8, at least in terms of private life if not in terms of family life under the Convention. It is therefore necessary to consider whether such an interference is justified under Article 8 (2) of the Convention.

III. AN INTERFERENCE PROVIDED FOR BY LAW

11. According to Article 8 (2) of the Convention, "*there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law (...)*." In the present case, the German authorities, having refused to acknowledge the second applicant as legal parent of the child, applied the German Law on the establishment of filiation. The latter provides indeed that the mother of a child is the woman who delivered him or her (BGB, section 1591) while his or her father is the man married to the mother of the child at the time of the birth (BGB, section 1592). Therefore, German Law only provides for the establishment of the legal mother only towards one woman and the presumption of legitimacy applies to the man married to the woman who has delivered the child and not to this woman's partner. In the case of a registered partnership, the establishment of a relationship between one of the partners and the child of the other partner through adoption is nevertheless provided for in section 9.7 of the

[8] *Boeckel and Gessner-Boeckel v. Germany*, *op. cit.*, § 27.
[9] *Paradiso and Campanelli v. Italy* [GC], *op. cit.*, § 148.
[10] *Paradiso and Campanelli v. Italy* [GC], *op. cit*., § 157.
[11] *S.H. v. Austria*, No 57813/00, Decision on the admissibility, 15 November 2007, § 4.
[12] *Paradiso and Campanelli v. Italy* [GC], *op. cit.*, § 141.
[13] *Mennesson v. France*, No 65192/11, 26 June 2014, § 100.

Act on Registered Life Partnerships of 16 February 2001. The interference is therefore provided for by law.

IV. AN INTERFERENCE WITH LEGITIMATE AIMS

12. According to Article 8 (2) of the Convention, "*There shall be no interference by a public authority with the exercise of this right except such as (...) 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*." In the present case, the interference pursues at least two of the legitimate aims listed in this provision: the protection of public order and the protection of the rights and freedoms of others.

The protection of order: ensure the respect of the German Law in terms of ART when placed before a *fait accompli*.

13. The conduct of the second and third applicants contravenes the German Law in two respects. On the one hand, the latter keeps ART for medical use for couples suffering from infertility, therefore, excluding single people and same-sex couples, like in 20 other member States of the Council of Europe;[14] yet, the applicants went to Belgium to circumvent this prohibition. On the other hand, article 1 (1) of the Embryo protection Act (Embryonenschutzgesetz) makes it an offence to implant the egg of a woman into another 'woman's body, as the German government observed in the case *S.H and others v. Austria*.[15] According to the words of the four judges in their joint concurring opinion regarding the case *Paradiso and Campanelli v. Italy*, the applicants "*acted with premeditation in order to circumvent domestic legislation [which] serves only to undermine their position*", "*the existence of a "parental project" [being] in reality an aggravating circumstance*".[16] In this case relating to surrogacy, the Grand Chamber recognized as legitimate for a government to try to discourage its citizens from going abroad to benefit from a practice which is contrary to public policy and illegal within their territory: it agreed on this issue with the Chamber which held that "*the measures taken in respect of the child had pursued the aim of "prevention of disorder", in so far as the applicants' conduct was contrary to Italian legislation on international adoption and on medically assisted reproduction.*"[17]

14. In the present case, if the German authorities had granted the 'applicant's request by automatically acknowledging a link of filiation regarding the two women, they would therefore have ratified their illegal conduct, endorsing the *fait accompli* at the expense of common good: this would amount to applying the principle that might makes right. Thus, it seems inopportune for the second and the third applicant to claim to be victims of a situation which they voluntarily created by their own conduct which infringes the German law: "*Nemo auditur propriam*

[14] See Steering Committee on Bioethics of the Council of Europe, "Answers of the Member States to the questionnaire on access to assisted reproductive technology (ART) and on the right to the recognition of one's origins for children born through ART", 9 February 2012, CDBI/INF7FEV2, p. 19 ; ILGA, « ILGA-Europe Rainbow Map (Index) », May 2016.
[15] *S.H and others v. Austria* [GC], *op. cit.*, § 69.
[16] *Paradiso and Campanelli v. Italy* [GC], *op. cit.*, Joint concurring opinion of judges De Gaetano, Pinto De Albuquerque, Wojtyczek et Dedov, § 4.
[17] *Paradiso and Campanelli v. Italy* [GC], *op. cit.*, §§ 100, 177, 203. See also Grégor Puppinck and Claire de La Hougue, « GPA : l'intérêt général peut primer le désir de parentalité – À propos de l'arrêt de Grande chambre Paradiso et Campanelli c/ Italie du 24 janvier 2017 », *Revue Lamy Droit civil*, No 146, 1st March 2017.

turpitudinem allegans. The law cannot offer protection to faits accomplis *in violation of legal rules or fundamental moral principles*" and furthermore, "*It is not acceptable to invoke detrimental effects resulting from one's own illegal actions as a shield against State interference. Ex iniuria ius non oritur.*"[18] From that perspective, it seems inappropriate to rely on a certain biological reality within the existence if the genetic link between the second and the first applicant against Germany, which simply applied its law even though the two women intentionally went abroad to deviate from the biological reality and use ART which is prohibited in Germany. In this situation which they themselves have created, compliance with the biological reality can under no circumstances be achieved if they voluntarily deprive the child of the biological truth about his father, and, if the woman who delivered the child, whose legal motherhood is in no way contested by the applicants, has no genetic link with the child (subject to the mitochondria heritage).

Protection of the rights and freedoms of others: protecting children in general by preventing two women from fighting over biological motherhood.

15. The current case marks a new stage within the breakdown of filiation as a result of adults' desire to have children. This form of surrogacy at issue here involves three adults who each have a "biological" status to claim to be a parent: two women could claim to each be recognized as mother. However, German law provides rationally that the mother is the women who delivers the child, therefore excluding any other woman's motherhood. However, the purpose of preventing two women from fighting over the biological motherhood of a child is legitimate and recognized as such in the *S.H. and others v. Austria* case, in which the Grand Chamber held that "*the Austrian legislature was guided by the idea that medically assisted procreation should take place similarly to natural procreation, and in particular 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 and to avoid disputes between a biological and a genetic mother in the wider sense*."[19] In this same case, the German government had rightly observed that "*Splitting motherhood into a genetic and a biological mother would result in two women having a part in the creation of a child and would run counter to the established principle of unambiguousness of motherhood which represented a fundamental and basic social consensus. Split motherhood was contrary to the child's welfare because the resulting ambiguousness of the mother's identity might jeopardise the development of the child's personality and lead to considerable problems in his or her discovery of identity*."[20]

16. To automatically recognize a link of filiation with two women would also be to accept the very principle of manufacturing fatherless children. It is thus the protection of all future children that is sought. The Court acknowledged the relevance of measures aimed at "*preventing disorder, and also that of protecting children – not merely the child in the present case but also children more generally – having regard to the prerogative of the State to establish descent through adoption and through the prohibition of certain techniques of medically assisted reproduction*."[21] Further on, it is the protection of the family and its members that is sought in

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[18] *Paradiso and Campanelli v. Italy* [GC], *op. cit.*, Joint concurring opinion of judges De Gaetano, Pinto De Albuquerque, Wojtyczek et Dedov, § 3.
[19] *S.H. and others v. Austria* [GC], *op. cit.*, § 104.
[20] *Ibid*, § 70.
[21] *Paradiso and Campanelli v. Italy* [GC], *op. cit.*, § 197.

the preservation of the natural structure of family whose necessity and irreplaceable value is proved by the experience of humanity; it is also in the interest of the entire society as soon as family is the "*fundamental unit of society*",[22] "*natural and fundamental group unit of society*",[23] "*for the growth and well-being of all its members and particularly children*",[24] "*(founded) primarily by the marriage between a man and a woman.*"[25] Atypical family situations are seldom in the best interests of the child and therefore, cannot have to necessarily be imposed to society. As noted by the Court in the *X, Y and Z v. The United Kingdom* case, "*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.*"[26] This is why the areas of procreation and human filiation cannot be abandoned to the offer of ART's "industry" and to the adults' desire to have children. This is the basis for the State's sole competence to acknowledge a link of filiation in the event of a biological link or regular adoption as reiterated by the Court in the case *Paradiso and Campanelli v. Italy*.[27]

V. A MEASURE PROPORTIONATE TO THE LEGITIMATE AIMS PURSUED

17. In the present case, Germany enjoys a wide margin of appreciation, the limits of which it has not exceeded as long as the application of its legislation to the applicant's situation seems consistent and balanced in so far as it takes largely into account the child's interest and respects the Court's case law, the international texts and the principles set out by the bodies of the Council of Europe.

The existence of a wide margin of appreciation

18. A "margin of appreciation (is) entrusted to the State in the regulation of filiation links".[28] Its extent can change depending on various factors. As the Court regularly points out, "*Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. (…) There will usually be a wide margin of appreciation accorded if the State is required to strike a balance between competing private and public interests or Convention rights.*"[29] If the filiation of an person can be considered as a particularly important aspect of his or her existence or identity, which would limit the margin

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[22] Article 16 of the European Social Charter of 1961.
[23] Article 16 (3) of the Universal Declaration of Human Rights of 1948; article 23 (1) and (2) of the International Covenant on Civil and Political Rights of 1966; article 10 § 1 of the International Covenant on Economic, Social and Cultural Rights of 1966; Preamble of the Convention on the Rights of the Child of 1989; article 16 of the European Social Charter (revised) of 1996; article 33 of the Charter of Fundamental Rights of the European Union of 1989; article 44 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990.
[24] Preamble of the Convention on the Rights of the Child, 1989.
[25] *Paradiso and Campanelli v. Italy* [GC], *op. cit*., Joint concurring opinion of judges De Gaetano, Pinto De Albuquerque, Wojtyczek et Dedov, § 3.
[26] *X, Y and Z v. United Kingdom* [GC], *op. cit*., § 47.
[27] *Paradiso and Campanelli v. Italy* [GC], *op. cit*., §§ 177 and 197. See also *Chavdarov v. Bulgaria*, No 3465/03, 21 December 2010, § 55.
[28] *Chavdarov v. Bulgaria*, *op. cit*., § 56 (free translation).
[29] See *Dickson v. United Kingdom* [GC], No 44362/04, 4 December 2007, § 78; *S.H. and others v. Austria* [GC], *op. cit*., § 94; *Paradiso and Campanelli v. Italy* [GC], *op. cit*., § 194.

of appreciation left to the State, it should however be broader in this case as according to the Court's words, "*the facts of the case touch on ethically sensitive issues – adoption (…) medically assisted reproduction and surrogate motherhood – in which member States enjoy a wide margin of appreciation*".[30] The State must also strike a fair balance in the matter in question, between the applicant's private interests and the public interest in the protection of order, family and children generally speaking, as stated above.

19. As to whether or not there is a consensus on the issues raised in this case, a comparative study carried out in 1998 by the Committee on Bioethics of the Council of Europe shows that regarding the question of who is legally considered as the mother of the child, between the woman carrying the child and the one who donated her ovum, it appears unanimously that neither the ovum donor, nor any of the two women can be considered as such.[31] A study by professor Nigel Lowe conducted for the Committee of experts on family law in 2008 states a "*unanimity among the Member States surveyed in regarding the woman who gives birth as the legal mother regardless of marital status*."[32] Anyhow, the establishment of maternal parentage for the mother's partner is a very controversial provision: in 2011, after intense negotiations, the European Committee on Legal Co-operation of the Council of Europe decided to withdraw Principle 17 (3) from the "Draft recommendation on the rights and legal status of children and parental responsibilities" which recommended that Member States establish maternal filiation for a woman who is the spouse, registered partner or concubine of the mother of a child conceived through ART. Therefore, the Court cannot impose on governments such an interpretation of the Convention, while there was almost unanimous consensus on the withdrawal of this provision in 2011, with only Norway, Sweden and the Netherlands maintaining their intention to retain it. This draft recommendation was eventually rejected by the Committee of Ministers as it did not sufficiently respect the natural structure of family.

German law takes the child's best interests into account and respects the Court's case law.

20. While the applicants wanted to imitate heterosexual procreation, it is doubtful that the situation thus created is optimum regarding the best interests and rights of the child, in particular his or her right to family life, involving his or her dual maternal of paternal filiation,[33] and his or her "*right to know and be cared for by his or her parents*" according to Article 7 (1) of the United Nations Convention on the Rights of the Child of 1989 (UNCRC): any heterologous ART, which is not without risk for the human being resulting of it,[34] necessarily deprives the child of at least one of his or her biological parentage which prevents him or her from addressing his or her legitimate need to know his or her origins,[35] which is a serious injustice. The child is

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[30] *Paradiso and Campanelli v. Italy* [GC], *op. cit*., § 194.

[31] CDBI, "Medically Assisted Procreation and the Protection of the Human Embryo: Comparative Study on the Situation in 39 States", 1998, CDBI/INF (98) 8, p. 111.

[32] 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.

[33] 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 Marckx v. Belgium, No 6833/74, 13 June 1979 (Maternal filiation); Johnston v. Irlande, No 9697/82, 18 December 1986 (Paternal filiation).

[34] 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. 22-25.

[35] See *Odièvre v. France*, [GC], No 42326/98, 13 February 2003, § 29: "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

also deprived of useful information regarding medical and genetic matters, particularly regarding prevention and appropriate healthcare.[36] Having voluntarily deprived the child of his or her paternal filiation, the adult applicants are less concerned about the child's interest in having his filiation established than about their own interest in having their rights over the child legally established. Unfortunately, the interests of the child can be easily exploited to the benefit of the adults surrounding him or her.

21. In such a situation, Germany adopted a balanced position, taking into account the child's best interests, in accordance with Article 3-1 of the UNCRC and with Principle 2 of the 1959 Declaration of the Right of the Child.[37] As the Court regularly points out: "*where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child's integration in his family*."[38]

22. In that respect, it should first be noted that even if all of the methods of establishing filiation were not open to her, the second applicant has not been deprived of all means of being recognized as the second parent of the first applicant with whom she has a genetic link: she was able to proceed with the adoption as permitted by section 9.7 of the Act on Registered Partnership of 16 February 2001. Prioritizing the possibility of adoption, Germany handled the interest of the child by not automatically admitting the establishment of a link of filiation with regard to two women, that is, a duality of motherhood mentioned in the birth certificate which would have led to believe that the child would have been conceived by two women.

In the *S.H v. Austria* case, the Court stated that it could not "*overlook the fact that the splitting of motherhood between a genetic mother and the one carrying the child differs significantly from adoptive parent-child relations and has added a new aspect to this issue.*"[39] It is also worth mentioning the case *X, Y and Z v. United Kingdom* concerning the relationship between a transsexual (female-male) and the child of his partner conceived through anonymous sperm donation: The Court had found that there had been no violation of the Convention, holding that "*the fact that the law of the United Kingdom does not allow special legal recognition of the relationship between X and Z does not amount to a failure to respect family life within the meaning of that provision (art. 8).*"[40] This means that the fact that two women cannot biologically be registered as mothers of a child does not constitute a breach of the Convention, let alone when adoption is possible as it is in this case. Moreover, in the *Chavdarov v. Bulgaria* case, the Court held that a restrictive law on the establishment of filiation which does not allow the recognition of a genetic link between a father and his natural children does not violate the

personal identity, such as the identity of one's parents (see *Mikulić v. Croatia*, no. 53176/99, §§ 54 and 64, ECHR 2002-I). Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention." See also *Phinikaridou v. Cyprus*, No 23890/02, 20 December 2007, § 45; *Jäggi v. Switzerland*, No 58757/00, 13 July 2006, § 37.

[36] Kavot Zillén, Jameson Garland, Santa Slokenberga, op. cit., p. 24-25.

[37] Those two texts respectively laid-down that "(I)n all actions concerning children … the best interests of the child shall be a primary consideration." And that "(t)he child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."

[38] *Keegan v. Irlande*, No 16969/90, 26 May 1994, § 50; *Kroon and others v. Netherlands*, No 18535/91, 27 October 1994, § 32; *Chavdarov v. Bulgaria*, *op. cit*., § 37.

[39] *S.H. and others v. Austria* [GC], *op. cit*., § 105.

[40] *X, Y and Z v. United Kingdom* [GC], *op. cit*., § 52.

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rights under the Convention, even though this situation goes against both biological truth and social reality, according to the father.[41] It should also be added that section 9.7 of the Law on Registered Partnerships refers to section 1754 of the BGB on the effects of adoption, by a spouse, of the child of the other and provides that the child acquires a legal status as the child of both spouses: thus, the applicants' expectations can be fully satisfied.

23. German legislation has once more taken into account the best interests of the child regarding the period before the adoption is granted. First, there was no deprivation of any filiation link pending the validation of the first applicant's adoption by the second applicant since such a link was established from birth with regard to the woman who delivered the child, under section 1591 of the BGB. On the other hand, in addition to the possibility of adoption, German law provides for a number of provisions concerning the legal link between the child and the partner of the legal parent,[42] including the possibility of establishing a right of co-decision in matters of everyday life affecting the child or the right to take any decision necessary to his or her well-being in case of danger for the latter (section 9.1 and 9.2 of the Law on Registered Partnerships).

German law respects the international texts and the principles developed by the bodies of the Council of Europe.

24. The refusal of the German authorities to automatically recognize the partner of the woman who delivered the child as the legal mother on the basis of the German legal provisions concerned in this case, in particular sections 1591 and 1592 of the BGB, is in compliance with the international texts and principles developed under the Council of Europe.[43]

25. Therefore, this is in line with Article 2 of the European Convention on the Legal Status of Children born out of Wedlock which states that "*Maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child.*" This is also consistent with the "*Report on principles concerning the establishment and legal consequences of parentage – "the white paper"*" developed by the CDCJ and adopted in May 2004, of which Principle 1 regarding the establishment of the maternal filiation states that "*The woman who gives birth to the child shall be considered as the mother.*"[44] One woman only, in this case the one who delivered the child, can be entitled to be recognized as mother as a result of giving birth. The CDCJ explains that Principle 1 "*follows the wording of paragraph 1 of Principle 14 of the general conditions for the use of artificial procreation techniques as contained in the "White Paper" on "Human artificial procreation" prepared by the Council of Europe's ad hoc Committee of experts on progress in the biomedical sciences (CAHBI). Furthermore, it is in the line with the interpretation given by the European Court of Human Rights in the Marckx judgment according to which it is a fundamental right for a mother and her child to have their link of affiliation fully established as from the moment of the birth.*"[45] It is further specified that *"after examining the different situations derived from the medically assisted procreation, it was agreed that Principle 1 concerns the legal situation at the time of birth.… In other words, all*

[41] *Chavdarov v. Bulgaria*, *op. cit*., § 28 and 30 (free translation).
[42] Comité directeur de bioéthique du Conseil de l'Europe, « Réponses des États membres au questionnaire sur l'accès à la procréation médicalement assistée (PMA) et sur le droit à la reconnaissance de ses origines pour les enfants nés après PMA », 9 février 2012, CDBI/INF7FEV2, p. 54.
[43] See in particular, Hague Conference on Private International Law, "A study of legal parentage and the issues arising from international surrogacy arrangements", March 2014, Prel. Doc. No 3C (The Study), p. 8.
[44] European Committee on Legal Co-operation of the Council of Europe "Report on principles concerning the establishment and legal consequences of parentage – "the white paper"", May 2004, CJ-FA (2006) 4 f, p. 7.
[45] *Ibid.,* § 12.

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previous circumstances concerning the conception and pregnancy (e.g. cases of surrogacy) and any subsequent modification of the legal parentage (e.g. adoption by another person) will not affect the legal maternal affiliation at the moment of birth."[46]

VI. THE ABSENCE OF DISCRIMINATION

26. In the present case, the applicants still complain that they are being treated in a discriminatory manner on the ground of sexual orientation according to Article 14 in conjunction with Article 8 of the Convention, the latter being likely to be applied as acknowledged above.

27. However, the presence of such a discriminatory treatment, namely, a difference in the treatment of similar situations is doubtful. Indeed, in the *Gessner and Gessner-Boeckel v. Germany* case, the facts of which are similar to those of the present case, except for the existence of a genetic link, the Court found that there had been no discrimination and concluded that the application was inadmissible. The applicants argued that what was discriminatory was that the presumption in Section 1592 § 1 of the BGB, that the husband of the mother is the father of the child, does not apply in the case of registered partnership.[47] Since, as stated above, the presence or not of a genetic link is irrelevant in the process of this presumption, which applies to the mother's husband whether or not the child is his, the Court's reasoning is expected to be applied *mutatis mutandis* to the present case.

28. The Court noted that "*in case one partner of a same-sex partnership gives birth to a child, it can be ruled out on biological grounds that the child descended from the other partner*" and therefore "*there is no factual foundation for a legal presumption that the child descended from the second partner*."[48] It had then held that it could not "*be said that the applicants found themselves in a relevantly similar situation as a married husband and wife in respect of the entries made into the birth certificate at the time of birth*."[49]

29. Indeed, such presumption is a mode of proof intended to establish the paternal filiation of a child born in the home of a married heterosexual couple.[50]

It is only useful for heterosexual couples who may have to prove who the father of the child is and it can definitely not apply to a same-sex female couple: it cannot reasonably be assumed that a child was conceived by two women! In the *Chavdarov v. Bulgaria* case, the government explained that the presumption of paternity is "*the most appropriate solution to meet the need to establish the link between the child and his father and is therefore widely adopted by the various European laws*.".[51] It is based on the laws of nature according to the Roman law principle *Pater is es quem nuptiae demonstrant* (L.5 De in jus voc.; Dig. 2, 4, 5), not on the possibilities of ARTs that go beyond what nature allows. Therefore, it only applies in the case of a man and a woman, married together, regardless of whether or not there is a real genetic link between the father and the child. In comparison, the French law which granted marriage to same-sex couples (Act No 2013-404 of 17 May 2013), pragmatically still reserves the

[46] *Ibid.*, § 14.
[47] *Boeckel and Gessner-Boeckel v. Germany*, *op. cit.*, § 6.
[48] *Ibid.*, § 30; see also § 8.
[49] *Ibid.*, § 29 et 31.
[50] See Hague Conference on private international Law "A study of legal parentage", *op. cit.*, p. 9.
[51] *Chavdarov v. Bulgaria*, *op. cit.*, § 31 (Free translation).

presumption of paternity to married heterosexual couples:[52] the wife of the woman who delivers the child does not benefit from it. Either way, a heterosexual couple would not be in the same situation as the applicants; discrimination on the basis of the sexual configuration of the couple cannot be identified in this case.

Conclusion

30. To condemn Germany in this case, when its legislation does not appear to lack consistency and balance, would be to encourage a certain form of procreative tourism which would allow the emergence of situations such as the present one and which is a source of problems. The State would see its freedom to establish provisions aimed at preventing this and its authority over filiation significantly restricted. It would also include the validation of a form of surrogacy.

31. The current case also raises important issues related to the link between law, science and nature. Law finds its ultimate foundation within human nature which defines the good and the right. The desire to have a child is deeply human; with the desire to live, to live in society and to learn it is part of the fundamental inclinations of the human being. It is respectable and universal in that it is an essential feature of human nature. It is this rooting within human nature of the desire to procreate that is the foundation of the "Right to Marry and Found a Family". If this right were only the expression of individual willingness, it would not be universal and would not be a human right. There are no human rights without human nature. This very same human nature, which is the source of the desire and the right to marry and found a family, is also the source of the ability to fulfil this desire. Both are inseparable within Man. It is pointless to rely on human nature to obtain the fulfilment of a natural desire in ways which are contrary to human nature, because then, the very foundation that one claims to be giving to one's assertion is denied. This same human nature which inspires the desire to become a parent also places within the child the need to be raised and loved by his or her real parents. Voluntarily depriving a child of his or her true parents and of the knowledge of his or her filiation is always a serious injustice and causes suffering. This is the result of the selfishness of adults who put their desires before the child's best interests on the grounds that they have technically gained the power to decide whether the child be born or not. It is essential to update the protection of children's rights to respond to new ARTs in order to prevent them from manufacturing human beings like objects. Children are the most vulnerable human beings, especially before birth, a time during which their acknowledgment as persons and their protection depend entirely on the adults' will. And even after their birth, children's need for love is such that it creates in them a dependence on adults, whoever they may be. This dependence is also a vulnerability which can be abused of by adults. In this respect, as the Grand Chamber pointed out with perspicacity in the Paradiso judgment, the protection of the child's best interest must be understood broadly, as also protecting children in general, and must be interpreted in light of their human dignity, which implies treating children humanely, that is, as an end in themselves and not as a means to satisfy the desire of third parties to have or not have a child. The purpose of human rights is

[52] Article 6-1 of the French Civil Code states that, "Marriage and filiation through adoption produce the same effects, rights, and obligations provided by legislation, with the exception of those provided for in Book I, Title VII, of this Code, regardless whether the spouses or parents are of different sexes or same sex." Title VII dealing with filiation. "La circulaire du Ministre de la justice du 29 mai 2013 de présentation de la loi ouvrant le mariage aux couples de personnes de même sexe (BOMJ n°2013-05 du 31 mai 2013 - JUSC1312445C)" explains : « le mariage entre deux personnes de même sexe n'emporte aucun effet en matière de filiation non adoptive. Ainsi la filiation d'un enfant à l'égard d'un couple de personnes de même sexe ne pourra que résulter d'un jugement d'adoption » (p. 2).

to help society preserve our humanity against any excessiveness. Founded in the post-war period to counter the ideological excessiveness of totalitarian systems, they must now face the excessiveness of individual desires that feed transhumanistic ideology. Individual desires get out of proportion when they are disconnected from nature. The role of the Court is to help States preserve our humanity, not to force those States to remove moral barriers to the fulfilment of unnatural individual desires.