2014-2015

Team Number: 082

THE EUROPEAN HUMAN RIGHTS MOOT COURT COMPETITION 2014-2015

"Case of B.N. and K.N. v. The Utopin Republic"

B.N. and K.N.

(Complainants)

VS

The Utopin Republic

(Respondent)

Submission for the Applicant

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II. List of Abbreviations

CM	Committee of Ministers
CoE	Council of Europe
CommDH	Commissioner for Human Rights
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FIGO	International Federation on Gynecology and Obstetrics
HRC	Human Rights Council
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICPD	International Conference on Population and Development
IGN	International Guardianship Network
IVF	In-vitro fertilisation

MAP	Medically Assisted Procreation
NGO	Non-Governmental Organization
PACE	Parliamentary Assembly of the Council of Europe
Rec.	Recommendation
ROPA	Reception of Oocytes from Partner
UR	Utopin Republic

III. List of References

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2. International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (No. I-14668).
3. Convention on the Rights of the Child 1990, UNTS 1577.
4. Convention on the Elimination of All Forms of Discrimination against Women 1979, 1249 UNTS 13 (No I-20378).
5. European Convention on the exercise of the children's rights 1996, CETS 160.
6. European Social Charter (revised) 1996, CETS 163.
7. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the application of Biology and Medicine: Convention on Human Rights and Biomedicine 1997, ETS No. 164.

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IV. Summary

- B.N., a Foretian national, and K.N., a Utopin national, are a lesbian couple, married in Foretia and living in the UR, where their marriage cannot be legally recognized. The couple decided to have a child through MAP, following IVF of K.N's eggs with donor sperm. However, a road accident postponed their plans for the implantation of the fertilised eggs into B.N.. K.N. was put on life support, while her parents, in her name, filed for a motion for the destruction of K.N.'s eggs. B.N. contested the parents' authority and successfully filed for an injunction to stay the execution of the order. Eventually, the eggs could not be destroyed, because they were no longer in the clinic's possession. The parents, accused B.N. of theft but she was found innocent for proceeding with the implantation in the absence of an enforceable decision and upon K.N.'s previous consent. However, the Court of Appeal on April 2014 condemned B.N. for disrespecting the court's order. B.N. gave birth to twins, the maternity of whom was challenged by K.N.'s parents. B.N. contested the parents' authority and asked to be awarded K.N.'s legal guardianship, as a spouse. The court granted B.N.'s request for maternity but dismissed the one for guardianship of K.N.. Meanwhile, K.N.'s parents blocked B.N.'s access to her partner's income and initiated proceedings to evict her and the children from K.N.'s apartment. The Supreme Court on July 2014 recognized K.N. as the mother of the twins while ordering their guardianship to remain with B.N. until K.N.'s recovery. The guardianship of K.N. was to remain with the parents. In this context they prohibited B.N.'s access to K.N's hospital room and requested for a medical report on their daughter's condition, which stated that there were no chances of recovery and life support should be withdrawn based on family's consent. On August 2014, B.N. submitted an application to ECtHR both in hers and K.N.'s name arguing that the UR violated:
- A. 12 and A. 8 in conjunction with A. 14 of the ECHR, since the U.R. refused to recognise the applicants' valid marriage conducted in Foretia.
- A. 8 of the ECHR, as the applicants' rights to private and family life have been severely affected.
- A. 6§§1 and 3 of the ECHR, since the domestic Court of Appeal at the criminal proceedings abruptly reclassified B.N.'s charge.
- A. 2 of the ECHR, as K.N. can be withdrawn from life support according to U.R.'s law.
- Due to this imminent threat, the applicants request interim measures to maintain K.N. on life support.

V. Interim Measures

K.N. following a road accident of 20 November 2012 was put on life support. In July 2014 she was declared as being in a permanent vegetative state. On 14 August 2014, K.N.'s parents, acting as her legal guardians, requested a medical report on K.N.'s condition. The report stated that K.N. had no chances of recovery and according to national law, life support can be withdrawn solely after her parents' consent. By virtue of Rule 39 of the Rules of the Court, the applicants ask to the Court to order the UR authorities to maintain K.N. on life support until the decision on the merits of the case, for there is imminent risk of irreparable harm to K.N.'s rights, namely her right to life (A. 2) and her right to private life (A. 8).

VI. Legal Pleadings

VI.1. Admissibility on the individual application

The UR infringed upon the applicants' rights to respect for their private and family life by convicting B.N. for proceeding with the lawful implantation of K.N.'s fertilized eggs, by negating their status as spouses and parents of their children and by recognising K.N's parents as her legal guardians. B.N.'s right to a fair trial was violated by the reclassification of the charges at the criminal proceedings and she was also order to pay a fine and damages of 15.000 euro. Hence, the applicants are direct victims,[1] who were placed in a precarious situation having suffered both non-pecuniary and pecuniary significant disadvantage.[2] Moreover, K.N.' life is endangered by the law that allows withdrawal of life support of PVS patients and as she is imminently threatened by the steps prescribed by this law and taken by her parents, she is a victim.[3] She has the right to lodge an application through B.N. who, as her spouse and life partner, is the most qualified person to represent her before the Court due to her vulnerable medical state.[4] B.N. gave a power of attorney to the NGO, which also represents K.N. in the present case under tacit authorisation.[5] The applicants, focusing on the delicate aspects of their family life with the children, as well as K.N.'s vulnerable medical position and popularity as an artist, requested for anonymity.[6] Finally, the application was lodged within the six-month time limit from the date on which the final decisions of 30th December 2013 by the Court of Appeal and 30th July by the Supreme Court were taken; hence all the criteria regarding its admissibility are fulfilled.

1 *Gorraiz Lizarraga a. o.* v. *Spain*, §§35; *Amuur* v. *France*, §36; ECHR, A. 34.
2 *Giuran* v. *Romania*, §18; *Zehentner* v. *Austria*, §93; ECHR, A. 35§3(b); CoE, Research Report, (2012), p. 5.
3 *Michaud* v. *France*, §51.
4 *CLR on behalf of Valentin Campeanu* v. *Romania* [GC], §§102, 103, 151; *Ilhan* v. *Turkey* [GC], §55; ECHR, Rules of the Court 36§1; Leach (2005), p. 119.
5 Zwart (1994), p. 79.
6 ECHR, Rules of the Court 47§4, 33§3; *Sindicatul "Pastorul Cel Bun"* v. *Romania* [GC], §§70, 72.

VI.2.1.UR's violation of A. 12 in conjunction with A.14 regarding the applicants' marriage

The UR did not recognise the validity of the applicants' marriage under Foretian law, due to the fact that the UR law considers marriage to be between a man and a woman. This refusal amounts to a violation of applicants' rights under A. 12 in conjunction with A. 14. Initially, A. 12 secured the fundamental right of a man and a woman to marry and found a family.[7] Gradually, voices were raised for its application to homosexual couples[8] and nowadays, it is accepted that the right to marry should not be defined by purely biological criteria nor be limited to heterosexual couples.[9] It is true that both the UR and Foretia enjoy in their territory a certain margin of appreciation concerning the institutionalisation of marriage and its scope.[10] However, the UR negated the applicants' right to marry which was accorded to them by Foretia, simply on the grounds that they were homosexuals, and consequently nullified the protection afforded by the ECHR, restricting it to such an extent that the very essence of their right was impaired.[11]

In addition, their right to found a family, as protected under A. 12 was also violated. The applicants exercised this right by using MAP and specifically a common IVF technique among lesbians, called ROPA,[12] which actively engages both women in the process of founding a family by impregnating one spouse with the fertilised eggs of the other spouse. However, the UR convicted B.N. for proceeding with the lawful implantation of her spouse's fertilised eggs. This interference was arbitrary, since both spouses jointly decided to found a family with the use of MAP. Therefore, ignoring B.N.'s and K.N.'s marriage solely based on their sexual orientation, and considering that there was no link between them, the UR nullified disproportionately and without weighty justification[13] their *status* acquired in Foretia as a married couple. Their right to marry exercised in Foretia and consequently their right to found a family under A. 12 in conjunction with A. 14 was violated.[14]

VI.2.2.Violation of A. 8 in conjunction with A. 14 regarding the applicants' marriage or an alternative form of legal recognition of their de jure family life

Even if A. 12 is found to be inapplicable, the UR's refusal to recognise the status acquired in Foretia constitutes a grave interference with the applicants' family life under A. 8.[15] In

[7] *Emonet a. o.* v. *Switzerland*, §90.
[8] Commission report on *W.* v. *the UK*, (Mr. H.G. Schermers dissenting).
[9] *Christine Goodwin* v. *the UK* [GC], §100; *Schalk and Kopf* v. *Austria*, §61; Hodson (2011), p. 173.
[10] *O' Donoghue a. o.* v. *the UK*, §83; *Jaremowicz* v. *Poland*, §49; *Frasik* v. *Poland*, §89.
[11] *V.K.* v. *Croatia*, §98; *Muñoz Díaz* v. *Spain*, §78; Grigolo (2003), p. 1035.
[12] Marina, Marina, Marina, Fosas, Galiana and Jove (2010), pp. 938-939.
[13] *J.M.* v. *the UK*, §54; *E.B.* v. *France* [GC], §91; *Salgueiro da Silva Mouta* v. *Portugal*, §29.
[14] Harris, O'Boyle and Warbrick (2014), pp. 754, 760.
[15] *Vallianatos a. o.* v. *Greece* [GC], §73; *P.B. and J.S.* v. *Austria*, §30; *Schalk and Kopf* v. *Austria*, §94.

essence, the applicants are in an analogous situation to the ones in *Wagner and J.M.W.L.* v. *Luxembourg*. *Mutatis mutandis*, the denial of *exequatur* of the foreign act due to the absence in the *lex fori* of provisions to recognise the particular family bond, is an unreasonable denial of the cross-border continuity of their legal status.[16] Such an interference was not justified under A. 8§2. B.N. and K.N. are in a comparable situation to any heterosexual couple married abroad as regards their need for protection of their relationship and they legitimately and reasonably expected to be treated as a married couple without discrimination to their gender.[17] The interference wasn't necessary in a democratic society in the absence of a pressing social need and of relevant and sufficient reasons of the decision to justify it. Merely recognising the validity of the applicants' marriage would in no way endanger the legitimate aim, namely the protection of the traditional family, nor would it be disproportionate to this aim, given the particularities of the case.[18] However, neither traditional values, nor the rules of "dominant culture" can be invoked to justify any form of discrimination.[19] Therefore, the denial of the UR to recognise their marriage breaches their right to family life under A. 8.

In any case, B.N. and K.N.'s relationship should have been awarded some other form of legal recognition, applied to same-sex couples, in order for the family life of the applicants to be protected in terms of UR's constitutional protection of family life.[20] Homosexuals are as capable as heterosexuals to form a stable committed relationship and consequently, have an interest in having their relationship officially recognised by the UR.[21] Emphasis shall be added to the uncontested evidence of a continuing European trend (25 out of 47 member states) in favour of social acceptance and legal recognition of same-sex couples.[22] The UR does not foresee any form of legal recognition of domestic partnership, whether heterosexual or same-sex, while the law only extents marriage to heterosexuals. The Court in its established jurisprudence has stated that States enjoy a narrow margin of appreciation with respect to discrimination on grounds of sexual orientation[23] and that there is a discriminatory treatment when failing "to treat differently persons whose situations are significantly

16 *Mennesson* v. *France*, §49; *Negrepontis-Giannisis* v. *Greece*, §58; *Wagner and J.M.W.L.* v. *Luxembourg*, §§123, 132-135; *Hussin* v. *Belgium* (dec.); Gallo, Paladini and Pustorino (2014), pp. 359-361.
17 *Gas and Dubois* v. *France*, §58; *P.B. and J.S.* v. *Austria*, §47; Vaigė (2012) p. 765.
18 *Hämäläinen* v. *Finland* [GC], §108; *Kozak* v. *Poland*, §91; *Karner* v. *Austria*, §37.
19 CoE/CM/ Rec. (2010), Preamble.
20 CoE 1474 (2000), A. 11.iii.i.; CoE, (2011), p. 13.
21 *Vallianatos a. o.* v. *Greece* [GC], §78, *Schalk and Kopf* v. *Austria*, §9 (Rozakis, Spielmann, Jebens dissenting); Rob (2014), pp. 261-262.
22 ILGA-Europe, Annual Review of the Human Rights Situation of LGBTI in Europe (2014); Trispiotis (2014), p. 348.
23 *J.M.* v. *the UK*, §54; *P.B. and J.S.* v. *Austria*, §42; *Kozak* v. *Poland*, §92; *Karner* v. *Austria*, §41.

different."[24] The UR cannot claim to have acted for the sake of traditional family, the special status of which is not impaired by granting rights and benefits to same-sex couples.[25]

A valid marriage or partnership gives rise to personal, social and legal consequences, specifically designed to protect the couple and their potential offspring.[26] The refusal of the UR to provide applicants with a legal form of recognition entails a denial to acknowledge the legal consequences that stem from a valid marriage or a registered partnership, such as property rights and legal guardianship.[27] As the UR law stipulates, community of property applies to married couples. The couple decided that B.N. was to be impregnated since K.N. being the main income provider of their family, wanted to carry on with her professional activity. Therefore, B.N. who had access to the bank account of her spouse legitimately expected that this financial situation would not change, especially after the birth of two children. Furthermore, K.N.'s parents had no right to initiate proceedings to evict her and the twins from the family and matrimonial home thus putting them in a precarious situation.

VI.3.UR's violation of K.N.'s private life under A. 8 regarding her legal guardianship

K.N.'s legal guardianship should have been awarded to B.N. given their marriage in Foretia and not to her parents as the courts ruled.[28] Indeed, the courts were aware of the fact that K.N.'s parents had showed a profound disrespect for their daughter's wishes and engagements prior to the accident and that they had not acted with diligence nor had considered K.N.'s paramount interests.[29] Therefore, the UR interfered with K.N.'s right to private life which entails, amongst others, her right to develop and establish relationships with others as well as, the right to personal development and self determination.[30]

The interference was not in accordance with the law.[31] The UR Civil Code does not impose an express obligation for the guardian to take into account the will of the ward. However, interpreted *in fine*, the UR law's aim is to provide incapacitated persons with adequate protection through a form of substituted judgment, which promotes the ward's self-determination and well-being.[32] The aforementioned purpose was not fulfilled in K.N.'s case.

[24] *Pretty* v. *the UK*, §87; *Thlimmenos* v. *Greece* [GC], §44.
[25] Scherpe (2013), p. 92.
[26] *Korosidou* v. *Greece*, §70; *Muñoz Díaz* v. *Spain*, §78; *Burden* v. *the UK* [GC], §63.
[27] UN A/HRC/19/41 (2011), §69.
[28] *Case*, §28.
[29] CoE/CM/Rec. (1999) 4, Principles 8, 9; IGN, Yokohama Declaration (2010), I, A. 4; Coe/CommDH, Who gets to decide? (2012), p. 20.
[30] *I.B.* v. *Greece*, §67; *Costa and Pavan* v. *Italy*, §48; *Schüth* v. *Germany*, §53.
[31] *Michaud* v. *France*, §94; *Kruslin* v. *France*, §27.
[32] National Guardianship Association, Standards of practice (2013), Standard 7, III, (B); ICCPR (1966), A. 1§3.

The protection that the UR pursued to provide to K.N. was disproportionate since the national courts could have opted for a less restrictive alternative.[33] B.N. being in a relationship with K.N. for six years and taking into consideration the estrangement of the latter from her parents, is the most suitable person to protect K.N.'s interests to the greatest extent possible.[34] K.N.'s relationship with her parents had deteriorated as they had rejected her due to her homosexuality. Not only did they attempt to destroy their daughter's fertilized eggs but also they denied B.N. access to K.N.'s hospital room, acting against her wishes. In addition, the impugned interference was unnecessary in the democratic society of the UR.[35] There was no pressing social need not to grant the legal guardianship of an incapacitated person to her spouse and the decision-making process did not afford due respect for the interests of K.N. since her views were not taken into account.[36]

The UR's margin of appreciation is narrow since the right at stake, i.e. K.N.'s self-determination and maintenance of relationship with her spouse is crucial to the effective enjoyment of her fundamental rights under A. 8.[37] Thus, the UR inexcusably violated K.N.'s right to have her private life and personal choices respected.

VI.4.1. UR's arbitrary interference with B.N.'s reproductive rights under A. 8§1

The right to private life and self-determination was further violated in B.N.'s case when the domestic Court of Appeal convicted her for carrying on with her decision to become a mother. The notion of "private life" encompasses, *inter alia*, the right to respect for both the decisions to have and not to have a child.[38] Particularly, reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely the spacing and timing of their children.[39] Consequently, the decision of spouses or a cohabitating couple to conceive a child and to make use of MAP for that purpose falls within the scope of A. 8.[40] Egregiously, the domestic courts convicted B.N. and ordered her to pay a fine and damages.

VI.4.2. UR's interference cannot be justified under A. 8§2

This interference does not meet the conditions of A. 8§2. Since the special law regulating MAP has not yet been adopted by the UR recourse should be had to the Oviedo Convention. According to the latter, any intervention in the medical field shall be carried out following a

[33] Arai (1998), p. 45.
[34] Hayden (1995), p. 45; Then (2013), p. 141.
[35] *Berger-Krall a. o.* v. *Slovenia*, §268; *Maskhadova a. o.* v. *Russia*, §221.
[36] *Taşkın a. o.* v. *Turkey*, §118.
[37] *Winterstein a. o.* v. *France*, §76; *Yordanova a. o.* v. *Bulgaria*, §118.
[38] *E.B.* v. *France* [GC], §43; *Dickson* v. *the UK* [GC], §66; *Evans* v. *the UK* [GC], §71.
[39] UN/ICPD, Report of the ICPD (1994), Chapter VII., 7.3; CEDAW (1979), A. 16(e).
[40] *Knecht* v. *Romania*, §54; *S.H. a .o.* v. *Austria* [GC], §82; *Artavia Murillo a. o.* v. *Costa Rica*, §146.

free and informed consent.[41] In the instant case, both B.N. and K.N. had given their consent for the harvest of the eggs and their implantation to B.N. on 25 November 2012. Therefore, B.N. exercised her lawful right to become a mother based on her spouse's previous consent and as such the legal basis of the proceedings renders unjustified the conviction of B.N..

Furthermore, the domestic court failed to strike a proportionate balance between the legitimate aim pursued and the means employed.[42] Specifically, it attempted to protect K.N.'s right not to become a parent by interfering with B.N.'s right to become a parent. The Court reiterates that when a conflict between two equally protected rights occurs, the State must choose adequate means to reach a fair balance. [43] However, the Court of Appeal failed to take into consideration the fact that there has been absolutely no conflict between the rights of B.N. and K.N. since they jointly decided to have a child. K.N. was committed to the procedure and had paid for all the required expenses. There was no retraction of her will and so there was no need for B.N. to pay damages.

Furthermore, the impugned interference was unnecessary in a democratic society given the absence of sufficient reasons to justify it.[44] The Court of Appeal delivered its decision based on the order of destruction of the fertilized eggs, requested by K.N.'s parents. However, even if a patient may freely withdraw his given consent, "the same right must not apply to an authorization given by a third-party for an intervention, which should be retractable only if this is in the interest of the person who originally contested".[45] In this particular situation, only K.N. could have withdrawn her consent and not her parents who acted against her best interests and wishes. Notwithstanding the above, B.N. proceeded with the implantation before an enforceable order for the destruction had been served on the clinic.

Additionally, the UR exceeded its margin of appreciation, the breadth of which is restricted where a particularly important facet of an individual's existence or identity is at stake.[46] B.N.'s reproductive rights derive from the hard core of her right to respect for private life and as such, her decision to have a child with her spouse should have been respected.[47]

[41] Biomedicine Convention (1997), Chapter II, A. 5. UNESCO, Universal Declaration on Bioethics and Human Rights (2005), A. 6§1; Robertson (2003), pp. 1849, 1867.
[42] *Mennesson* v. *France*, §50.
[43] *Fernández Martínez* v. *Spain* [GC], §123; *Chassagnou a. o.* v. *France* [GC], §113.
[44] *S. and Marper* v. *the UK* [GC], §101; *Johansen* v. *Norway*, §64.
[45] CoE, Explanatory Report on the Convention Of Human Rights and Biomedicine (1996), §48.
[46] *M.K.* v. *France*, §31; *A, B and C* v. *Ireland* [GC], §232.
[47] FIGO, Ethical Issues in Obstetrics and Gynecology (2012), p. 15.

VI.5.1.UR's arbitrary interference with B.N. and K.N.'s parental rights under A. 8§1 in conjunction with A. 14

The applicants' right to family life under A. 8§1 was infringed upon by the courts' refusal to recognise both of them as parents of the twins, which were born during their parents' valid marriage that the UR should have taken into account as elaborated above. This marriage is sufficient to trigger the protection of A.8 for all those involved, including the children, which should be considered members of the family *ipso jure* from their birth.[48] When the UR deprived B.N. of her parental rights, it disregarded this family life on terms of the applicants' homosexuality and thus without weighty reasons it held a difference in treatment between the applicants and different-sex married couples, whose family is protected.[49] Even if B.N. applied for adoption of her spouse's biological children or established her parenthood in Foretia as the Supreme Court suggested, her attempt would be hindered by the discriminatory approach to the applicants' marriage.

Even if the applicants' marriage cannot be recognised in the UR, B.N. and K.N. are in a *de facto* long term relationship, amounting to a *de facto* family life, as they have been cohabiting since 2008 and K.N. financially supported their family.[50] Their relationship is protected under A. 8 since the current notion of family life includes same-sex couples, living in a stable *de facto* partnership.[51] Furthermore, they jointly decided to become parents and began procedures for this purpose, thus confirming their mutual commitment.[52] The twins born in this relationship are *ipso jure* part of this family from the moment of their birth, despite the fact that at that time the parents were no longer cohabiting due to K.N.'s hospitalisation.[53] The denial of parental rights to the applicants as *de facto* partners, constituted a differential treatment compared to parents of a child born of a marriage based relationship.[54]

The domestic courts failed to evaluate the particularities of the applicants' case that demanded protection under A.8. The applicants had applied jointly to have a child through MAP and B.N. acted as the twins' co-parent in every respect before and after their birth, and established a strong emotional bond, which is central to the parent-child relationship.[55] Most importantly, B.N. gave birth to the twins, which constitutes a distinguishing feature of this

[48] *Al-Nashif v. Bulgaria*, §112; *Berrehab v. the Netherlands*, § 21; ECHR, Protocol No 7, A. 5.
[49] *E.B.* v. France, §91; Salgueiro *Da Silva Mouta v. Portugal*, §36.
[50] *Kroon a. o.*v. *the Netherlands*, §30; *Keegan* v. *Ireland*, §44; *Nylund* v. *Finland* (dec.).
[51] *Vallianatos a. o.* v. *Greece* [GC], §73; *Schalk and Kopf* v. *Austria*, §91.
[52] *X, Y and Z* v. *the UK* [GC], §36; Shultz (1990), pp. 322-323.
[53] *X a. o.* v. *Austria* [GC], §96; *Al-Nashif* v. *Bulgaria*, §112; *Berrehab* v. *the Netherlands*, §21.
[54] *Sahin* v. *Germany* [GC], §94; *Şerife Yiğit* v. *Turkey* [GC], §79.
[55] *X, Y and Z* v. *the UK* [GC], §37; *Margareta and Roger Andersson* v. Sweden, §72; Marckx v. *Belgium*, §31.

case in relation to other cases regarding same-sex partners wishing to obtain parental rights over the partner's biological child. Hence, these strong family ties linking B.N. and the twins should have been formalised along with K.N.'s.[56] The fact that they were not, constitutes a severe interference with their right to family life, whose notion is an autonomous concept and as such, it must be interpreted independently of national law.[57] Given that the ECHR is a living instrument to be interpreted under the light of present day conditions, UR should have taken into account, that the applicants' 'alternative' family reflects the rapid social developments, namely children born through ROPA and raised in LGBT families.[58]

VI.5.2. UR's interference cannot be justified under A.8§2

This interference was not justified under A. 8§2. The impugned measure was not compatible with the rule of law.[59] UR Civil Code stipulates that motherhood is established through the fact of birth, incorporating the maxim "*mater semper certa est"*, which indicates that family life exists between the woman giving birth and a genetically unrelated child.[60] Moreover, given the fact that the UR has not regulated surrogacy contract, no derogation from the above rule is excused. This legislation was definitely accessible to B.N. as well as precise enough in order for her to foresee its applicability,[61] and legitimately expect being declared as the mother of the twins to whom she gave birth. Therefore, under no legal basis could the UR deprive her of her relevant right.

Although UR's objective was to protect K.N.'s and the twins' interests, the interference with B.N.'s rights was disproportionate.[62] There is no conflict between the applicants' parental rights, since they both intended to be parents, without annulling each other's parental status.[63] Moreover, the UR's interference was unnecessary in a democratic society, since its two hallmarks of tolerance and broadmindedness incline against the justifiability of interferences towards the right of a same-sex couple to become parents.[64] Parental rights concern an intimate facet of their identity,[65] therefore limitations on these rights require a stricter scrutiny and entail a narrow margin of appreciation, since there is the danger of

[56] European Social Charter (revised) (1996), A. 16; ICCPR (1966), A. 23 §1.
[57] *Mazurek* v. France, §52; Van Dijk, Van Hoof, Van Rijn and Zwaak (2006), p. 690.
[58] *Vallianatos a. o.* v. *Greece* [GC], §84; Hodson (2012), pp. 504-505.
[59] *Kruslin* v. *France*, §27.
[60] *Marckx* v. *Belgium*, §§31, 39.
[61] The Sunday Times v. *the UK (no 1)*, §49; Harris, O'Boyle and Warbrick (2014), p. 507
[62] *Mennesson* v. *France*, §50.
[63] *K.A.B.* v. *Spain*, §89; *Keegan* v. *Ireland*, §45; Pettiti (1999), p. 115.
[64] CRC (1989), A. 2 §2; *Dudgeon* v. *the UK*, §53; *Handyside* v. *the UK*, §49.
[65] *Evans* v. *the UK* [GC], §77; *Winterstein a. o.* v. *France*, §76; Yourow (1996), pp.189-193.

curtailing the family relations.[66] In fact, the problem appears to be the blanket prohibition on same-sex couples' joint parental rights, which regulates all situations according to one standard so rigidly it becomes disproportionate,[67] without taking the necessary steps to support and promote their common responsibilities in raising their children.[68]

The UR's denial to acknowledge the twins' legal relationship with their parents was not an appropriate measure to protect their best interests, which should be taken into consideration, since they are directly affected.[69] Awarding legal recognition to both their parents, regardless the latter's sexual orientation, ensures better safeguards to them, such as inheritance, maintenance and property rights.[70] Although the Supreme Court referred to the fact that B.N. had raised them so far and it was to their best interest to stay with her, it refused to recognise her as a second parent, devaluing their close personal ties,[71] separating their family and violating the twins' rights to identity.[72] The courts recognised only K.N.'s parental status, relying only on her mere biological kinship with the twins and completely ignoring factual elements indicating a strong family bond arising from B.N.'s caring parental role.[73] Granting B.N. their temporary guardianship only, with no obligations or parental rights *vis-à-vis* the twins, the UR jeopardised their legal security and full enjoyment of their family rights given that the highly probable death of K.N. would initiate a new trial, which could alter their guardianship, perturbing their lives once again. Particularly since the twins' best interests are overriding, even depriving K.N. of her parental rights would be justified, given her inability to take care of them and the consequent lack of close personal ties.[74] Hence, UR severely violated the applicants' right regarding their family life.

VI.5.3. UR's failure to comply with the positive obligations regarding family life under A. 8

Furthermore, UR failed to comply with its positive obligations to protect B.N.'s family life with the twins.[75] The domestic court, appointing B.N. with temporary guardianship over her children deprives them of the chance to lead a normal family life and renders impossible the

[66] *Anayo* v. *Germany*, §66; *Sahin* v. *Germany* [GC], §65; *T.P. and K.M.* v. *the UK* [GC], §71.
[67] *Gas and Dubois* v. *France*, (Villiger dissending) p. 25; *Anayo* v. *Germany*, §§67, 69.
[68] European Social Charter (revised) (1996), A. 17; CRC (1989), A. 18; ICCPR (1966), A. 23 §1.
[69] CRC (1989), A. 3; European Convention on the exercise of children's rights (1996), A. 6. (a); CoE CM/Rec (2010)5, §23; CoE, Strategy for the rights of the child (2011), pp. 4-5; Van Bueren (2007), pp. 33, 26.
[70] *X a. o.* v. *Austria* [GC], §145; *E.B. v. France* [GC], §77; Vaigė (2012), p. 762; Pettiti (1999), p. 317.
[71] *Anayo* v. *Germany*, §57; K. *and T.* v. *Finland* [GC], §150; *Eski* v. *Austria*, §39.
[72] CRC (1989), A. 7, 8, 16; PACE Res/1728 (2010), §§16.10; *Atala Riffo a. daughters* v. *Chile*, §178.
[73] *L.* v. *the Netherlands*, §§36, 37.
[74] CRC (1989), A. 9; *Nuutinen* v. *Finland*, §128; *Johansen* v. *Norway*, §78; CRC, General Comment No. 14 (2013); CoE, Meeting the needs of children, (2008), p. 16.
[75] *Tocarenco v. the Republic of Moldova*, §51; *Jeunesse v. the Netherlands* [GC], §106.

successful integration of the twins in their family.[76] The UR's unwillingness to acknowledge the legal bonds between B.N. and the twins places them in a precarious position and endangers the development of the existing family ties between them.[77] Consequently, UR's acts and omissions led to a breach of B.N.'s right to respect for family life.

VI.6. UR's violation of B.N.'s rights under A. 6 due to the reclassification of the charge

K.N.'s parents submitted a criminal complaint against B.N. for theft of her spouse's eggs. Both the Prosecutor and the First instance court acquitted her. The Utopolis Court of Appeal overturned the previous judgment and by reassessing the facts, held B.N. innocent for the crime of theft, whereas she was found guilty for the offence of disrespecting a court order. Altering the criminal charge, without B.N.'s prior notification, constitutes a profound violation of A. 6 §1 and §3 (a) and (b).

Under A. 6§3 (a), procedural justice presupposes precise and complete information to be given on the acts the accused allegedly committed as well as on the legal characterisation of these acts.[78] In criminal matters, these procedural safeguards are an essential prerequisite for ensuring the adversarial principle, the principle of equality of arms and the right to a fair hearing guaranteed in A. 6§1.[79] In the present case, the substantially different nature of the two offences deprived B.N. of her chance to be informed in detail of the nature and cause of the new accusation and the right to prepare her defence effectively and in a good time.[80] She only learnt of the re-characterisation of the facts through the court's decision, when, plainly, it was too late for her to contest it.[81] In light of the above, there has been a violation of A. 6§3 (a) and (b) of the ECHR, taken together with A. 6§1.

VI.7. Imminent risk of violation of K.N.'s right to life under A. 2

K.N. was put on life support following the road accident of 20 November 2012 and in July 2014 she was declared as being in a PVS. On 14 August 2014, a medical report stating that there were no chances of K.N. recovering was issued and thus life support could be withdrawn after the parents' consent, in accordance with the UR law.

The applicants argue that the national law giving power to the legal guardians of an incapacitated person to withdraw life support at any moment would expose legally incapacitated persons to a genuine and extremely serious danger. Indeed, it would cause K.N.

[76] *Marckx v. Belgium*, §31; *Wagner and J.M.W.L. v. Luxembourg*, §119; *Kroon a. o. v. the Netherlands*, §32; *Keegan v. Ireland*, §50.
[77] *Harroudj v. France*, §41; *Emonet a. o. v. Switzerland*, §82; *Johnston a. o. v. Ireland*, §74.
[78] *Grande Stevens a. o.* v. *Italy*, §167; *Haxhia* v. *Albania*, §127; *Pelissier and Sassi* v. *France* [GC], §51.
[79] *El Mentouf* v. *France*, §22; *Fitt* v. *the UK* [GC], §43.
[80] *Grande Stevens a. o.* v. *Italy*, §169; *Pelissier and Sassi* v. *France* [GC], §54, 62; Trechsel (2005), p. 195.
[81] *Miraux* v. *France*, §33.

serious harm and injustice to an incalculable extent, leaving her at the mercy of her parents, acting as her legal guardians who can freely dispose of her life. As the Court stated in *Burke v. the UK*, the spirit of the Convention is satisfied with the presumption that is strongly in favour of prolonging life where possible, which is not the case with the UR law. The UR should uphold the prohibition against euthanasia its laws stipulate and abide by its Constitution which protects life, including PVS patients who are alive,[82] by ensuring that 'no one shall be deprived of his life intentionally' especially a terminally ill or dying person.[83]

In addition, A. 2§1 obliges States not only to refrain from the intentional taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. The decision-making process regarding end-of-life decisions must be a collective one, involving persons who are close to the patient, even when they have no legally defined role but share an intimate and emotional tie, in order to secure an essential objectivity for the patient's protection.[84] UR should have adopted regulations compelling hospitals to take all appropriate measures for the protection of their patients' lives and should have involved B.N. in the decision-making process regarding the withdrawal of K.N.'s life support.[85] Therefore, the UR failed to comply with its obligations arising from A. 2.

For all these reasons, we respectfully request the Court:

To adjudge and declare that the UR is in violation of B.N.'s and K.N.'s rights:

- Under A. 12 and 14 regarding the denial to recognize the applicants' marriage
- Under A. 8 and A. 14 regarding the proceedings relating to the applicants' private and family life.
- Under A. 6 regarding the criminal proceedings.
- Under A. 2 regarding the imminent threat to K.N.'s life.

To award just satisfaction under A. 41 ECHR in respect to B.N.'s and K.N.'s non-pecuniary and pecuniary damage, relevant costs and expenses included, such amount being determined by the Court at its discretion.

[82] Holland, Kitzinger, Kitzinger (2014), pp. 413, 415.
[83] CoE/PACE/Rec. (1999) 1418, §9ci; CoE/PACE/Rec. (2012) 1859, §5.
[84] CoE, Decision-making process regarding medical treatment in end-of-life situations (2014), pp. 15, 22.
[85] *Burke* v. *the UK* (dec.); *Calvelli and Ciglio* v. *Italy* [GC], §§48-49.