



2022-2023

Team: 19

**HELGA PEDERSEN
MOOT COURT COMPETITION**

Kramer

VS

Zephyria

Submission of the Applicant

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8. Big Brother Watch and Others v. the UK [GC], app. nos. 58170/13; 62322/14; 24960/15
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2. Convention on the Rights of the Child (adopted of 20 November 1989 as General Assembly resolution 44/25, entered into force 2 September 1990) UNTS No. 1577 (p. 3), Registration No. 27531.
3. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000 as General Assembly resolution A/RES/54/263 and entered into force 18 January 2002) UNTS No. 2171 (p. 227), Registration No. 27531.
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2. *European Court of Human Rights, The Court's Priority Policy* (adopted June 2009, amended 22 May 2017).
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4. *Recommendation of the Committee of Ministers to Member States on Measures to combat Discrimination on Grounds of Sexual Orientation or Gender Identity* (adopted 31 March 2010) CM/Rec(2010)5.

B. List of Abbreviations

– app. no(s).	Application number(s)
– Art(s).	Article(s) of the Convention
– ASR	Draft Articles on State Responsibility by the International Law Commission
– AK	Anton Kramer
– dec.	Decision
– CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
– CoE	Council of Europe
– CoM	Committee of Ministers
– the Court / ECtHR	European Court of Human Rights
– CQ	Clarification Questions
– CRC	United Nations Convention on the Rights of the Child
– ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
– GC	Grand Chamber
– icw.	In conjunction with
– ILC	International Law Commission
– IVF	In-Vitro-Fertilisation
– LCC	Lari City Court
– LK	Luke Kramer
– MRC	Malenian Regional Court
– OPCRCSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
– PC	Plenary Court
– Prot.	Protocol
– RoC	Rules of the Court
– SAA	State Adoption Agency

–	sect.	section
–	SGA	Surrogacy Agreement
–	UK	United Kingdom
–	ZAL	Zephyrian Adoption Law
–	ZCC	Zephyrian Constitutional Court
–	ZFL	Zephyrian Family Law

C. Summary of Submissions

- The Applicant's fundamental human rights enshrined in Art. 8 and Art. 14 icw. Art. 8 and Art. 1 Prot. 12 and Art. 13 icw. Art. 8 and Art. 13 icw. Art. 1 Prot. 12 of the Convention were violated.
- The Applicant holds victim status according to Art. 34; he has exhausted all domestic remedies and complied with the further admissibility criteria set forth in Art. 34 and Art. 35.
- The Applicant submits that the Respondent, by not entering his name into B's birth certificate, placing B in D's care and denying him adoption of B without justification, has breached its obligations to protect his private life and family life safeguarded by Art. 8 § 1.
- Alternatively, the Respondent did not fulfil its positive obligations by failing to establish a legal and administrative framework to integrate B in the Applicant's family by law.
- The Applicant argues that the national authorities discriminated against him on the basis of his sex. As regards the birth registry and childcare decision, unjustified preference was given to D as a woman. Furthermore, reverse discrimination would have demanded that preference be given to the Applicant for childcare, as his psychological and physical suitability to raise children is proven.
- The Zephyrian parental rights regime which prevents same-sex couples from adopting, while at the same time allowing them to conceive children through IVF treatments and while heterosexual couples can use adoption to recognise parental rights stemming from IVF, amounts to a discrimination on the basis of sexual orientation. The subsidiary reason given for the individual adoption denial cannot be justified.
- The Applicant submits that for all the above violations, he was not able to obtain an effective remedy in Zephyria. The Applicant's claim was not examined in substance, since the courts did not properly review and weigh the key elements of the case and the ZCC wrongfully applied conventional law.
- The length of the proceedings did not satisfy the strict standard for childcare cases and are therefore not effective.
- The refusal of the ZCC to review the adoption decision and the discrimination allegation demonstrates the proceedings to not have been effective.

D. Legal Pleadings

(1) The Applicant submits that Zephyria has violated his rights guaranteed by Art. 8 and Art. 14 icw. Art. 8 and Art. 1 Prot. 12 and Art. 13 icw. Art. 8 and Art. 13 icw. Art. 1 Prot. 12 ECHR.

I. Admissibility

(2) The requirements set forth by Arts. 34 and 35 ECHR are hereinafter shown to be fulfilled.

1. Victim Status

(3) The Applicant is a direct victim, since he is directly affected by the Respondent's actions and omissions.¹ The Court also acknowledged that victim status can be established through the automatic application of a law to an individual.²

(4) Currently, AK has neither legal nor *de facto* access to B because of state decisions, therefore a violation of Art. 8 is given. Other people in comparable situations to AK have been registered in their surrogate child's birth certificate, had their children placed in their care, and were able to adopt, therefore, AK's rights protected by Art. 14 icw. Art. 8 and Art. 1 Prot. 12 were likely violated.³ The denial of the adoption was based on an automatic, not individual case-related application of the ZAL.⁴ Although AK has been seeking to secure his legal position for 17 months, he is still affected by the violations and there was no possibility to obtain relief.

(5) Alternatively, he can be considered an indirect victim since his partner, LK, the biological parent of B, cannot execute parental rights over B. Thus, AK has a valid personal interest in having the violation remedied.⁵ Moreover the Court has departed in certain cases from the victim-status rule based on "interests of human rights"⁶ – specifically in judgements serving "to elucidate, safeguard and develop the rules instituted by the Convention",⁷ which also allows for AK's victim status.⁸

2. Exhaustion of domestic remedies

(6) Before applying to the ECtHR, all available and effective⁹ domestic remedies were exhausted.

(7) AK and LK have initiated proceedings to register AK in B's birth certificate before the LCC; both the MRC as well as the ZCC reviewed the matter.¹⁰

(8) In these same proceedings the issue of childcare over B was reviewed. AK met the requirements

¹ Cf. *Vallianatis and Others v. Greece* [GC], app. nos. 29381/09, 32684/09, § 47; *Beizaras and Levickas v. Lithuania*, app. no. 41288/15, § 76.

² *Marckx v. Belgium* [PC], app. no. 6833/74, § 27.

³ *X v. Poland*, app. no. 20741/10, § 71.

⁴ The Case, § 22.

⁵ Cf. *Vallianatos and Others v. Greece* [GC], app. nos. 29381/09; 32684/09, § 47.

⁶ *Karner v. Austria*, app. no. 40016/98, § 26.

⁷ *Ireland v. the UK*, app. no. 5310/71, § 154.

⁸ Cf. *D. B and Others v. Switzerland*, app. nos. 58817/15; 58252/15, § 38.

⁹ *Selmouni v. France* [GC], app. no. 25803/94, § 76.

¹⁰ The Case, §§ 12, 17, 26.

of raising the conventional complaint - right to private and family life, discrimination¹¹ - in substance.¹²

(9) There is a second set of civil proceedings initiated by the Applicant's partner, LK, for custody which is pending before the LCC. This avenue is not effective to AK, as the MRC and the ZCC in their final judgements denied his request to be registered as B's father. Requesting custody from the LCC which is responsible for the dispute,¹³ even after the ZCC has overruled the LCC's initial judgement and barred AK from parental recognition cannot be deemed effective since there are no circumstances that have increased the probability of a successful outcome.¹⁴ Furthermore, the proceedings against urgent measures are not applicable in the case at hand since the judgement of the MRC is final.¹⁵

(10) The same considerations apply to the adoption decision. AK went through all instances provided for in the Zephyrian judiciary. Trying to lodge a complaint with the Ombudsman and asking him to refer the adoption legislation to the ZCC for review¹⁶ would not be effective since procedural safeguards are unknown.¹⁷ Hence, all available and effective domestic remedies have been exhausted.

3. Compliance with the four-month time-limit

(11) By lodging the application one month after the ZCC's judgement,¹⁸ the Applicant has also complied with the four-month limit, Art. 35.

4. Compliance with further criteria

(12) The failure to acknowledge paternity, the separation from his child and the denial of adoption constitutes substantial violations and a significant disadvantage in view of the fundamental character of the rights violated by Zephyria, regardless of any pecuniary interest for him.¹⁹ As in *Giusti*, the Applicant kindly invites the Court to consider both the subjective perception of AK and what is objectively at stake in the case.²⁰

(13) The state should have offered compensation²¹ to AK or at least have considered it.²² D offered to repay the money she received as part of the SGA.²³ This offer, however, cannot be considered a compensation, particularly since this act would not be attributable to the state. Furthermore, AK has exhausted all possibilities to be B's legal and *de facto* father again. *E contrario* to *Shefer*,²⁴ there is no

¹¹ The Case, §§ 12, 23-25.

¹² *Rotaru v. Romania*, app. no. 28341/95, § 67.

¹³ Cf. CQ Part I no. 2.

¹⁴ Cf. *Pressos Compania Naviera S.A. and Others v. Belgium*, app. no. 17849/91, § 27.

¹⁵ The Case, §§ 17, 19-20, 21, 26, 41.

¹⁶ CQ Part I nos. 4-6.

¹⁷ Cf. *De Souza Ribeiro v. France* [GC], app. no. 22689/07, § 79.

¹⁸ The Case, § 28.

¹⁹ *Eon v. France*, app. no. 26118/10, § 34.

²⁰ *Giusti v. Italy*, app. no. 13175/03, §§ 22-36.

²¹ *Kahn v. Germany*, app. no. 16313/10, § 75.

²² *Egill Einarsson v. Iceland* (No. 2), app. no. 31221/15, § 39.

²³ The Case, § 9.

²⁴ *Shefer v. Russia* (dec.), app. no. 45175/04.

inactivity of AK which would show his disinterest. Hence, AK's application is admissible.

II. Merits

1. Violation of Art. 8

(14) The Applicant submits that Zephyria has infringed upon his rights to respect for private and family life in three ways: first, by not registering his paternity in B's birth certificate, second by the MRC's judgement of placing B in D's care, and finally by denying his request to adopt B.

a. Applicability

i. Respect for family life

(15) The Applicant asserts that he established an existing family by living with B for 14 months and by him behaving like his parent in every aspect.²⁵ The family life dimension of Art. 8 § 1 establishes protection for existing families,²⁶ both biological families and families established through close personal ties.²⁷ In short, enjoyment of parents and children being together.²⁸ The Court has long held that the protection of family life also applies to same-sex couples²⁹ and that *de facto* families are protected.³⁰ AK, by continuously caring for B from his birth on for 14 months,³¹ has created a close relationship and personal ties with B.³² Even without biological ties between them, AK has acted as B's parent,³³ all the while acting not in a preliminary capacity like a foster parent but as an actual long-term caregiver. *A fortiori* to *Antkowiak*, the contextual situation falls under *de facto* family life.³⁴ Additionally, Art. 8 protects family ties between close relatives, so that they have the possibility to develop normally.³⁵ As LK is AK's partner and³⁶ and B's biological parent, AK is B's close relative and needs to be allowed to further develop his family life with B.

(16) These established family ties need to be effectively legally recognised for example via adoption.³⁷ Due to the primary interest of the child, the state's *margin of appreciation* in the matter of legal recognition is reduced.³⁸ These considerations also apply to same-sex couples.³⁹ The effective legal

²⁵ Cf. *Mennesson v. France*, app. no. 65192/11, §§ 44-46.

²⁶ *Marckx v. Belgium*, app. no. 6833/74, § 31.

²⁷ *Valdís Fjölnisdóttir and Others v. Iceland*, app. no. 71552/17, § 59.

²⁸ *K. and T. v. Finland* [GC], app. no. 25702/94, § 151.

²⁹ *P.B. And J.S. v. Austria*, app. no. 18984/02, § 30.

³⁰ *X and Others v. Austria* [GC], app. no. 19010/07, § 95.

³¹ The Case, § 20.

³² Cf. *Moretti and Benedetti v. Italy*, app. no. 16318/07, §§ 49-50.

³³ Cf. *Antkowiak v. Poland* (dec.), app. no. 27025/17, § 62.

³⁴ Cf. *D.B. and Others v. Switzerland*, app. nos. 58817/15; 58252/15, § 44.

³⁵ *Marckx v. Belgium* [PC], app. no. 6833/74, § 45.

³⁶ The Case, § 1.

³⁷ *D.B. and Others v. Switzerland*, app. nos. 58817/15; 58252/15, §§ 88-89; Advisory Opinion regarding surrogacy, request no. P16-2018-001, §§ 40, 54; *K.K. and Others v. Denmark*, app. no. 25212/21, § 72.

³⁸ *K.K. and Others v. Denmark*, app. no. 25212/21, § 53; *C.E. and Others v. France*, app. nos. 29775/18; 29693/19, § 100.

³⁹ *D.B. and Others v. Switzerland*, app. nos. 58817/15; 58252/15, § 84.

recognition of these ties is also practiced via adoption in cases of altruistic SGAs for heterosexual married couples in Zephyria.⁴⁰ There is an obligation of states to take action to allow *de-facto* family ties to develop – an obligation which cannot be made dependent on the existence of marital ties.⁴¹ In *Emonet*, the applicants were an opposite-sex couple who did not wish to marry but still desired to jointly adopt the woman’s biological child.⁴² *A fortiori*, there must be avenues to legally recognise the family ties between couples who are living in a registered partnership, like AK, and their children.

(17) Family ties can also be based on legal recognition of the family relation,⁴³ like the lawful SGA in the case at hand. In *Paradiso and Campanelli*, the recognition of a foreign SGA as the basis for parental rights was denied, as such agreements were prohibited and the applicants had no biological ties to the child in question.⁴⁴ In the case at hand, however, LK is the biological parent of B. The Applicant and the biological father live in an established registered partnership, so unlike the applicants in *Paradiso and Campanelli*, biological ties exist in the contextual environment between the Applicant and B.

(18) The denial of legal family ties based on SGAs is accepted, as the Court considers such matters to be “sensitive ethical question[s] on which no consensus exists among [CoE member states].”⁴⁵ Zephyria has an established legal practice of allowing the parents specified in SGAs to be the parents listed in the respective birth certificates. This practice has already been upheld over the course of ten years.⁴⁶ Such continuous acceptance of a practice as lawful can create a basis of trust for the addressee of the state practice. As held in *The Sunday Times*, written and unwritten law must be accessible and foreseeable for citizens to model their behaviour accordingly.⁴⁷ *E contrario* to cases where a ban on surrogacy exists in domestic law, Zephyria shows, via its legal practice, that it has decided this ethical question in favour of altruistic gestational surrogacy, and therefore the legal ties shall be respected.⁴⁸

(19) The Applicant respectfully invites the Court to consider that AK’s “demonstrable interest in and commitment to” B, even before his birth, demonstrates family life.⁴⁹ Already during D’s pregnancy, AK – as the intended father – had established a close relationship to B by continuously remaining updated about D’s pregnancy process⁵⁰ and investing considerable emotional energy in the relationship with his prospective child. All the while, D had no intentions of keeping the child.

⁴⁰ CQ Part II no. 10.

⁴¹ *Emonet v. Switzerland*, app. no. 39051/03, § 82.

⁴² *Emonet v. Switzerland*, app. no. 39051/03, §§ 9-12.

⁴³ *Pini and Others v. Romania*, app. nos. 78028/01; 78030/01, § 148.

⁴⁴ *Paradiso and Campanelli v. Italy* [GC], app. no. 25358/12, § 149.

⁴⁵ *Paradiso and Campanelli v. Italy* [GC], app. no. 25358/12, § 184.

⁴⁶ The Case, § 42.

⁴⁷ *The Sunday Times v. the UK* [PC], app. no. 6538/74, §§ 47-49.

⁴⁸ Cf. *Valdís Fjölfnisdóttir and Others v. Iceland*, app. no. 71552/17, § 65; *A.M. v. Norway*, app. no. 30254/18, § 124.

⁴⁹ Cf. *Anayo v. Germany*, app. no. 20578/07, § 57.

⁵⁰ The Case, § 6.

ii. Respect for private life

(20) AK's right to respect for private life has been violated by placing B in D's care since private life protects "general interhuman connections",⁵¹ including connections between an adult who wants to become the child's parent and the child outside of kinship.⁵² This protection also encompasses the right to self-fulfilment through the fulfilment of the desire to have children.⁵³

b. Interferences

(21) Both D's registration in B's birth certificate and the court's decisions based on said certificate in the following proceedings constitute an interference with AK's right to respect for family life.

(22) The correct person to be listed in B's birth certificate is AK, since his paternity claim derives from the established legal practice in Zephyria. The State, being aware of this agreement, erroneously registered D as B's mother.⁵⁴ While the LCC ordered the removal of her name which was not implemented, the MRC and the ZCC based their argumentation on the erroneous birth certificate as a legal reference point for the issue of childcare and adoption.⁵⁵

(23) The judgement by the MRC to place B in D's care, which was upheld by the ZCC, and the removal of B from the Applicant's home⁵⁶ constitute interferences with the Applicant's *de facto* family life.⁵⁷

(24) The denial of AK's adoption request for B interferes with his family life⁵⁸ because it blocks AK's last legal avenue to formally recognise his family ties and get access to B. This constitutes an additional interference after the arbitrary refusal to recognise the legal family ties stemming from the SGA.

c. No Justification

(25) These interferences are not in accordance with the law, do not pursue legitimate aims and are not necessary in a democratic society.

i. In accordance with the law

(26) The legal practice in Zephyria regarding the establishment of legal ties and rights between a child and its social or genetic parents is not uniform, hence not sufficiently clear and foreseeable,⁵⁹ and not compatible with the rule of law.⁶⁰ It does not provide individuals with a sufficient indication of the circumstances in which authorities are entitled to take measures affecting their conventional rights.⁶¹

⁵¹ *Niemietz v. Germany*, app. no. 13710/88, § 29.

⁵² *Paradiso and Campanelli v. Italy* [GC], app. no. 25358/12, §§ 161-163.

⁵³ *Evans v. the UK* [GC], app. no. 6339/05, § 71.

⁵⁴ The Case, § 7; CQ Part III no. 8.

⁵⁵ The Case, §§ 4, 15, 17, 26, 42.

⁵⁶ The Case, §§ 17-20, 26.

⁵⁷ Cf. *Antkowiak v. Poland* (dec.), app. no. 27025/17, § 63.

⁵⁸ *Negreptis-Giannisis v. Greece*, app. no. 56759/08, § 31.

⁵⁹ *Silver and Others v. the UK*, app. no. 5947/72, § 87; *N.V. and C.C. v. Malta*, app. no. 4952/21, § 55.

⁶⁰ *Big Brother Watch and Others v. the UK* [GC], app. nos. 58170/13, 62322/14; 24960/15, § 332.

⁶¹ Cf. *Fernández Martínez v. Spain* [GC], app. no. 56030/07, § 117.

(a) Regarding the birth registry decision and the decision to place B in D’s care

(27) The prerequisites for becoming a legal parent and having parental rights are governed by Arts. 70 and 79 of the ZFL. Art. 70 ZFL only specifies the requirements for a woman to become the legal mother of a child but does not mention the father. Art. 79 ZFL governs the entry into birth certificates of the child’s parents without making clear which man can apply to be the father, instead the article simply states that the application for an entry can be filed by either parent.⁶² However, this law does not put in place a mechanism to ensure that the potential parent applying for registration in the certificate really is the parent that should be listed therein.⁶³ It simply presupposes that the parent (in the present case the woman who birthed the child) is the “correct” parent. The lack of sufficient clarity in domestic law regarding the conditions under which a man becomes a father is a violation of Art. 8.⁶⁴

(b) Regarding the adoption law

(28) The law governing adoption in Zephyria does not provide a legal avenue for established family ties to be recognised for same-sex couples. This failure is not in accordance with the law. To meet the requirements of lawfulness, domestic law needs to provide adequate safeguards to protect individuals against arbitrary interference⁶⁵ of their rights under Art. 8. The law governing adoption only allows different-sex married couples to adopt. This is not a safeguard, and therefore not adequate due to the fact that it does not provide a legal avenue to recognise the Applicant’s and B’s established family life and to place B in the Applicant’s care. Therefore, AK’s last legal opportunity to establish family ties through adoption was blocked, which is unlawful and not compatible with the rule of law.

ii. Legitimate aim

(29) It is for the Respondent to demonstrate that the interference pursued a *legitimate aim*.⁶⁶ Art. 8 § 2 states, among other things, that the interests in the protection of health and morals, and the protection of the rights and freedom of others are *legitimate aims* for a state to pursue.⁶⁷

(30) As regards the birth registry and childcare decision, neither the MRC nor the ZCC referred to any of these *legitimate aims*. Even though these courts explicitly used the term “child’s best interest”, in practice they have not actually considered B’s individual case and his interests in their decisions since they only relied on D’s suitability to raise children due to her sex.⁶⁸ They merely used the legal expression “child’s best interest” as a pretext and pursued no *legitimate aim*. As in *D.B. and Others*,

⁶² The Case, § 37.

⁶³ Cf. CQ Part II no. 5.

⁶⁴ Cf. *Vukota-Bojić v. Switzerland*, app. no. 61838/10, § 77.

⁶⁵ *Vig v. Hungary*, app. no. 59648/13, § 62; *Bykov v. Russia* [GC], app. no. 4378/02, §§ 78-82.

⁶⁶ *Mozer v. the Republic of Moldova and Russia* [GC], app. no. 11138/10, § 194.

⁶⁷ Art. 8 § 2; *Vavřička and Others v. the Czech Republic* [GC], app. nos. 47621/13; 3867/14; 73094/14; 19298/15; 19306/15; 43883/15; § 272.

⁶⁸ The Case, §§ 17, 26.

the child's best interest can be to provide legal recognition avenues of the paternity of the intended father which underlines the lack of the courts' considerations.⁶⁹

(31) Concerning the adoption, the Respondent does not present a *legitimate aim* for the prohibition of adoption by same-sex couples. The aim of the law seems to be to bar a certain group of people from having their established family ties recognised, which is not legitimate.⁷⁰ Even in the adoption law itself, the child's best interest is only mentioned when it comes to overriding the lack of consent of the biological parent. B's best interest was also not considered in the individual adoption decision, which only mentions the law and the lack of D's consent. The consent of D is all the more irrelevant since she is not a biological parent.⁷¹ Hence, no *legitimate aim* can be found in the adoption law or decision.

iii. Necessary in a democratic society

(a) Birth registry decision

(32) Should the Court nevertheless consider Zephyria's aim to be legitimate, the decision regarding parenthood is not *proportionate* to the aim pursued.⁷²

(33) Even if the Respondent pursued the *legitimate aim* to protect the rights and interests of another individual, namely D and B, in this case D's alleged parental rights do not outweigh the Applicant's rights. D is not biologically related to B, since the gametes stemmed from LK and an anonymous donor's eggs were used⁷³ causing D's role in B's life to be merely accidental. D had not spent any time with B after his birth and before his forcible removal from AK's home.⁷⁴ Since there is neither biological kinship, nor factual elements of a close relationship and the legal elements – the parental rights – are disputed, D does not fall within the scope of family life in the sense of Art. 8.⁷⁵

(34) On top of that, before B's birth, D intentionally and unambiguously relinquished her parental rights by signing the SGA. Although ZFL regards the birth mother as the legal parent, according to Zephyrian legal practice, the pre-birth relinquishment, as the exception to that rule, is effective and possible.⁷⁶ IVF was one of D's personal projects showing that she has thought about the matter thoroughly. All procedural prerequisites – even a psychological evaluation declaring her fit for surrogacy – were met. Hence, there were no indications that D would be emotionally exploited by giving up her child.⁷⁷ This is especially true as the parties were assisted by an attorney providing legal

⁶⁹ Cf. *D.B. and Others v. Switzerland*, app. nos. 58817/15; 58252/15, § 89.

⁷⁰ *Karner and Others v. Austria*, app. no. 40016/98, §§ 41-42.

⁷¹ The Case, §§ 17, 22, 34.

⁷² Cf. *Dudgeon v. the UK* [PC], app. no. 7525/76, §§ 51-53.

⁷³ The Case, § 2.

⁷⁴ The Case, §§ 4, 24.

⁷⁵ Cf. *Schneider v. Germany*, app. no. 17080/07, § 80.

⁷⁶ The Case, §§ 36, 42-43.

⁷⁷ CQ Part II no. 11; Part III nos. 5, 18.

advice, enabling them to foresee the consequences of their decisions. By voluntarily agreeing to use an anonymous donor's egg and to not have any future contact with the child,⁷⁸ D was fully aware of the consequences of her agreement. As she did not list any exceptions in the agreement or express a desire for the possibility of amending it in the future, she should be pre-empted from changing her mind. During her pregnancy, D voiced no doubts about the SGA; only after the birth of B, upon seeing him, she suddenly changed her mind.⁷⁹ There is no way to know whether D will change her mind about B again in the future, whereas AK has consistently and genuinely proven his willingness to raise B. A comparative look at the well-established and frequently applied Californian and Indian surrogacy law, reveals that the surrogate can revoke her agreement only until the implementation of the embryo to avoid legal insecurity for the child with regard to the surrogate's intentions.⁸⁰

(35) Furthermore, not reviewing the correctness of the birth certificate entry amounts to a violation of the procedural limb of Art. 8. The law governing entries into birth certificates is ambiguous as argued above.⁸¹ The legal reality in Zephyria accepts that maternity claims can be relinquished before birth and in contested cases, courts consider the free will of the mother, which is given in the present case. The MRC simply claimed that the law demands D's entry into the birth certificate without reviewing the special circumstances and D's free will.⁸² Since different legal avenues for recognition of parenthood exist within Zephyria's jurisdiction, when giving preference to one of the options, courts at the very least should provide an explanation as to why preference was given to one legal avenue over the other. Not reviewing the correctness of the entry can amount to foreclosing the parenthood claim of another parent (in this case AK). Hence, the entry of D into B's birth certificate should not just have been accepted prematurely but rather have been subject to scrutiny.

(b) Regarding the decision to place B in D's care

(36) The decision to place B in D's care cannot be regarded as proportionate. It is settled case law that in childcare decisions, the child's best interest is the paramount consideration.⁸³ The Court demands an "in-depth examination of the entire family situation and a whole series of factors, in particular factors of a factual, emotional, psychological, material and medical nature, and [...] a balanced and reasonable assessment of the respective interests of each person [to be made]".⁸⁴ The procedural limb of the assessment of the child's best interest's requires the decision-making process to be evaluated

⁷⁸ The Case, §§ 2, 4; CQ Part III no. 6.

⁷⁹ The Case, § 9.

⁸⁰ *Gössl/Sanders* (2022), p. 497.

⁸¹ This submission, sect. II.1.c.i.(a).

⁸² The Case, §§ 17, 43; CQ Part II no. 9.

⁸³ *Neulinger and Shuruk v. Switzerland* [GC], app. no. 41615/07, § 135.

⁸⁴ *Neulinger and Shuruk v. Switzerland* [GC], app. no. 41615/07, § 139.

and balanced.⁸⁵ While the Court acknowledges that national authorities are closer to the matter and in a better position to decide on it,⁸⁶ it states that failing to make clear why a decision is in the child's best interest – as opposed to the arrangement proposed by the applicant –, breaches the law.⁸⁷ This is relevant to the present case, as the MRC and ZCC failed to clarify why B should be raised by D.⁸⁸

(37) The MRC held that it was in B's best interest to be raised by D, a woman, without further explanation. The claim was allegedly supported by scientific evidence, namely a scientific report from 2005, which is outdated since more recent studies prove the ability of gay men to raise children.⁸⁹ Studies allegedly proving that hetero couples are better suited to raise children than gay couples have even recently shown to be scientifically inaccurate.⁹⁰ Even without a genetic link between the intended parent and the child, close psychological bonds can be forged between them.⁹¹ Abruptly completely disrupting these bonds cannot be in B's best interest. AK's suitability to raise children is even scientifically proven by a physical and psychological screening emphasising the best interest of the child-to-be-conceived before the IVF treatment.⁹² This screening was developed by the five largest fertility clinics in Zephyria, of which three are state run meaning that this practice can be considered state-controlled behaviour and be attributed to the state according to Art. 8 ASR.⁹³ Hence, he is "state-approved" to be suited to raise B.

(38) In contrast, D's suitability to raise a child has not been tested, but is only based on an archaic assumption that, as a woman, she is better able to raise B. The MRC consulted a psychologist, but it is not clear from its reasoning whether the expertise of the psychologist led to the MRC's conclusion or whether the assertion that women are better placed to raise children is merely a claim by the MRC. The psychologist did not evaluate D individually but only gave an overall assessment about women.⁹⁴

(39) With respect to the material nature of B's environment, it should be noted that D is on unpaid leave from work and wants to dedicate her time to travel and personal projects, which points towards an unstable personal and material situation. The Kramers, in contrast, are in a stable relationship and have been proven psychologically and emotionally capable of raising children. These circumstances proving that it is in B's best interest to live with AK, have not been considered by the domestic courts. Instead, the ZCC simply reiterated the stereotype that it is in B's best interest to live with a mother.⁹⁵

⁸⁵ *Johansen v. Norway*, app. no. 17383/90, § 64.

⁸⁶ *Sommerfeld v. Germany* [GC], app. no. 31871/96, § 62.

⁸⁷ *Lazoriva v. Ukraine*, app. no. 6878/14, §§ 69-70.

⁸⁸ The Case, §§ 19, 26.

⁸⁹ Cf. *A.M. and Others v. Russia*, app. no. 47220/19, § 55; *Bracken* (2020), pp. 70, 199–202.

⁹⁰ *Bracken* (2020), p. 71.

⁹¹ *Gössl/Sanders* (2022), p. 496.

⁹² The Case, §§ 1, 44; CQ Part III no. 15.

⁹³ The Case, § 42; CQ Part III no. 7.

⁹⁴ The Case, §§ 18-19, 26.

⁹⁵ The Case, §§ 1-3, 26.

(40) When Zephyria states to have acted in accordance with the child's best interest, it should be considered that B's right to private life could be violated by placing B into D's care since it is a "component of (their) identity in relation of their parentage"⁹⁶ and B's parentage is only LK, the Applicant's partner, as the biological father.

(41) Alternatively, the MRC's consideration of the child's best interest was limited to stating that it would be in B's best interest to know his birth mother. This statement does not explicitly explain why B should be put in D's care and does not justify foreclosing the Applicant from any paternal rights.

(42) Furthermore, D's offer to pay back the money she received from the SGA⁹⁷ should be considered a violation of the international rules prohibiting the sale of children. Art. 9 § 1 OPCRCSC which the Court considers as a relevant source of international law and Zephyria is bound to by ratification⁹⁸ obliges states to combat the offences referred to in the Prot., including the sale of children in the sense of Art. 2 (a) OPCRCSC. The SGA payment was given on a non-commercial basis, as a way to cover costs related to the pregnancy, it was not payment in exchange for the child itself. D, on the other hand, offered money directly for the return of B. This act, therefore, could be found to constitute child trafficking in the sense of Art. 2 (a) OPCRCSC. A person who views a child as a tradeable good should not be deemed fit to raise the child. Therefore, the failure of the domestic authorities to take this argument into consideration, is not proportionate.

(c) Regarding the adoption request

(43) As shown above, the law governing adoption, which was applied mechanically by the SAA, does not pursue a legitimate aim as shown above.⁹⁹ However, even if a legitimate aim was found, the individual decision to deny the Applicant's adoption request was not proportionate.

(44) The SAA and the domestic courts which upheld the decision did not evaluate AK's rights properly by not considering that adoption was the last option for him to establish a family life with B.

(45) In asserting, as a subsidiary reason for the denial, that D's consent was missing, the SAA and the domestic courts did not apply the law correctly. Here, D's consent is irrelevant as she is not B's biological parent since she has no genetic ties to B.¹⁰⁰ The MRC explicitly acknowledged the lack of a biological link. According to ZAL, the biological parent needs to give their consent.¹⁰¹ The only biological parent of B is LK, AK's partner, who consents to B's adoption by AK.

(46) Finally, Zephyrian law states that even in the absence of consent of a biological parent, the child's

⁹⁶ *Mennesson v. France*, app. no. 65192/11, § 98.

⁹⁷ The Case, §§ 9, 17.

⁹⁸ *Demir and Baykara v. Turkey* [GC], app. no. 34503/97, § 69; The Case, § 29; CQ Part I no. 11.

⁹⁹ This submission, sect. II.1.c ii.

¹⁰⁰ This submission, sect. II.1.c.i.(a).

¹⁰¹ The Case, §§ 17, 22, 34.

best interest can demand a different decision. B's best interest is to live with the Applicant and his partner, LK as B's biological father,¹⁰² which was not even considered in the adoption decision.¹⁰³

d. Positive obligations

(47) Alternatively, should the Court disagree on the existence of said state practice,¹⁰⁴ the domestic authorities breached their positive obligations under Art. 8 when they failed to create a legislative and administrative framework regarding surrogacy laws to recognise the Applicant's paternity and to integrate B in his family.¹⁰⁵ The SGA between the Kramers and D was found to be irrelevant by the MRC and the ZCC,¹⁰⁶ and hence AK's parental rights over B were denied. AK's adoption request was also dismissed, leaving him with no way to acknowledge his paternity and integrate B into his family.

(48) In Zephyria there is not even a discussion about implementing law regulating SGAs contrary to the Court's own advisory opinion demanding an "effective mechanism" to acknowledge legal parent-child relationships stemming from SGAs.¹⁰⁷ Furthermore, providing more legal clarity for the recognition of SGAs by putting in place a positive legal framework would also better serve the aim to prevent child trafficking.¹⁰⁸ Since the early 2000s, fertility clinics in Zephyria have accepted clients traveling from abroad to undergo IVF treatments. For all these reasons, the State breached its positive obligations under Art. 8.

2. Discrimination

a. Relation between Art. 14 and Art. 1 Prot. 12

(49) Even though AK's claims fall within the scope of Art. 8,¹⁰⁹ as required by Art. 14,¹¹⁰ this is not necessary to establish a discrimination under of Art. 1 Prot. 12, since it applies also to domestic law and introduces a general prohibition of discrimination.¹¹¹ The Court applies the settled interpretation of "discrimination" as developed in the jurisprudence concerning Art. 14 as it acknowledges that a violation of Art. 14 also constitutes a violation of Art. 1 Prot. 12.¹¹² Discrimination can also appear in the form of indirect discrimination. It exists where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one group.¹¹³

¹⁰² This Submission sect. II.c.iii.(b).

¹⁰³ This submission, sect. II.1.c.ii.

¹⁰⁴ This submission, sect. II.1.a.i.

¹⁰⁵ Cf. *Airey v. Ireland*, app. no. 6289/73, § 32.

¹⁰⁶ The Case, §§ 17, 26.

¹⁰⁷ Cf. CQ Part II no. 15; Advisory Opinion regarding surrogacy, request no. P16-2018-001, § 54.

¹⁰⁸ The Case, § 44; *Mausmousseau and Washington v. France*, app. no. 39388/05, § 53.

¹⁰⁹ This submission, sect. II.1.a.

¹¹⁰ *Sahin v. Germany* [GC], app. no. 30943/96, § 85.

¹¹¹ *Pilav v. Bosnia and Herzegovina*, app. no. 41939/07, § 39; Explanatory Report Prot. 12, § 21.

¹¹² *Sejdic and Finci v. Bosnia and Herzegovina* [GC], app. nos. 27996/06; 34836/06, §§ 55-56.

¹¹³ *D.H. and Others v. the Czech Republic* [GC], app. no. 57325/00, § 184.

b. Regarding the birth certificate registration

(50) By upholding D as B's mother in the birth registry, the Respondent violated the prohibition of non-discrimination based on sex stemming from Art. 1 Prot. 12.

i. Difference of treatment in analogous situation

(51) The applicant must be in a relevantly similar situation with the group treated differently¹¹⁴ and the difference in treatment needs to be established on the basis of identifiable characteristics or status.¹¹⁵ AK's position is comparable to D's position: Both have no genetic ties to B and have a *prima facie* claim under national law to parenthood over the child. In D's case, this is based on Art. 70 ZFL and in the Applicant's case it is based on the state practice of accepting SGAs as a basis for birth certificate entries. D was given preferential treatment in the revision of the birth certificate entry by the courts and was therefore treated differently.

ii. Prohibited grounds of discrimination and no justification

(52) The upholding of D's entry in B's certificate is discriminatory as it is based on bias on the grounds of sex. Both the MRC and the ZCC simply state that the entry of D in B's birth certificate was according to the law, and it is allegedly in B's best interest to have a mother.¹¹⁶ As demonstrated,¹¹⁷ the courts did not consider the child's best interest in substance. Hence, the assertion that it is in B's best interest to have a female as a mother, points to discrimination based on sex.¹¹⁸

(53) The requirements to be entered into birth certificates are ambiguous and therefore would have required review by domestic courts. It is sufficient to simply state that the entry was according to the law.¹¹⁹ There are no reasons stated which justify the determination at hand.¹²⁰

c. Regarding the decision to place B in D's care

(54) Furthermore, the reasoning of the domestic courts which placed B in D's care violated the prohibition of non-discrimination on the basis of sex.¹²¹

i. Difference of treatment in analogous situation

(55) The Applicant is in an analogous situation to D.¹²² Regarding the acceptance of other parental rights, established state practice in Zephyria acknowledges the legal consequences of an SGA.¹²³ The

¹¹⁴ *Zarb Adami v. Malta*, app. no. 17209/02, § 71.

¹¹⁵ *Carson and Others v. the UK* [GC], app. no. 42184/05, § 61.

¹¹⁶ The Case, §§ 17, 26.

¹¹⁷ This submission, sect. II.1.c.iii.(b).

¹¹⁸ *D.H. and Others v. the Czech Republic* [GC], app. no. 57325/00, §§ 178-197.

¹¹⁹ This submission, sect. II.1.c.iii.(a).

¹²⁰ *D.H. and Others v. the Czech Republic* [GC], app. no. 57325/00, § 177.

¹²¹ *Carvalho Pinto de Sousa Morais v. Portugal*, app. no. 17484/15, §§ 53-54.

¹²² This submission, sect. II.2.b.i.

¹²³ The Case, § 43.

Court acknowledges that men and women are in analogous situations regarding parental-leave allowances to care for their children in the earliest stage of their development.¹²⁴ Beyond the earliest, most vulnerable stage of caring, the two sexes must *a fortiori* also be seen to be in comparable situations regarding general caregiving.

ii. Prohibited grounds of discrimination and lack of justification

(56) The MRC has based its decision to grant care over B to D mainly on the consideration that she, as a woman, would be biologically and emotionally better suited to raise a child.¹²⁵

(57) The Court has repeatedly stated that advancement of gender equality is a major goal in CoE member states.¹²⁶ Art. 5 of the CEDAW, which the Court takes into consideration as a relevant international treaty,¹²⁷ places an obligation on contracting states to take all appropriate measures to modify the social and cultural patterns in a society to eliminate prejudices based on sex.

(58) *Konstantin Markin*, concerning childcare preferences given to one parent based on their sex, dismissed the government's argument that alleged special bonds between the mother and the child suffice as a ground for preferential treatment.¹²⁸ The reasoning of the MRC was supported by the erroneous interpretation of the out-dated 2005 scientific study.¹²⁹

(59) The same scientific study is also invoked in the Zephyrian parliament by opponents of adoption by same-sex couples.¹³⁰ However, psychological and physical ties established between (surrogate) mothers and children are completely irrelevant in that context. If the scientific study were to be followed exactly, only the woman who gives birth to the child could ever be seen as suited to raise the child, due to her strong psychological and physical ties. Then, both surrogacy and adoption in general, no matter the sexual orientation of the intended parents, should not be possible. However, this is not the legal reality in Zephyria which allows adoption and surrogacy through its state practice. The practice of handling the scientific study in Zephyria points towards a bias against gay couples and single men when it comes to raising children. In *Tapayeva*, the Court confirmed that if a large structural bias exists in a country, this bias automatically translates to an individual discrimination.¹³¹ Invoking a neutral scientific study as a pretext to justify a generalised policy with respect to which parent should care for children, amounts to an indirect discrimination.

(60) Also, the ZCC in a general manner held that it was in B's best interest to have a mother without

¹²⁴ *Konstantin Markin v. Russia* [GC], app. no. 30078/06, § 132.

¹²⁵ The Case, § 19.

¹²⁶ *Konstantin Markin v. Russia* [GC], app. no. 30078/06, § 127.

¹²⁷ *Demir and Baykara v. Turkey* [GC], app. no. 34503/97, § 69; *Tapayeva and Others v. Russia*, app. no. 24757/18, § 58.

¹²⁸ *Konstantin Markin v. Russia* [GC], app. no. 30078/06, § 132.

¹²⁹ This submission, sect. II.1.c.iii.(b).

¹³⁰ The Case, § 35.

¹³¹ *Tapayeva and Others v. Russia*, app. no. 24757/18, § 110.

further explanation. This points to a discrimination against the Applicant based on his sex.

(61) The courts did not justify the preference given to D. Simply referring to prevailing sex and gender stereotypes in a society does not suffice as a justification.¹³²

iii. Reverse discrimination

(62) Additionally, the Respondent has discriminated against AK by not giving preference to his request to care for B despite his positive results on the parental suitability screening which amounts to similar treatment in relevantly different situations.¹³³ While AK has undergone an in-depth psychological and physical screening focusing on the best interest of the child and proving his ability to raise B, nothing of the sort can be said about D who was only assessed according to her fitness for pregnancy.¹³⁴ Therefore, the authorities should have, in B's best interest, given preference to AK regarding childcare. Not taking these relevantly different circumstances into account amounts to a discrimination.

d. Regarding the adoption denial

(63) The Applicant submits that the Zephyrian law prohibiting second-parent adoption rights for unmarried couples is discriminatory based on sexual orientation. This also renders the individual adoption denial discriminatory. Sexual orientation is protected from discrimination by Art. 14.¹³⁵

iv. Difference of treatment in analogous situations

(a) Regarding the adoption law itself

(64) ZAL categorically treats individuals in analogous legal or factual situations differently.¹³⁶ The domestic law opens two avenues for adoption: The joint adoption of a biologically unrelated child by different-sex married couples and second-parent adoption by married couples.¹³⁷ The latter is also unavailable to same-sex couples, since they cannot get married. Therefore, an (indirect) prohibition to adopt jointly in general can be identified for same-sex couples.¹³⁸ There already is a trend to "assimilate same-sex relationships to heterosexual relationships"¹³⁹ in CoE countries, which also includes shared responsibility for children.¹⁴⁰ This shows that the practice among member states is not so fragmented anymore that the *margin of appreciation* afforded to member states in that field should be as wide as afforded in *Fretté*,¹⁴¹ but should be reduced.¹⁴²

¹³² *Konstantin Markin v. Russia* [GC], app. no. 30078/06, § 127.

¹³³ Cf. *Stec and Others v. the UK* [GC], app. nos. 65731/01; 65900/01, §§ 61, 66.

¹³⁴ The Case, §§ 1, 44; This submission, sect. II.1.c.iii.(b); CQ Part II no. 11.

¹³⁵ *Salgueiro da Silva Mouta v. Portugal*, app. no. 33290/96, § 28.

¹³⁶ Cf. *Zarb Adami v. Malta*, app. no. 17209/02, § 76.

¹³⁷ The Case, § 34.

¹³⁸ *Bracken* (2016), p. 361.

¹³⁹ *Konstantin Markin v. Russia* [GC], app. no. 30078/06, § 126; *J.M. v. the UK*, app. no. 37060/06, § 50.

¹⁴⁰ *Waalwijk* (2018), p. 14.

¹⁴¹ *Fretté v. France*, app. no. 36515/97, §§ 40-42.

¹⁴² *Nozawa* (2013), p. 75.

(65) Additionally, the situation in Zephyria of same-sex registered couples willing to adopt the biological child of a partner is relevantly similar to that of different-sex couples viewed in conjunction with the possibility to carry out IVF and given that different-sex couples use adoption to legally recognise parental rights stemming from SGAs.¹⁴³ Although a right to adoption is not explicitly protected by the ECHR,¹⁴⁴ the Court has acknowledged that “additional rights [...] for which the state voluntarily decided to provide” are also protected by Art. 14.¹⁴⁵ Different approaches can be identified in the Court’s case law which determine the groups that are considered for the comparison, especially with regard to the broadness of the comparator. This is shown comparing two cases which also concerned second-parent adoption in a registered same-sex partnership.¹⁴⁶ In *Gas and Dubois*, the Court did not find a violation of Arts. 14, 8 since the situation of the applicant was not comparable to that of a married couple and it was possible for member states to differentiate between married and registered couples in their status.¹⁴⁷ In *X and Others* on the other hand a violation was given, since Austrian law provided for successive adoption by heterosexual unmarried couples and the situation of the applicants in a registered partnership was comparable to that.¹⁴⁸ The Court engaged in a comparative analysis of CoE member states not finding a sufficient consensus regarding the issue of second-parent adoption by unmarried couples.¹⁴⁹ In short, the difference of treatment based on marital status was found to be in line with the ECHR in *Gas and Dubois*, as was the denial of second-parent adoption for same-sex parents in *X and Others* merely due to the lack of sufficient consensus on the issue. Yet there was a discrimination in Austrian law in conjunction with the less restrictive parenting laws for unmarried different-sex couples. It can be concluded that not only a general view into the practice of CoE member states serves as a basis to finding comparable groups but also the special domestic legal circumstances must be scrutinized to find a fitting comparator.

(66) Zephyrian law makes IVF available to everyone and allows different-sex couples to have their parental rights stemming from SGAs recognised through adoption, while it prohibits adoption by same-sex unmarried couples.¹⁵⁰ The interplay of these two legal standards amounts to a discrimination based on sexual orientation, since only same-sex couples are barred from receiving the legal recognition of parental rights for a child they can legally conceive through IVF treatment. The domestic legislator has shown that it accepts same-sex couples as caregivers for children per se and there is no

¹⁴³ CQ Part II no. 10.

¹⁴⁴ *Frettè v. France*, app. no. 36515/97, § 32.

¹⁴⁵ *E.B. v. France* [GC], app. no. 43546/02, § 48.

¹⁴⁶ *Gas and Dubois v. France*, app. no. 25951/07, §§ 8-16; *X and Others v. Austria* [GC], app. no. 19010/07, §§ 9-14.

¹⁴⁷ *Gas and Dubois v. France*, app. no. 25951/07, §§ 68, 66.

¹⁴⁸ *X and Others v. Austria* [GC], app. no. 19010/07, § 116.

¹⁴⁹ *X and Others v. Austria* [GC], app. no. 19010/07, §§ 55-57.

¹⁵⁰ The Case, §§ 34, 42-44.

reason for barring the application of this principle to second-parent adoption. This is also in line with the evolving trend. Hence, they are in a comparable legal and factual situation.

(b) Regarding the individual adoption request

(67) The SAA denied AK's adoption request on the grounds that the law does not permit it which is a potentially discriminatory automatic application of the law.¹⁵¹ The subsidiary reason given was the lack of consent of D as the alleged mother. These reasons were upheld by the courts.

v. No justification

(a) Regarding the adoption law itself

(68) As regards the *aim* of the adoption law: The Court accepts that domestic authorities are better placed than an international court to decide on issues concerning the notion of family, marriage and the relationship between parents and children.¹⁵² Zephyria, in its adoption law regime seems to show a preference for traditional nuclear family constellations. While states may pursue the support and encouragement of the traditional family as a valid objective,¹⁵³ the measures enacted must not result in prejudicing the "rainbow family".¹⁵⁴ Since biological ties are not necessary to establish family life,¹⁵⁵ non-traditional families also fall into that scope, and consequently they must "enjoy the guarantees of Art. 8 on an equal footing with the members of the traditional family".¹⁵⁶

(69) With respect to the *efficiency* of the measure encouraging traditional family constellations: Trying to disincentive non-traditional family constellations by reducing the rights of non-traditional families to the greatest extent possible does not encourage homosexual individuals to enter a heterosexual family constellation.¹⁵⁷ Given this result, the measure does not serve the alleged policy aim and is not a means that can be regarded as necessary in a democratic society.

(70) Even if the aim were found to be legitimate and the measure adequate, it lacks *proportionality*. It is settled case law that "differences based on sexual orientation require particularly serious reasons by way of justification" and the *margin of appreciation* for the justification is narrow.¹⁵⁸ The Court held that the State has the burden of proof to justify the measures taken to pursue its policy goals.¹⁵⁹ Zephyria has not asserted any reasons why second-parent adoption by same-sex couples in registered partnerships can justifiably be denied, which is in contradiction to its established legal practice which

¹⁵¹ Cf. *D.H. and Others v. the Czech Republic* [GC], app. no. 57325/00, § 184.

¹⁵² *X and Others v. Austria* [GC], app. no. 19010/07, § 86.

¹⁵³ *Vallianatos v. Greece* [GC], app. nos 29381/09; 32684/09, § 83; *Karner v. Austria*, app. no. 40016/98, § 40.

¹⁵⁴ *Marckx v. Belgium* [PC], app. no. 6833/74, § 40.

¹⁵⁵ *Antkowiak v. Poland* (dec.), app. no. 27025/17, § 62.

¹⁵⁶ *Marckx v. Belgium* [PC], app. no. 6833/74, § 40.

¹⁵⁷ *Scherpe* (2013), p. 92.

¹⁵⁸ *Gas and Dubois v. France*, app. no. 25951/07, § 59; *Karner v. Austria*, app. no. 40016/98, § 41.

¹⁵⁹ *D.H. and Others v. the Czech Republic* [GC], app. no. 57325/00, §§ 178-197.

shows that same-sex couples are considered generally fit to raise children.¹⁶⁰

(71) As it has emphasized that its mission is not only to decide on individual matters brought before it but also to raise the “general standards of protection of human rights”,¹⁶¹ the Court is invited to consider the CoM recommendation which asserts that couples in a civil registered partnership should have the same rights as couples living in a marriage.¹⁶² While mindful of the non-binding nature of this recommendation, it still reflects a progressive attitude in the CoE which is relevant to the interpretation of the Convention¹⁶³ as a living instrument.¹⁶⁴

(72) Two opinions on *Gas and Dubois* are relevant in requiring to bring in line adoption provisions with contemporary societal reality and calls for non-blanket legislation due to proportionality issues.¹⁶⁵

(b) Regarding the individual adoption request

(73) Art. 1 Prot. No. 12 prohibits discrimination by any public authorities, including administrative authorities and courts.¹⁶⁶ The SAA, which *prima facie* discriminated against the Applicant based on his sexual orientation,¹⁶⁷ did not provide proof to the contrary as it should have.¹⁶⁸

(74) Subsidiarily, the SAA pointed towards the lack of D’s consent into the adoption which is irrelevant since she is not the biological mother of B¹⁶⁹ who would need to consent to the adoption.¹⁷⁰ In the case at hand, the only biological parent is LK who gave his consent.

(75) Even if one of the grounds for the adoption denial might be legitimate, the grounds that form the overall situation of the Applicant and the reasons that the authorities base their decision on must be considered concurrently and the “illegitimacy of one of the grounds has the effect of contaminating the whole decision”.¹⁷¹ Hence, the illegitimacy of basing the decision on his sexual orientation contaminates the second ground given, which is the lack of consent of the alleged mother.

(76) Lastly, AK respectfully asks the Court to consider B’s best interests, namely, to live with him,¹⁷² as paramount.¹⁷³ This is also demanded by Art. 3.1 CRC, as a relevant treaty.¹⁷⁴ In Zephyria, the best interest of the child in adoption cases prevails, even without the consent of the biological parent.¹⁷⁵

¹⁶⁰ This submission, sect. II.2.d.i.(a).

¹⁶¹ *Karner v. Austria*, app. no. 40016/98, § 26.

¹⁶² CM/Rec (2010)5, § 24.

¹⁶³ *Maumousseau and Washington v. France*, app. no. 39388/05, § 60.

¹⁶⁴ *E.B. v. France* [GC], app. no. 43546/02, § 46.

¹⁶⁵ *Gas and Dubois*, app. no. 25951/07, Concurring opinion *Costa/Spielmann*, Dissenting opinion *Villiger*.

¹⁶⁶ *Buonomo* (2001), p. 430.

¹⁶⁷ This submission, sect. II.2.d.i.(b).

¹⁶⁸ Cf. *E.B. v. France* [GC], app. no. 43546/02, § 74.

¹⁶⁹ This submission, sect. II.1.c.iii.(a).

¹⁷⁰ The Case, § 34.

¹⁷¹ Cf. *E.B. v. France* [GC], app. no. 4346/02, § 80.

¹⁷² This submission, sect. II.1.c.iii.(b).

¹⁷³ Cf. *Antkowiak v. Poland* (dec.), app. no. 27025/17, § 66.

¹⁷⁴ *Demir and Baykara v. Turkey* [GC], app. no. 34503/97, § 69.

¹⁷⁵ The Case, § 34.

3. Violation of Art. 13 in conjunction with Art. 8

(77) The Respondent has failed to fulfil its obligations under Arts. 13, 8 by not providing an effective remedy in the form of prevention, discontinuation, or redress.¹⁷⁶ Art. 13 is meant to ensure the primary responsibility of the domestic courts to remedy an alleged violation of the Convention before applicants can turn to the ECtHR.¹⁷⁷ As an ancillary provision,¹⁷⁸ Art. 13 can be invoked where there is an arguable claim.¹⁷⁹ The arguable claim which must be assessed individually¹⁸⁰ is established in the present case, since Art. 8 has been violated.¹⁸¹ In childcare cases, the individual assessment of effectiveness¹⁸² demands that there needs to be a preventive review to prevent a *fait accompli*.¹⁸³

a. Regarding the birth registry proceedings and placing B in D's care

(78) D was wrongfully registered in B's birth certificate.¹⁸⁴ While the LCC first ruled that her name should be removed, the MRC stated she should be registered according to Zephyrian law and the ZCC did not review the registration but simply based its decision on the fact of her entry in the registry.¹⁸⁵

(79) While effectiveness does not depend on a favourable outcome for the applicant,¹⁸⁶ the key elements of a violation need to be addressed.¹⁸⁷ In both the birth registry determination and the decision to place B in D's care, the MRC did not properly address the key elements.

(80) The MRC based its decisions mostly on the assumption that it was in B's interest to know his birth mother while declaring other factors irrelevant, such as the period of time B had already lived with AK, or the lack of biological link to D,¹⁸⁸ without evaluating the impact that this would have on B in the individual case. The preference given to D is furthermore discriminatory¹⁸⁹ and fails to address and evaluate other evidence submitted, such as AK's proven suitability to raise B and an alternative psychological report proving the importance of bonds between fathers and children.¹⁹⁰

(81) Unlike the Supreme Court in *K.K. and Others*, the ZCC argued superficially and did not weigh up different arguments.¹⁹¹ Without reviewing the legal grounds on which the decision was made by

¹⁷⁶ *Kuppinger v. Germany*, app. no. 62198/11, § 137.

¹⁷⁷ *Kudła v. Poland* [GC], app. no. 30210/96, § 152.

¹⁷⁸ *Zavoloka v. Lithuania*, app. no. 58447/00, § 35.

¹⁷⁹ *Hatton and Others v. the UK* [GC], app. no. 36022/97, § 137.

¹⁸⁰ *Boyle and Rice v. the UK* [PC], app. nos. 9659/82; 9658/82, § 55.

¹⁸¹ This submission, sect. II.1.

¹⁸² *Klaas v. Germany*, app. no. 15473/89, § 55.

¹⁸³ *Kuppinger v. Germany*, app. no. 62198/11, § 137.

¹⁸⁴ This submission, sect. II.1.c.iii.(a).

¹⁸⁵ The Case, §§ 8, 17, 26.

¹⁸⁶ *Kudła v. Poland* [GC], app. no. 30210/96, § 158.

¹⁸⁷ *Smith and Grady v. the UK*, app. nos. 33985/96; 33986/96, § 138.

¹⁸⁸ The Case, §§ 17-18.

¹⁸⁹ This submission, sect. II.2.c.ii.

¹⁹⁰ This submission, sect. II.1.c.iii.(b); CQ Part III nos. 10, 19.

¹⁹¹ Cf. *K.K. and Others v. Denmark*, app. no. 25212/21, §§ 57-62.

the lower instance courts or substantiating its own arguments by evidence, it held that D was correctly listed as B's mother on B's birth certificate.¹⁹² The reference of the ZCC to Art. 8 cannot be seen as a particular examination of the conventional rights.¹⁹³ The ZCC denied the applicability of a *de facto* family due to the duration of the cohabitation in contrast to the ECtHR's finding that no minimal duration for the establishment of *de facto* family life is required.¹⁹⁴ AK cohabited with B for 14 months. He has the relevant close inter-personal bond with the child and has behaved in every way like B's parent.¹⁹⁵ So not even finding Art. 8 to be applicable is obviously a wrong application of ECHR rights by the ZCC. The Respondent has failed to prove the practical effectiveness of the remedies provided.¹⁹⁶ In light of the above, the Court is invited to hold that AK has been violated in his Art. 13 right.

b. Regarding the length of the proceedings

(82) The Court held that in childcare cases, where a delay could cause a *fait accompli* for the family ties, a "more rigid approach" needs to be taken to reach an effective remedy. The decision by the domestic courts needs to be both preventive as well as compensatory.¹⁹⁷

(83) The proceedings for recognition of paternity and childcare for B in the domestic courts took a year and two months in total,¹⁹⁸ while B was in his earliest, most vulnerable stage of development. During this time, the Applicant developed *de facto* family ties with B while at the same time being in a constant state of uncertainty regarding the question of whether his paternity would be recognised. Ultimately, his request was rejected before the domestic courts. The proceedings before the Zephyrian courts were not able to prevent B's and AK's emotional distress caused by first allowing family ties to be built and then ultimately taking away B from the Applicant.

c. Regarding the adoption proceedings

(84) Zephyria did not provide an effective remedy for AK's family life violation constituted by the denial of his adoption request. Since the SAA and the lower instance courts mechanically applied ZAL,¹⁹⁹ which does not provide for any exceptions, the courts responsible for bringing about remedy were not able to review the Applicant's complaint in substance and were therefore not effective.²⁰⁰ Again, the courts did not consider all relevant factors²⁰¹ since they did not take into consideration arguments that speak in favour of AK or introduce and consider any arguments regarding the best

¹⁹² The Case, § 26.

¹⁹³ Cf. *Fabris v. France* [GC], app. no. 16574/08, § 72.

¹⁹⁴ *Paradiso and Campanelli v. Italy* [GC], app. no. 25358/12, § 153.

¹⁹⁵ Cf. *Moretti and Benedetti v. Italy*, app. no. 16318/07, §§ 49-50; The Case, § 23.

¹⁹⁶ *Kudla v. Poland* [GC], app. no. 30210/96, § 159.

¹⁹⁷ *Kuppinger v. Germany*, app. no. 62198/11, § 137; *A.L. v. France*, app. no. 13344/20, § 68.

¹⁹⁸ The Case, § 20.

¹⁹⁹ The Case, § 22.

²⁰⁰ Cf. *Smith and Grady v. the UK*, app. nos. 33985/96; 33986/96, §§ 132, 135-137.

²⁰¹ Cf. *Hatton and Others v. the UK* [GC], app. no. 36022/97, § 141.

interest of the child, as demanded also by domestic law.²⁰²

(85) The ZCC refused to review the adoption decision since it allegedly amounted to a review of local legislation which falls outside of the ZCC's competence. However, the ZCC is competent to review local legislation upon request by regular courts or the Ombudsman. The LCC's and MRC's omission to refer the ZAL to the ZCC for constitutional review despite its controversies²⁰³ should not have been accepted by the ZCC. While the ECtHR acknowledges in principle that the ZCC can provide an effective remedy, it has never considered a case in which a violation stemmed directly from legislation.²⁰⁴ The omission of the ZCC to review the (individual) adoption decision in light of the special circumstances amounts to a violation.

4. Violation of Art. 13 in conjunction with Art. 1 Prot. 12

(86) Neither the MRC nor the ZCC considered the allegation of discrimination brought forward by AK.²⁰⁵ The effectiveness of the remedy is assessed for every individual alleged violation.²⁰⁶ As the Zephyrian courts discriminated against AK, the remedy that is generally considered effective must be considered ineffective here, as the Court held in *Beizaras and Levickas*.²⁰⁷

III. Conclusion

(87) In light of the arguments presented above, the Applicant respectfully requests the Court to:

1. *declare* the application applicable and acknowledge that Zephyria has violated the Applicant's rights under Art. 8 and Art. 14 icw. Art. 8 and Art. 1 Prot. 12 and Art. 13 icw. Art. 8 as well as Art. 13 icw. Art. 1 Prot. 12;
2. *award* just satisfaction under Art. 41 with respect to the Applicant's pecuniary and non-pecuniary damages and to order the reimbursement of the full costs and expenses incurred;
3. *adopt* an interim measure under Rule 39 RoC to countermand the MRC's decision to place B in D's care, thereby ending the current and preventing future violations of the Applicant's rights and
4. *give priority* to this application according to Rule 41 RoC with regard to the importance and urgency of the issues raised, namely "circumstances linked to the personal or family situation of the applicant, particularly where the well-being of a child is at issue".²⁰⁸

²⁰² The Case, § 34.

²⁰³ This submission, sect. II.2.d.ii.(a).

²⁰⁴ The Case, §§ 27, 31- 32; CQ Part I nos. 5-6.

²⁰⁵ The Case, §§ 24-25.

²⁰⁶ *Smith and Grady v. the UK*, app. nos. 33985/96; 33986/96, § 138.

²⁰⁷ *Beizaras and Levickas v. Lithuania*, app. no. 41288/15, §§ 151-156.

²⁰⁸ Cf. Category I, Court's Priority Policy.