
2022-2023

Team: 58

HELGA PEDERSEN MOOT COURT COMPETITION

(Kramer)

VS

(Zephyria)

Submission of the Respondent

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A. List of References

Case-Law

European Court of Human Rights

1. C.G and Others v Bulgaria, app. no. 1365/07
2. Çelik and İmret v. Turkey, app. no. 44093/98
3. Costello-Roberts v. the United Kingdom, app. no. 13134/87
4. D.B and Others v Switzerland, app. no. 58817/15
5. De Tommaso v Italy, app. no. 43395/09
6. E. B. v France [GC], app. no. 43546/02
7. Fernández-Martínez v Spain, app. no. 56030/07
8. Gas and Dubois v France, app. no. 25951/07
9. Hilal v. the United Kingdom, app. no. 45276/99
10. Johnston and Others v Ireland, app. no. 9697/82
11. Kemmache v France (No. 3), app. no. 17621/91
12. Kopf and Liberda v Austria, app. no. 1598/06
13. Kudla v. Poland [GC], app. no. 30210/96
14. Marckx v Belgium, app. no. 6833/74
15. Mennesson v France, app. no. 65192/11
16. Molla Salli v Greece, app. no. 20452/14
17. Moretti and Benedetti v Italy, app. no. 16318/07
18. Müller v Austria, app. no. 28034/04
19. Olsson v Sweden, app. no. 10465/83
20. Paradiso and Campanelli v. Italy, app. no. 25358/12
21. Pretty v The United Kingdom, app. no. 2346/02
22. Silver and Others v the UK, app. no. 5947/72
23. Swedish Engine Drivers' Union v Sweden, app. no. 5614/72
24. Wagner and J.M.W.L v Luxembourg, app. no. 76240/01

United Nations Committee on the Rights of the Child

1. UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14.

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4. Jadvá, Blake, Casey, Golombok, Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins. Human reproduction journal, vol. 27 nr.10, 2012.
5. Jadvá, V. / Imrie, S., The significance of relatedness for surrogates and their families, Chapter 9, Cambridge University Press, 2014.

B. List of Abbreviations

- app. no. – Application Number
- CRC - United Nations Convention on the Rights of the Child/ UN Committee on the Rights of the Child
- ECHR/the Convention - The European Convention on Human Rights
- ECtHR/ the Court - The European Court of Human Rights
- GC - Grand Chamber
- UN – United Nations

C. Summary of Submissions

- The Respondent submits that the Applicant's complaints under Article 8 and Article 13 are inadmissible since he lacks victim status required in Article 34 of the Convention.
- All parts of the application are inadmissible on the grounds that they are manifestly ill-founded according to Article 35 of the Convention as the Applicant is seeking a fourth-instance procedure.
- The Respondent claims that there has been no violation of the Applicant's rights under Article 8.1 of the Convention on the grounds that the Applicant has not established *de facto* family ties with the child in question, B. There has also been no violation by the Respondent of the Applicant's private life.
- The Respondent's interference with the Applicant's family and private life is justified under Article 8.2 of the Convention. The Respondent applied a strict interpretation of Article 70 of Family Law to regulate the surrogacy agreement. The Respondent pursued a legitimate aim to protect the rights and freedoms of B. The Respondent's interference was necessary and proportional to protect the best interests of B.
- Additionally, the Respondent needs to be awarded a wide margin of appreciation.
- The Respondent submits that there was no violation of Article 1 of Protocol No. 12 because the difference in treatment concerning adoption rights is justified and thus does not give rise to discrimination. The Respondent's denial of the Applicant's request to adoption is justified on the grounds of protecting the best interests of B regarding the consequences of the adoption, rather than on the sexual orientation of the Applicant.
- The Respondent submits that there is no violation of Article 1 of Protocol No. 12 because there is no difference in treatment in paternity proceedings. The Applicant is placed in a relevantly different situation than the birth mother. Even if a difference in treatment based on sex is found to exist, there is an objective and reasonable justification.
- The Respondent argues that there is no violation of Article 13 of the Convention in conjunction with Article 8 despite the Applicant's arguable claim. The Applicant was afforded an effective remedy for his family and private life claims.
- The Respondent argues that there is no violation of Article 13 of the Convention in conjunction with Article 1 of Protocol No. 12 because the Applicant lacks an arguable claim under national law and was given an effective remedy within the competences of the Respondent's courts.

D. Legal Pleadings

1. Admissibility

[1] The State of Zephyria submits that the application is inadmissible based on Articles 34 and 35 of the European Convention on Human Rights. The Respondent challenges the victim status of the Applicant under Article 8 and Article 13. Second, the Respondent submits that the application to the Court regarding violations of Article 8, Article 13, and Article 1 of Protocol No. 12 is manifestly ill-founded.

1.1. The application is partially admissible under Article 34 of the Convention

[2] The Respondent challenges the admissibility of Mr Kramer's application under Article 34 due to his lack of victim status under the scope of Article 8 and Article 13, as required by Article 34 of the Convention.

1.1.2 The Applicant lacks victim status regarding his complaints under Article 8 and Article 13

[3] The Respondent alleges that the Applicant lacks victim status concerning Article 8. The Article does not provide the right to found a family or to become a parent.¹ Rather, the respect for "family life" under Article 8 presupposes the existence of a family. In the absence of the legal recognition of family life, *de-facto* family ties are assessed by close personal ties and periods of cohabitation. The Applicant has not established *de-facto* family ties with B. The Respondent argues that the short duration of the Applicant's cohabitation with the child was insufficient to establish *de facto* family ties, thus the Applicant's claims do not warrant the protection of Article 8. Moreover, the Applicant's claim of rights to personal development under private life do not warrant the protection of Article 8.

[4] The Respondent argues that the Applicant lacks victim status concerning Article 13. The Applicant was given access to the Lari City Court and the Malenian Regional Court with the correct procedure applied, and as a last resort, access to and a remedy by the Zephyrian Constitutional Court. Thus, the Respondent submits that the Applicant cannot be considered a victim under Article 13 given that he was able to plead his case before the national authorities and been awarded relevant remedies.

¹ E.B. v France [GC], app. no. 43546/02, § 41

1.2 The application is inadmissible under Article 35 of the Convention

[5] Regardless of whether the Court finds that the Applicant has victim status under Article 34, the Respondent challenges the admissibility of the Applicant's claims under Article 8, Article 13, and Article 1 of Protocol No. 12 based on the criteria established by Article 35. In particular, the Applicant's claims are incompatible with this provision of the ECHR given that they are of a fourth-instance nature and hence, manifestly ill-founded.

1.2.1 The Applicant's claims are manifestly-ill founded.

[6] The Respondent acknowledges that the Applicant has exhausted all domestic remedies and complied with the four-month time rule when submitting his complaint. Yet, the Respondent argues that the Applicant's claims to this Court are of a fourth-instance nature, as exemplified in the established case law.² The Respondent argues that the Applicant is seeking another appeals procedure as he is not content with the national courts' decisions. As found in the case of *De Tommaso v. Italy*, even though that case dealt with a different set of facts, the Court's function must remain limited to verifying the Respondent's compliance with human rights, rather than accepting the Applicant's claims and acting as a court of fourth instance. Unless the Respondent's "findings can be regarded as arbitrary or manifestly unreasonable,"³ the Court should not intervene.

[7] The Respondent has not acted arbitrarily or in a manifestly unreasonable manner. Its domestic authorities have not failed in their obligation to examine in substance the Applicant's complaints and have not failed to provide the correct course of proceedings by the competent national courts. The Respondent submits that the State provided the Applicant with proceedings under the correct bodies of the Lari City Court, and upon appeal, the Malenian Regional Court. The proceedings went according to domestic law requirements, giving the Applicant multiple opportunities to submit evidence and be heard. The final decision rendered by the Constitutional Court was sufficiently reasonable by taking into consideration domestic law such as Articles 70 and 79 of Zephyrian Family Law, the physical evidence at hand such as B's birth certificate, and a fair strike of the child's best interests with that of the Applicant's. The Applicant cannot simply petition the ECtHR because the outcome was not as expected, given that the Respondent has completed their obligation to provide a procedure with no arbitrariness or unfairness.

² *Kemmache v France* (No. 3), app. no. 17621/91, § 44

³ *De Tommaso v Italy*, app. no. 43395/09, § 170

[8] The Respondent argues that if the Court were to question Zephyria's domestic proceedings pertaining to the Applicant's case, they would be entertaining a fourth-instance complaint, which itself lacks foundation. Thus, the Respondent asks the Court to declare the Applicant's claims inadmissible.

2. Merits

2.A. There has been no violation of Article 8

[9] If the Court finds the Applicant's claims to be admissible, the Respondent further submits that there is no violation of Article 8. First, the Respondent submits that the situation of the Applicant does not fall within the scope of Article 8.1 of the Convention with respect to family life and private life. Second, if the Court finds that the Applicant's claim does fall under Article 8.1, the Respondent's inference is in accordance with the law and as found necessary in a democratic society following its obligations under Article 8.2.

2.A.1 The Respondent contests that there has been a violation of the Applicant's right to family life under Article 8.1 of the Convention.

[10] The State of Zephyria has not violated the Applicant's rights under Article 8.1 of the Convention due to the absence of family life, including *de facto* family ties with the child in question, B. The Court has defined family life as the right for members of a family to live together and enjoy each other's company, as found in the relevant case law.⁴ A biological relation between members of a family is not necessary to establish family life, and hence, the Court has confirmed that Article 8.1 also applies to *de facto* family ties. These *de-facto* family ties are defined through case law as the measure of cohabitation and time spent living together of the relevant parties, as reasoned in the *Johnston and Others v. Ireland* case.⁵

[11] The Respondent considered the time of cohabitation of the Applicant and B when analyzing their alleged *de facto* family life, given the lack of biological ties of the Applicant with the child. The Respondent acknowledges that the relationship between the Applicant and his partner prior to the arrival of B lasted 5 years. However, this time is not relevant in order to assess the complaint submitted by the Applicant, which concerns exclusively his family ties with B.

⁴ *Marekx v Belgium*, app. no. 6833/74, § 31; *Olsson v. Sweden*, app. no. 10465/83, § 59

⁵ *Johnston and Others v Ireland*, app. no. 9697/82, § 56

[12] As seen in the Court's rationale in the case of *Paradiso and Campanelli v. Italy*,⁶ it would be inappropriate for the Respondent to define a minimum necessary length of shared life for family life to exist. The Respondent nevertheless finds that the duration of the period of cohabitation when B was under the Applicant's care to be insufficient to establish family ties, following the *Paradiso and Campanelli v. Italy* judgment, where the *de facto* family ties were not established due to the short duration of the cohabitation (a total of 8 months of time spent between the mother and father and the surrogate child)⁷. Where the Court has found that there was *de facto* family life, the time of cohabitation has been much longer. In the *Wagner and J.M.W.L v. Luxembourg* case, where the cohabitation between a mother and her adopted child lasted for more than ten years and thus constituted *de facto* family life. In the *Kopf and Liberda v. Austria* case, the family life between a child and his former foster parents was determined to exist after forty-six months of cohabitation, or 3.8 years, which was seen as sufficient time for emotional bonds to develop between the individuals.

[13] The Respondent further refers to the case of *Moretti and Benedetti v. Italy*,⁸ where the child was in the applicant's care for a time of 19 months, shorter than in the other cases cited, and where it was still necessary to examine court-ordered reports to show the child's deep attachment to and integration with the applicants to establish family life. The Respondent claims that the Applicant's time spent living with B is close but even shorter than the referenced time in *Moretti and Benedetti v. Italy*. Furthermore, the Applicant has not shown similar evidence regarding B's integration nor attachment which was given importance in the examination of family life. In the case of the Applicant, his relationship with B lasted less than 15 months, which the Respondent believes to be insufficient and too short a period to create *de facto* family ties, ties that the child has however created with his biological mother, D.

[14] In conclusion, the Respondent finds that the conditions for the existence of *de facto* family life have not been met and thus, the Applicant does not enjoy the protection of Article 8.1.

2.A.1a The Respondent contests the alleged violation of the Applicant's right to private life under Article 8.1 of the Convention.

[15] The Respondent challenges the Applicant's claim that there has been a violation of his right to private life under Article 8.1. The scope of Article 8.1 includes the right to personal development, which is defined by case law as the right to establish and develop relationships

⁶ *Paradiso and Campanelli v Italy*, app. no. 25358/12, § 153

⁷ *Paradiso and Campanelli v. Italy*, app. no. 25358/12, § 152

⁸ *Moretti and Benedetti v Italy*, app. no. 16318/07, § 48

with other human beings and the outside world.⁹ The Applicant's claim of a right to develop a personal relationship with B because he is an intended parent stems from his claim that he has a right to found a family. Based on the aforementioned case law,¹⁰ the right to found a family is outside the scope of Article 8.1. Rather, the Respondent must protect B's right to private life and to personal development of relations as part of establishing details of B's identity. As a guiding principle of case law, this requires the Respondent to protect B's right to a relationship with his legal parents.¹¹ As further established in Article 8.1 of the UN Convention on the Rights of the Child, "*States parties undertake to respect the right of the child to preserve his or her identity, including ... family relations as recognized by law and without unlawful interference.*" Therefore, the Respondent challenges the Applicant's claim regarding an infringement of his right to private life because it must safeguard B's private life and right to develop personal relationships.

2.A.2 The Respondent's interference with the Applicant's alleged family life and private life was justified under Article 8.2 of the Convention

[16] If the Court considers that the Respondent's action to remove B from the Applicant's care and place him in Ms. D's care did interfere with the Applicant's right to private and family life, then the Respondent submits that these actions were justified under Article 8.2. The Respondent acted in accordance with its national law, pursuing the legitimate aim of protecting the rights of the child in question, B. The Respondent's interference was necessary to safeguard the child's best interests. The Respondent further struck a fair balance between B's best interests and the Applicant's right to family and private life.

2.A.2a The interference was in accordance with the law

[17] For the interference of the Respondent to be in accordance with national law, the law must be foreseeable, clear, and accessible.¹² The Respondent submits that the interference with the Applicant's family life had a legal basis. Article 70 of Zephyria's Family law clearly assigns motherhood to the birth mother, unless she relinquishes her parental rights after the birth of the child. In surrogacy agreements, where there is no conflict between the intended parents and the surrogate, the Respondent applies Article 70 in a flexible manner, allowing mothers to relinquish their parental rights before birth.

⁹ Pretty v. The United Kingdom, app. no. 2346/02, § 61

¹⁰ Paradiso and Campanelli v. Italy, app. no. 25358/12, § 141

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

¹² Silver and Others v the UK, app. no. 5947/72, § 87

[18] Due to the different circumstances of this case, where Ms. D changed her mind and wanted to keep B, the Respondent has applied a strict interpretation of Article 70, in order to be in accordance with law; thus, Ms. D is the legal birth mother of B. When interpreting the relinquishment of parental rights under Article 70, the decision of Ms. D to relinquish her rights, as demonstrated by the signing of the private surrogacy agreement before the birth of B, was invalidated *after* his birth by her decision to change her mind and keep her child. This change of mind of Ms. D is permissible because it is compatible with the freedom of choice that governs contractual agreements. The Respondent submits further research from the Harvard Journal on Law and Public Policy concerning the freedom of contract in surrogacy agreements from 2018, which found that the mother's freedom of contract in consenting to a surrogacy agreement is more limited than that of the commissioning parents.¹³ Hence, the Respondent argues that Ms. D's change of mind, and consequently, her lack of consent to the contract, is a permissible manifestation of her right to exercise her freedom of contract. When weighing this with the competing interests of the Applicant to enforce his freedom of contract, the Respondent submits that the Ms. D's freedom of choice to change her mind is severely limited by the specific conditions of the surrogacy agreement in question. As a matter of rule of law, the Respondent found a need to strictly interpret Article 70 of Family Law and place the Civil Code and its guarantees above private law agreements. Given the change of mind of Ms. D, the enforcement of the latter would not be in accordance with the law and should not supersede the birth mother's parental rights.

[19] Furthermore, the Court has stated that domestic legislation must be adequately foreseeable for actions by the State affecting personal rights and freedoms of individuals to be justified.¹⁴ The Zephyrian Code of Civil Procedure is foreseeable in demarcating the actions of its domestic courts. It allows the courts to take *ex officio* measures in cases involving the best interest of a child, including their immediate removal from the care of one parent. It is further noted by the Respondent that the Applicant was aware of the risks of entering a gestational surrogacy contract in Zephyria. Following the reasoning of the Court in the *D.B & Others v. Switzerland* case, the practical difficulties that the Applicant is claiming regarding the recognition of his family life are foreseeable and within the limits of the law.

[20] In conclusion, the decision of the courts of the Respondent to place B in Ms. D's care was in accordance with the law.

¹³ Allen (2018), pp. 786

¹⁴ Fernández-Martínez v Spain, app. no. 56030/07, § 117; C.G and Others v Bulgaria, app. no. 1365/07, § 39

2.A.2b The interference pursued a legitimate aim.

[21] The State's removal of B from the Applicant and his partner's care to that of the birth mother, Ms. D, pursued a legitimate aim under Article 8.2, as it was done "*for the protection of the rights and freedoms of others*". This refers to the State's responsibility to protect the rights and freedoms of the child in question, B.

[22] Article 3(1) of the UN CRC states that, "*In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*" The Respondent therefore has an obligation to prioritize B's best interests above all other considerations, to comply with the legally binding Convention on the Rights of the Child. In conclusion, the Respondent's decision to place B with Ms. D was based on the legitimate aim of protecting the child's best interests.

2.A.2c The interference was necessary and proportional to the aim pursued by the Respondent

[23] The Respondent claims that the interference with the Applicant's rights under Article 8.1 were necessary to protect the best interests of the child. The Respondent analyzed which action would lie within the best interest of the child by following the preliminary considerations of General Comment No. 14 of the UN Committee on the Rights of the Child of 2013.¹⁵ Namely, to assess which measures ensure the best interests of the child, the following factors are relevant: the preservation of the family environment and maintaining relations with his parents; the care, protection and safety of the child; and the child's right to mental and physical health.¹⁶

[24] The Respondent argues that the best interests of B with respect to preserving and developing emotional ties and a relationship with his parents is found in the relationship with the birth mother and surrogate, Ms. D. Regarding the preservation of emotional ties, a 2005 scientific study conducted by Zephyrian psychological experts indicates that during pregnancy, "strong psychological and physical bonds are created between the mother and child."¹⁷ The mother has carried the child in her womb for nine months, which establishes an emotional relationship between Ms. D and B outside the womb even after a 15-month separation. According to the newer research done in the United States from 2018, a bond between a baby

¹⁵ CRC/C/GC/14

¹⁶ CRC/C/GC/14

¹⁷ Case facts, §18

and a woman who carries him is created by shared life in the womb apart from any genetic connection that may exist.¹⁸ Thus, the Respondent claims that this bond between Ms. D and B cannot be broken even after a 15-month separation, and to deny the bond is not in the best interests of B.

[25] Regarding the preservation of the relationship with the mother, the Respondent submits a recent 2012 study conducted throughout a 10-year period in the UK which examined both prospective parents and their children's family relations, and the family relations of those same children with the surrogate mother. This research finds that the well-being of the child is associated with the maintenance of a relationship with the surrogate mother, measured by the amount of contact with her.¹⁹

[26] The best interests of B with respect to his mental and health needs are preserved by remaining with Ms. D rather than with the Applicant. A new article carried out in 2022 is of relevance to the Respondent's analysis. An expert statement by Dr. Gayathri Kamath, a Senior Consultant in Obstetrics & Gynecology from the Fortis Hospital in India states that, "a mother's physical and emotional presence benefits babies in two ways: stress reduction and emotional regulation." The same study concludes that both stress reduction and emotional regulation are vital for brain development and future well-being of the child.²⁰

[27] The Respondent submits that the best interests of B with respect to his care, protection, and safety are provided by remaining with Ms. D. Her experience as a birth mother and gestational surrogate enables her to develop good emotional stability and psychosocial adjustment to be a parent. These two aspects are necessary for a child's adequate care in the long term, as evidenced in a 2014 study of surrogates in the UK examining the significance of the gestational link with the surrogacy child.²¹

[28] In conclusion, the aforementioned factors and empirical studies have allowed the Respondent to determine the best interests of the child. These weigh heavily in the balance when compared to the weight attributed to the Applicant's claims which are based on a short duration of cohabitation with B. Therefore, the Respondent has made the necessary intervention to protect the child's rights based on the CRC's assessment by placing B in the care of Ms. D.

¹⁸ Allen (2018), pp. 774.

¹⁹ Jadva, Blake and Casey (2012).

²⁰ Arivalan (2022).

²¹ Jadva and Imrie (2014), pp. 162-177.

[29] The Respondent's interference was proportional in its aim of securing B's best interests because it struck a proper balance between the Applicant's rights and B's rights. It is important to note that the national authorities of Zephyria have a wide margin of appreciation in relation to Article 8.2 when it comes to matters of moral and ethical questions, as shown in the Court's case law.²² Due to the ethical and moral conflicts that arise in the context of surrogacy agreements, such as the discussion of treating a birth mother and a child as a commodity, the wide margin of appreciation of the Respondent is justified.²³ This wide margin of appreciation is further attributed to the lack of consensus at the European level in comparative law.²⁴ There is currently no consensus on the legality or regulation of surrogacy in Europe:²⁵ German domestic courts do not enforce surrogacy contracts due to their illegality and find surrogates to be a child's legal mother, while Bulgarian and Swiss²⁶ laws generally prohibit surrogacy. Zephyria does not have an express law in place for surrogacy yet tolerates these agreements on a case-by-case basis.²⁷ The lack of harmonization of laws regulating surrogacy contracts justifies the Respondent's right to apply surrogacy agreements as it sees fit based on its domestic frameworks. This margin of appreciation is of greater significance because this is the first time that Zephyrian courts have dealt with a case where the surrogate mother changed her mind. Thus, the national courts struck a fair balance between the rights of the Applicant and the best interests of the child through the existent domestic law and the margin of appreciation afforded by the Convention, thereby complying with the international law requirements.

[30] Of particular interest to the Respondent's justification for interference is the need to uphold Article 9.3 of the UN Convention on the Rights of the Child. It specifically states that "*parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.*"

[31] The Respondent took into account that this right to contact with one parent was not respected when B was in the care of the Applicant and his partner. They denied Ms. D access to the child and wanted to cut all relations with her. Through the Respondent's interference, Ms. D was recognized as the child's birth mother and was reunited with B, and Luke Kramer was recognized as the biological father of B and given visitation rights. This was a

²² Paradiso and Campanelli v Italy, app. no. 25358/12, § 184

²³ Allen (2018), pp. 792.

²⁴ Paradiso and Campanelli v Italy, app. no. 25358/12, § 184

²⁵ Brunet, Carruthers, Davaki, King, Marzo and McCandless (2013), p.36-110.

²⁶ D.B. and Others v. Switzerland, app. no. 58817/15

²⁷ Case facts, § 42

proportionate measure undertaken to protect B's best interests to have two legally recognized parents (his birth mother and biological father) under the right to family life and private life. Despite these parents not having a family relationship with each other, the Respondent argues that this will not affect B's ties with the mother, which are of great importance to the development of the child. The interference was proportional to the urgency of the situation given that B had been separated from the birth mother for over 14 months. Thus, the measure to place B in the birth mother's care was immediate because the harm resulting from the separation had been long enough. To ensure a degree of proportionality between the immediate removal of the child and the rights of the other legal parent to form a family life with the child, the biological father was granted visitation rights.

[32] Based on above grounds, there was no violation of the Applicant's rights under Article 8 because the Respondent's interference was in accordance with the law, conducted in pursuit of a legitimate aim, and necessary and proportionate to that aim.

2.B. The Respondent claims that there is no violation of Article 1 of Protocol No. 12

[33] The Respondent has not violated the Applicant's rights under Article 1 of Protocol No. 12, which affords a general prohibition of discrimination. The Respondent has not violated this provision because while the Applicant is found to be in a similar situation as married couples, any difference in treatment arising from this is justified in an objectively and reasonable manner.

[34] The Respondent gives further importance to the fact that adoption law in Zephyria is still the subject of an ongoing discussion when it comes to Parliament's decision to address adoptions by same-sex individuals and joint adoptions by same-sex couples. While registered partnerships are in a similar situation to marriage, though are not afforded all of the same rights, the Respondent is still fully in compliance with its domestic competence to decide matters in which there is no consensus. Nevertheless, the Respondent is ready to support its evolution in the national Parliament's decision. The courts of Zephyria are therefore interpreting to the best of their abilities cases concerning same-sex adoption, which is not yet a "right set forth by law" and thus cannot be in violation of Article 1 of Protocol No. 12 of the Convention.

2.B.1 The denial of adoption is based on a reasonable and objective justification

[35] The Respondent acknowledges that a couple in a registered partnership and a married couple are comparable, yet submits that the difference in treatment of the Applicant's denial of adoption was not discriminatory. The Respondent submits that there is a reasonable and objective justification in protecting the child's best interests by denying the Applicant's request for adoption.

[36] Following relevant case law, the actions taken by the Respondent are justified as having a legitimate and proportionate aim,²⁸ namely to protect the best interests of B. Zephyria followed Article 21(1)(a) of the CRC which states that, "*States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be of paramount consideration and shall [...] adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures [...] that the adoption is permissible in the view of the child's status concerning parents [...] and that if required, the persons concerned should give their informed consent to the adoption [...]*". The Respondent took into account the risks posed to B's best interests. First, by removing Ms. D from the child's birth certificate and indicating the Applicant and his partner as B's sole parents through adoption, Ms. D is effectively removed from the child's life. To deny B a relationship with the birth mother and the birth mother a relationship with B would be against B's best interests. Second, accepting the Applicant's request for B's adoption would act contrary to Ms. D's consent as the legally recognized mother. Due to the particular change of mind of Ms. D to keep B, which is an exceptional situation of this case, the Respondent cannot blatantly uphold the private surrogate contract. The birth mother is interested and willing to be a parent to B, and has invalidated any relinquishment of parental responsibilities after the birth of B. Proceeding with B's adoption to the Applicant would hence go against Ms. D's consent and freedom of choice. Therefore, the Respondent argues that the national legislation on adoption does more to safeguard the best interests of the child than the surrogacy contract. In conclusion, these consequences arising from the adoption of B by the Applicant carried heavier weight in the analysis of the child's best interest, and thus, there was sufficient reasoning to deny the adoption application.

[37] Furthermore, the Respondent's decision to deny adoption to the Applicant was not based

²⁸ Molla Sali v. Greece, app. no. 20452/14, § 135; Gas and Dubois v. France, app no. 25951/07, § 58

on his sexual orientation but rather on the fact that the application had been made for an individual adoption, which is not allowed in Zephyria. As stated in the *Gas and Dubois v. France* case, the refusal for simple adoption was based not on the difference in treatment based on the applicant's sexual orientation but on the interpretation of the law in general.²⁹

[38] The Respondent was objective in its interpretation of national adoption law and in its employment of state procedures when justifying the denial of the Applicant's adoption application. First, the Court and the State Adoption Agency, which are the relevant acting public authorities for such a matter, were applying what is set forth by Zephyrian law. Second, the Zephyrian Code of Civil Procedure contains safeguards that will "exceptionally allow adoption even in the absence of the mother's consent, if it is in the child's best interests."³⁰ Hence, the relevant authorities took this into consideration and still determined that there was no exceptional reasoning to allow the adoption application of the Applicant, demonstrating objectivity in the employment of state procedure.

[39] In conclusion, the Respondent pleads that there has been no violation of Article 1 of Protocol No. 12, given that the decision to deny the Applicant's adoption application was based on a reasonable and objective justification.

2.B.2 There has been no difference in treatment in paternity proceedings

[40] The Respondent has shown no difference in treatment on the basis of sex when refusing to acknowledge the Applicant's paternity to the child in question, B. This is because the Applicant, who claims to be the intended parent, is in a relevantly different situation to the birth-mother Ms. D and to the legally recognized biological father, Luke Kramer. Ms. D has a legal relationship with the child based on the birth certificate and her role in B's life is proven to be in his best interest following the previous research discussed in the merits of Article 8. The biological father of B, Mr. Luke Kramer, is also legally recognized as the child's second parent. Thus, the denial of paternity was not on the basis of sex, but on the lack of legal recognition supported by legal documents.

[41] The denial of paternity was further not based on sex but on the impossibility for Zephyria's courts to deviate from the Civil Code. The law of Zephyria specifies that a child can only have two legal parents and finds that the birth certificate correctly allocates maternity to Ms. D and paternity to Luke Kramer.

²⁹ *Gas and Dubois v. France*, app no. 25951/07, § 69

³⁰ Case facts, § 34.

2.B.2a The difference in treatment regarding acknowledgement of paternity has an objective and reasonable justification

[42] If the Court disagrees and finds that the Applicant was in a similar situation to Ms. D and Luke Kramer, and that there was a difference in treatment in the denial of the Applicant's paternity, this treatment would still be justified objectively and reasonably.

[43] The decision of the Zephyrian Constitutional Court was not taken based on the sex of the Applicant, but rather taking into account the best interests of the child. The Respondent acted with a reasonable aim, which was to maintain B's established legally relevant father and legally relevant mother on his birth certificate because it is in the best interest of the child to have two parents.

[44] The Respondent was objective when interpreting the registered birth certificate in contrast to the surrogacy agreement and their respective placement of paternity. The surrogacy agreement had granted paternity to the Applicant, yet the Regional Court found that such agreement should not supersede the mother's parental rights from the interpretation of the Family Law. The Respondent's objectivity stemmed from giving importance to national public law rather than private agreements.

[45] In conclusion, the Respondent pleads that there has been no violation of Article 1 of Protocol No. 12 if a difference in treatment arises, given that the decision to deny the Applicant's paternity application was based on a reasonable and objective justification.

2.C. The Respondent claims that there has been no violation of Article 13

[46] The State of Zephyria did not violate the Applicant's right to an effective remedy as stated in Article 13 of the Convention. The Respondent submits that the Applicant does have an arguable claim under Article 8, and that the Applicant has been provided with effective domestic remedies under Article 8 in conjunction with Article 13. The Respondent further submits that the Applicant does not have an arguable claim under Article 1 of Protocol No. 12, as the Constitutional Court is an effective remedy under Article 1 of Protocol No. 12 in conjunction with Article 13.

[47] The Respondent has a positive obligation to afford an effective remedy, and it reiterates that it is in the competence of each state to decide how to provide said remedy. Following the case *Müller v. Austria*,³¹ Article 13 does not impose the existence of different levels of jurisdiction in a state, yet Zephyria further complied with its obligation to provide for an

³¹ Müller v. Austria, app. no. 28034/04

effective remedy by providing different hierarchical levels of judicial complaints. The Zephyrian Constitutional Court was accepted by the Court as an effective remedy in Zephyria,³² thus proving the existence of an extensive compliance with Article 13.

[48] Article 13 only guarantees the availability of a remedy, regardless of the outcome. The effectiveness of the Respondent's remedies do not depend on the certainty of a favorable result for the Applicant's claims under Article 8 or Article 1 of Protocol No. 12.³³

2.C.1 There has been no violation of Article 13 in conjunction with Article 8

[49] The Respondent acknowledges the arguable claim of the Applicant's complaint under Article 8. However, there is no violation of Article 13 in conjunction with Article 8 because the remedy provided by the Respondent was effective. The Respondent followed all requirements laid down by case law to provide the Applicant with an effective remedy: the remedy needed to be sufficient, accessible, and fulfilling the obligation of promptness.³⁴ The Zephyrian Constitutional Court demonstrated that the remedy was sufficient by addressing the Applicants' complaint in a reasoned manner: it dismissed the claims based on an analysis and fair examination prioritizing the Respondent's obligation to protect the child's best interests. The remedy was accessible since the Applicant had the possibility to raise his grievances through all domestic channels, including the Constitutional Court, which rendered the final remedy. The remedy fulfilled the need for promptness since the Constitutional Court remedy was given two months after the Applicant submitted the Constitutional complaint.

[50] The Respondent argues that the lack of effectiveness in the remedy would have only occurred if the Court had placed an absolute ban on the exercise of parental rights acting in contrast to national law's requirement for a child to have parents and international law, found in the requirements of Article 9.3 of the CRC. Given this was not the case, the Respondent pleads that there has been no violation of Article 13 in conjunction with Article 8 because the Applicant was provided with an effective remedy.

³² Case facts, § 31

³³ Swedish Engine Drivers' Union v. Sweden, app. no. 5614/72 ; Kudla v. Poland [GC], app. no. 30210/96, §157 ; Costello-Roberts v. the United Kingdom, app. no. 13134/87, § 40 ; Hilal v. the United Kingdom, app. no. 45276/99, § 78

³⁴ Çelik and İmret v. Turkey, app. no. 44093/98, § 59

2.C.2 There has been no violation of Article 13 in conjunction with Article 1 of Protocol No. 12

[51] The Respondent submits that the claim of a violation of Article 13 in conjunction with Article 1 of Protocol No. 12 made by the Applicant is not arguable because it is not admissible under national law. As a civil law country, the Respondent's courts apply a correct interpretation of the Civil Code of Zephyria when analyzing the case. The Constitutional Court's decision not to review the Applicant's adoption claim is not itself incompatible with Article 13. It is not within the Constitutional Court's competence to review compliance of Zephyrian legislation based on individual complaints with the Constitution itself or the Convention.³⁵ Hence, the claim made by the Applicant is inadmissible under national law since it falls outside the powers of the Constitutional Court and its determined judicial scrutiny.

2.C.2a The remedies provided to the Applicant before the Constitutional Court constitute an effective remedy for the Applicant's grievances under Article 1 of Protocol No. 12

[52] Even if the Court finds that there was an arguable claim of Article 13 in conjunction with Article 1 of Protocol No. 12, the remedy of the Respondent was effective through an interpretation of national law. The State Adoption Agency and the City Courts will allow adoptions to proceed if the biological parents have consented to it. In this case, Ms. D, as the legal mother, did not consent to the adoption of B. City Courts can then exceptionally allow adoption even in the absence of an explicit consent by the child's biological parent if it deems this to be in the child's best interests, of which was not the case. Thus, the remedy provided was effective in ensuring the child's best interest despite it not being a favorable result for the Applicant. At the Constitutional Court level, the inadmissibility of the Applicant's request for B's adoption did not mean that there was no effective remedy, but rather that the Zephyrian Court found it to be outside its powers to deal with such a matter.

[53] In conclusion, the Respondent pleads that there has been no violation of Article 13 in conjunction with Article 1 of No. 12 because the Applicant was provided with an effective remedy.

³⁵ Case facts, § 32

3. Conclusions

For the reasons states above, the Respondent respectfully requests the Court:

- a. To declare the application inadmissible; and
- b. To adjudge and declare that the Respondent has not violated the Applicant's rights under Article 8, Article 1 of Protocol No. 12, and Article 13 of the Convention.