I.ÚS 3226/16 dated 29 June 2017

Failure to Recognise the Foreign Legal and Factual Parenthood of one of the Men Constituting a Same-Sex Couple is in Violation of the Right to Family Life and the Best Interest of the Child

Czech Republic
JUDGMENT
Of the Constitutional Court
In the Name of the Republic

The Constitutional Court held, in the chamber consisting of Presiding Judge Kateřina Šimáčková (Judge Rapporteur) and Judges Tomáš Lichovník and David Uhlíř, in the matter of a constitutional complaint of the complainants 1) J. A., 2) R. D. A., represented by Mgr. Petr Kalla, attorney, with the head office at Jana Zajíce 32, Prague 7 a minor child 3) L. D. A., represented by the guardian, Mgr. Radka Korbelová Dohnalová, Ph.D., attorney, with the head office at Převrátilská 330, Tábor, against the Judgment of the Supreme Court, file reference 28 Ncu 187/2015-6, dated 18 July 2016, under the presence of the Supreme Court as the party to the proceedings, as follows:

I. The Judgment of the Supreme Court file reference 28 Ncu 187/2015-6, dated 18 July 2016, violated the right of the third complainant to consider the best interest of the child as the foremost aspect of decision-making under Art. 3, para. 1 of the Convention on the Rights of the Child, and the right of the second and third complainants to family life under Art. 10, para. 2 of the Charter of Fundamental Rights and Freedoms.

II. For this reason, the above decision shall be annulled.

Reasoning:

1. By means of a constitutional complaint, the complainants challenged the decision referred to in the heading, seeking to have it set aside owing to its violation of their constitutionally guaranteed rights to private and family life, not to be discriminated against, due process, as well as owing to its violation of the principle of the best interest of the child. They referred to Art. 3, para. 1, Art. 10, and Art. 36, para. 1 of the Charter of Fundamental Rights and Freedoms (hereinafter only as the “Charter”) and Art. 6, 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter only as the “Convention”).

I. Facts of the Case and the Content of the Contested Decision

2. The first and second complainants live together in a common household and are married under the law of the State of California. The first complainant is a citizen of the Czech Republic and the other complainant is a citizen of Denmark. They reside together in California, yet they regularly visit the Czech Republic, where the first complainant has his relatives.

3. In 2012, the complainants concluded, under the law of the State of California, a contract with a surrogate mother who carried an embryo to term resulting from artificial fertilisation from an anonymous egg donor and semen of the complainants. On 30 July 2013, the third applicant was born to this surrogate mother. According to their statement, the first and second complainants do not know which one of them is the biological father of the third complainant.

4. By means of the judgment dated 10 May 2013, file reference BF 047383, the California State High Court for the District of Los Angeles (hereinafter only as the “judgment of the Californian court”) held that in accordance with the Surrogacy contract concluded between the complainants and the surrogate mother, the surrogate mother was not a legal parent of the not-yet-born third complainant and that the first and second complainants were those parents. In addition, it also held that the first and the second complainants would be registered as parents in the birth certificate of the third complainant once he was born. This subsequently occurred and in the birth certificate of the

complainant L. D. A., issued by the State of California, the complainant J. A. is registered in the father / parent section, and the complainant R. D. A. is registered in the mother / parent section.

5. The complainants subsequently turned to the Municipal Authority of Prague 1, seeking to have the certificate of nationality of the complainant L. D. A. issued. However, by means of the decision issued on 4 September, the Municipal Authority discontinued the proceedings and invited the complainant to initiate proceedings before the Supreme Court on recognition of the above-mentioned judgment of the Californian court, as a foreign judgment on declaration of parenthood may only be recognised upon a special decision of the Supreme Court. The first complainant initiated these proceedings before the Supreme Court by means of filing the relevant petition on 26 December 2014.

6. By means of the judgment issued on 22 May 2015, the Supreme Court partially allowed the first complainant's petition, recognising the judgment of the Californian court in the territory of the Czech Republic as for the declaration of parenthood (paternity) of the first complainant J. A. Pursuant to the Supreme Court, any such recognition does not violate § 54, para. 3 of Act No. 91/2012 Coll., on Private International Law (hereinafter only as the "PILA"), according to which it is sufficient, in order to validly determine the parenthood, if this takes place in accordance with the law of the state in which the declaration of the parenthood recognition was issued. At the same time, pursuant to the Supreme Court, it is not in violation of public order if the child was born using the institute of surrogacy. With reference to this judgment, the Municipal Authority of Prague 1 issued a certificate of citizenship of the complainant L. D. A. and subsequently, the complainants were provided with a Czech birth certificate in which the first complainant is registered as father and the mother's box has been left empty.

7. In this judgment, the Supreme Court did not at all hold on the parenthood of the complainant R. D. A. For this reason, on 4 August 2015, the complainants filed another petition with the Supreme Court seeking the recognition of the judgment of the Californian court concerning the second complainant.

8. By means of the contested judgment, the Supreme Court dismissed the second petition of the complainants. Pursuant to the Supreme Court, allowing this petition would be contrary to § 15, para. 1, letter e) of the PILA, according to which it is impossible to recognise a foreign decision if any such recognition clearly contravened the public order. Pursuant to the Supreme Court, allowing the petition would effectively result in a situation corresponding to the joint adoption of the child by two persons of the same sex, which is a state not accepted by the Czech law, as it categorically excludes the joint adoption of a minor child by persons who are not spouses. The Supreme Court emphasised that the issue of delimiting the borders in which, according to the Czech law, it is conceivable to establish a parental relationship between a minor and a couple of cohabiting persons of the same sex was perceived as a legislative issue the solution to which cannot rely on the leading role of courts but the democratically elected legislature.

II. Arguments of the Parties

9. In their constitutional complaint, the complainants state that they regularly visit the Czech Republic, yet in the current situation, when the Supreme Court refused to recognise the second complainant's parenthood, these stays represent certain legal risks. As a matter of fact, the complainant R. D. A. does not enjoy any legal relationship with his son L., which may cause difficulties, for instance, in the case of a medical examination or hospitalisation of the child, in access to information on the medical condition of the child, or even already upon entering the territory of the Czech Republic if he travelled alone with the child. Besides this, negative impacts on the child's inheritance rights cannot be overlooked either.

10. The Supreme Court motioned to dismiss the constitutional complaint. In its view, when assessing the issue of discrimination, it is necessary to compare the legal status of the complainants with the status of two unmarried persons of different sexes or possibly civil partners, as the Czech law does not recognise the marriage of two persons of the same sex. In this case, however, no disparate treatment takes place, as the Czech law does not allow such couples to adopt a child either. According to the Supreme Court, the issue of parenthood between children and same-sex couples represents a political issue the solution to which lies in the legislature.

11. The appointed guardian of the minor complainant L. D. A., Mgr. Radka Korbelová Dohnalová, Ph.D, motioned for the constitutional complaint to be allowed, as the contested decision is not in the

child's best interest. She alleges that the Supreme Court did not address the best interest of the child at all, which is a crucial and insurmountable error and contrary to the Convention on the Rights of the Child. The Supreme Court should have taken into account that the minor complainant resided and jointly created a family with the first and second complainants. Thus, it is the duty of the state to enable the development of these family ties and to provide legal protection leading to the integration of the child into the family. According to the guardian, the instant case does not represent any contradiction with the public order so obvious as to outweigh the interests of the minor child to have a foreign decision recognised.

12. In their reply, the complainants insisted on their constitutional complaint, alleging both the contradiction of the contested decision with the best interest of the child, and the prohibition of discrimination.

13. For the purposes of hearing the constitutional complaint, the Constitutional Court also requested an opinion of the Office for the International Legal Protection of Children (hereinafter only as the "Office"). The Office proposes that the contested decision be annulled. It alleges that the decision infringed the right to a due process, as it is inadequately reasoned and the court issuing the decision lacked the jurisdiction. The matter should have been brought before the District Court, as it concerned the recognition of the adoption decision pursuant to § 63 of the PILA, rather than the recognition of the decision in the matter of determining parenthood under § 556 of the PILA. According to the Office, the contested decision is also discriminatory, since the Supreme Court favoured the first complainant on the grounds of nationality, having recognised his parenthood, to the detriment of the second complainant. However, the Office disagrees that the best interest of the child has been violated. According to the Office, the principle of best interest of the child enshrined in Article 3, para. 1 of the Convention on the Rights of the Child is not a subjective right but merely an interpretative aid. According to the Office, the application of this principle cannot deny an unambiguous wording of the law. The Office also believes that the fact that the Czech legal order allows for joint adoption only by married heterosexual couples is fully consistent with the Charter and the international obligations of the Czech Republic.

III. Assessment of the Constitutional Court

14. The Constitutional Court considers it appropriate first to address the complainants' objection that the contested decision violated the principle of best interest of the child and then whether they became victims of direct discrimination. However, it is first necessary to assess whether there is a family life between the complainants within the meaning of Article 10, para. 2 of the Charter and Article 8 of the Convention, as this is essential for assessing the violation of the two rights in question.

A. Existence of Family Life

15. Pursuant to the established case law of the European Court of Human Rights (hereinafter only as the "ECtHR"), family life under Art. 8 of the Convention between an adult person and a child may arise not only in the case that the adult person is a registered parent recognised by the state, but also in the case of the existence of a de facto parent-child relationship in everyday reality. For instance, the ECtHR thus found the existence of a family life between an adoptive mother and a child co-habiting and forming a household even though the state did not recognise that the mother was a registered parent (Wagner and J. M. W. L. v Luxembourg, dated 28 June 2007, application No. 76240/01, paragraph 117). Similarly, the ECtHR had no doubts about the existence of a de facto family life between parents and a child delivered through surrogate motherhood (hereinafter only as "surrogacy"), even if the particular state did not legally recognise this relationship (Mennesson v France dated 26 June 2014, application No. 65192 / 11, paragraph 45). Pursuant to the EtCHR, it is obvious that in this case the ordering couple have been acting as parents of two children obtained by means of surrogacy since their birth and all four have cohabited in a manner indistinguishable from family life in the usual sense.

16. In the instant case, the three complainants have been living in California in a common household since the birth of the third complainant. The first and second complainants are therefore the social fathers of the third complainant in everyday reality. In the USA, both parents are registered parents as well. Consequently, even if the second complainant has not been recognised as a legal parent of the third complainant by means of the contested judgment, the Constitutional Court has no doubt that

there is a de facto family life between them. There is thus a family life between the second (as well as the first) complainant and the third complainant within the meaning of Art. 8 of the Convention and Art. 10, para. 2 of the Charter.

17. It should also be noted that, in addition to social parenthood, there is a half probability that the second complainant is also the biological parent of the third complainant. The complainants do not know themselves and do not wish to know which one of them is a biological parent, which is a fact to be respected, and in no manner may the complainants be forced to demonstrate who the biological father of the child is. However, this half-probability further supports the conclusion that there is a family life between the second and third complainant as well.

18. In addition, pursuant to the ECtHR, same-sex couples may enjoy family life in the same manner as heterosexual couples (Judgment in the case of Schalk and Kopf v Austria dated 24 June 2010, application No. 30141/04, paragraph 94; identically, for instance, the Judgment in the case of Oliari and others v Italy dated 21 July 2015, application No. 18766/11, paragraph 103). In these judgments, the ECtHR concluded that a homosexual couple in a stable relationship, sharing a common household, fell within the concept of family life within the meaning of Article 8 of the Convention. In the present case, therefore, family life also exists in the relationship between the first and second complainants who reside together permanently and are married under the law of the State of California.

19. The family life between the first and second complainants and the third complainant was established using the institute of the surrogate mother. The first and second complainants concluded an agreement with a surrogate mother to carry and deliver a child to them. Such an agreement is lawful in the State of California, being regulated by the applicable statute. The third complainant was therefore carried to term and delivered by the surrogate mother using the genetic material of an anonymous donor and the complainants. By means of the judgment of the Californian Court prior to the birth of the third complainant, it was determined that the third complainant's parents would be the first and second complainants, who were also registered as parents in the child's birth certificate.

20. According to the Constitutional Court, parenthood acquired through the institute of surrogate motherhood cannot be likened to the adoption of a child. There are several arguments supporting this. First, unlike adoption, in the case of surrogate motherhood, there are no (and legally have never existed) other parents of the child than the ordering couple. Adoption is parenthood created secondarily replacing the original parents. On the other hand, surrogacy leads to the primary and original parenthood of the ordering couple. Secondly, surrogacy is related to the process of conceiving and delivering the child. In the case of surrogacy, ordering parents possess the control over the genetic material from which the child is born. On the other hand, adoption is not at all related with the process of conceiving or delivering a child, as it is a subsequent process. In addition, the adoptive parents have no control over the child's genetic origin. Thirdly, adoption is a change of legal parent of an already born child. Pursuant to § 794 of the Civil Code, adoption means acceptance of another person as their own. However, in the case of surrogacy, the ordering couple become the parents of the child upon their birth. In this case, no new relationship to a stranger is established. This applies even more when the ordering parent is also a biological parent.

21. On the other hand, parenthood of a child born out of surrogacy cannot be regarded as natural parenthood either. This is obviously not the case, since in a number of instances even with heterosexual couples, the aim of surrogacy is to help couples who cannot naturally become parents. As stated in the doctrine, surrogacy occurs when a surrogate mother undergoes artificial insemination or has an embryo implanted and then carried to term and delivered for someone else, usually for the ordering couple (Králíčková, Z. Mater semper certa est! O náhradním a kulhajícím mateřství [Mater semper certa est! On Surrogate and Limping Motherhood]. Právní rozhledy, No. 21/2015, p. 725). Surrogacy-aided parenthood should therefore be perceived as a different institute from adoption, yet also as distinct from natural parenthood. In this respect, one may talk about the third manner to become a parent.

22. In the instant case, the Constitutional Court does not deem it necessary to comment more closely on the appropriateness of the institute of surrogacy, as this is not the subject of this constitutional complaint. It is sufficient to state that the Czech legal order does not regulate this institute, unlike the law of the State of California, where the complainants used surrogacy. In the present case, it is

essential that, pursuant to the Supreme Court, this institute does not conflict with the Czech public order (paragraph 6 above).

23. In general, the Constitutional Court agrees with this conclusion, stating that it is in line with the ECtHR case law (see Judgment in the case of Mennesson v France dated 26 June 2014, application No. 65192/11). However, it is deemed appropriate to point out that this conclusion cannot be unconditional and may depend on a case-by-case basis. In fact, it is possible to imagine situations in which surrogacy could be contrary to Czech public order. For instance, this may be the case if exploitation and inhuman treatment of surrogate mothers occurred. As implied in the case law of the Constitutional Court, the reservation of the public order should be applied in the event of violation of fundamental rights abroad [Judgment file reference I. ÚS 709/05 dated 25 April 2006 (N 91/41 SbNU 163)]. In the case of California, where surrogacy is regulated by the statute and impartial courts supervise surrogacy agreements, no such danger occurs. Scientific papers based on empirical studies have found no exploitation of surrogate mothers in democratic states, including the USA where surrogate motherhood is sufficiently regulated (PENG, L., Surrogate Mothers: An Exploration of the Empirical and the Normative. American University Journal of Gender, Social Policy & the Law, Vol. 21, Issue 3, 2013; identically BUSBY, K. and VUN, D. Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers. Canadian Journal of Family Law, Vol. 26, Issue 1, 2010). The latter study, however, refers to the exploitation of surrogate mothers in India, where surrogate motherhood suffered from insufficient legal regulation.

24. The Constitutional Court thus identifies with the conclusion of the Supreme Court that the recognition of a family legally established abroad using surrogate motherhood does not manifestly violate the public order. In such a case, the surrogate mother, in accordance with the relevant foreign regulation, is not the legal mother of the child. Since the marriage was concluded between the complainants under foreign law and legal parenthood applies in relation to both of them and there is no doubt that the child has close bonds to both of them, all three of them have a family life within the meaning of Art. 8 of the Convention and Art. 10, para 2. of the Charter. Unlike in the case of adoption, it does not consist in family life yet to be established in the future but rather a legal and factual reality which requires recognition from our state.

25. In the light of these findings, the Constitutional Court will assess whether the contested decision is in conformity with the best interests of the child as enshrined in Art. 3, para. 1 of the Convention on the Rights of the Child.

B. The Best Interest of the Child

26. Under Art. 3, para. 1 of the Convention on the Rights of the Child, the best interests of the child shall be a primary consideration 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. In its case law, the Constitutional Court has long emphasised the need to take into account the best interests of the child in all actions concerning the child, including judicial decision-making [see for instance Judgment file reference Pl. ÚS 23/02 dated 30 June 2004 (N 89/33 SbNU 353; 476/2004 Coll.); Judgment file reference Pl. ÚS 15/09 dated 8 July 2010 (N 139/58 SbNU 141; 244/2010 Coll.), paragraph 29; Judgment file reference IV. ÚS 3305/13 dated 15 October 2014; Judgment file reference I. ÚS 1506/13 dated 30 May 2014 (N 110/73 SbNU 739); or Judgment file reference III. ÚS 3363/10 dated 13 July 2011 (N 131/62 SbNU 59)]. According to the authoritative interpretation of the Committee on the Rights of the Child, “whenever a decision is to be made that will affect a specific child, … the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. … The justification of a decision must show that the [best interest of the child] has been explicitly taken into account [General comment No. 14 on the right of the child to have his or her best interests taken as primary consideration), dated 29 May 2013, CRC/C/GC/14, § 6, similarly § 29, hereinafter only as the “General Comment No. 14 of the Committee on the Rights of the Children”].

27. Similarly, the ECtHR case law emphasises that courts shall deal with the best interest of the child and assess it in a particular situation when deciding on a matter impacting a child (see, for instance, the Judgment in the case of Wagner and J.M.W.L. v Luxembourg dated 28 June 2007, application No. 76240/01, paragraph 135, or Mennesson v France dated 26 June 2014, application No. 65192/11, paragraph 93; Anayo v Germany dated 21 December 2010, application No. 20578/07, paragraph 71;

Gözüm v Turkey dated 20 January 2015, application No. 4789/10, paragraphs 50-51; or Penchevi v Bulgaria dated 10 February 2015, application No. 77818/12, paragraph 71). This ECtHR case law clearly implies that in the case of judicial decision-making concerning children, abstract principles cannot be preferred to the best interest of the child in a particular case.

28. Thus, pursuant to the Constitutional Court, the contested judgment is erroneous due to the very fact that it does not at all address the best interest of the child in violation of Art. 3, para. 1 of the Convention on the Rights of the Child. The Supreme Court supported its decision only by arguing that the recognition of the parenthood of the second parent would be contrary to public order, as the Czech law does not allow same-sex couples to jointly adopt a child. The Supreme Court did not at all assess the question of the best interest of the child, although the contested decision was obviously absolutely essential for the interests of the third complainant.

29. However, apart from the above-mentioned function of the procedural rule, the best interest of the child in Art. 3, para. 1 of the Convention is also a substantive right and an interpretation principle. Within the proceedings, children may thus seek the best interest of the child as a subjective right and may also refer to it as an interpretative aid. In the event that an unambiguous conclusion cannot be made using a linguistic interpretation of a legal regulation, it is necessary to opt for such an interpretation that supports the best interest of the child as effectively as possible [see the General comment No. 14 of the Committee on the Rights of the Child paragraph 6]. Already in the Judgment file reference Pl. ÚS 31/96 dated 9 April 1997 (N 41/7 SbNU 279; 103/1997 Coll.), the Constitutional Court concluded that the provision of Art. 3, para. 1 of the Convention on the Rights of the Child was "immediately applicable in the national law (self-executing)". In the past, it has also repeatedly concluded that the contested decision was not in the best interest of the child, holding on the violation of this right in relation to a minor complainant [for instance, see Judgment file reference IV. ÚS 2244/09 dated 20 July 2010 (N 146/58 SbNU 227); or Judgment file reference II. ÚS 19/16 dated 1 August 2016]. Thus, there is no doubt that the best interest of the child is not only a procedural rule but also a substantive subjective right.

30. When assessing the very best interest of the child, the Constitutional Court reiterates that the concept of the best interest of the child is flexible and adaptable. It should be adapted and defined individually in view of the specific situation of the child or children concerned, while attention should be paid to their personal circumstances, situation and needs.

In the General comment No. 14, the Committee on the Rights of the Child, formulated the following factors which need to be taken into account when formulating the best interests of the child: the child's attitude, child's identity, maintaining the family environment and bonds, caring for the child's protection and safety, child's membership in a vulnerable group, the right of a child to health, and the right of a child to education [Judgment file reference I. ÚS 1554/14 dated 30 December 2014 (N 236/75 SbNU 629), paragraphs 23-24 with the relevant references].

31. Above all, The Constitutional Court does not lose sight of the fact that, in the instant case, it concerns the issue of determining parenthood of a child, i.e. a status question. At the same time, the Constitutional Court acknowledges that status issues fall primarily within the competence of the legislature, thus being reticent when assessing constitutional complaints in this field (for instance, see the recent Judgment file reference II. ÚS 3122/16 dated 16 May 2017, in particular paragraphs 50 and 62).

32. However, what is essential in the instant case is that the contested judgment refuses to formally recognise the already existing parental relationship between the second and third complainant. The complainants reside in the USA, where they form a formally recognised family. Therefore, this consists in the legal recognition of the actually existing family life between the second and third complainant. It is thus a completely different situation than in the case of creating a new family relationship. In addition, although it is a status issue, it does not even consist in creating a new legal bond between the complainants, but only in recognising a legal bond already constituted in the law of the state where the complainants reside permanently.

33. The case law of the Constitutional Court and the ECtHR clearly emphasises that if family life already exists between individuals, it is the duty of all public authorities to act in such a manner that this relationship may develop and legal guarantees must be provided to allow the integration of the

child in the family [see Judgment file reference II. ÚS 485/10 dated 13 April 2010 (N 82/57 SbNU 93), paragraph 24; or the ECtHR Judgment in the case of Emonet and Others v Switzerland dated 13 December 2007, application No. 39051/03, paragraph 64]. According to the ECtHR, it is important that legal family life should be legally recognised (see, for example, the Judgment of the Grand Chamber in the case of X. and others v Austria dated 19 February 2013, application No. 19010/07, paragraph 145). For instance, the ECHR found it inadmissible if the legal relationship with the first parent (Emonet and others v Switzerland) was annulled in the case of adoption by the second parent; it established the need to recognise individual adoption by the mother abroad, even though the law of the relevant state did not allow for individual adoption (Wagner and J.M.W.L v Luxembourg dated 28 June 2007, application No. 76240/01); or to recognise the adoption by a monk abroad, even though the law of the state did not allow monks to adopt (Judgment in the case of Négrépontis-Giannisis v Greece dated 3 May 2011, application No. 56759/08). In all of these cases, the ECtHR considered it crucial that this is a legal recognition of a de facto existing family bond.

34. The ECtHR case law then implies that states cannot neglect the legal status created in another country on the basis of which there is a family life within the meaning of Art. 8 of the Convention. The standards of private international law should not take precedence over social reality and the best interest of the child, which is paramount (Judgment in the case of Wagner and J. M. W. L. v Luxembourg, cited above, paragraph 133). A relationship between the parent and the child is a crucial aspect of the personal identity of an individual enjoying protection under the right to private and family life. If the state refuses to recognise a formal relationship between the parent and the child based on the law of another state, it undermines the child's personal identity in the particular society and will commonly be contrary to the principle of the best interest of the child (Mennesson v France dated 26 June 2014, application No. 65192/11, paragraphs 96 and 99: in this case, the ECtHR also found a contradiction with the best interest of the child born to the surrogate mother on the grounds that the unrecognised parent was also a biological parent).

35. Even in the instant case, the contested decision is not in the best interest of the child. The reality in this case is that the child (third complainant) lives in the family with the first and second complainants, who are not only his de facto parents in fact, but also legal parents in the place where the complainants reside permanently. It is in the interest of the child to allow the development of a relationship with the adult person who looks after them and cares for their nourishment and education and to whom the child has emotional bonds if there are no doubts concerning the care quality provided by the specific adult person. As a matter of fact, the contested judgment undermines the child's de facto and (in the place of domicile also) formal legal family bonds. It is also contrary to the child's right to recognition of their identity if it refuses to recognise a legal relationship with one of their parents.

36. The Constitutional Court emphasises that in this case it has not even found any arguments to suggest that the best interest of the child could consist in a decision other than the recognition of the complainants' parenthood. For instance, such arguments could include the issues of the relationship of the children to biological parents or other caregivers or the need to prevent trafficking in children. However, no such arguments have arisen in the instant case.

37. In fact, the third complainant is the biological son of the first or second complainant. The first and second complainants have decided not to find out who the biological father of the child is, while there is a possibility that it is either one of them – that is expressed by their right to information self-determination, and therefore it is not even possible for public authorities to demand that the the biological father of the child be determined. As far as the mother is concerned, the third complainant never had a mother in legal terms and there is no woman who could seek custody of the third complainant. The case docket implies that the woman who gave birth to the child is not his biological mother, as the egg was obtained from an anonymous donor, and for this reason, it is not even possible to determine who the biological mother of the child is. The first and the second complainants have been the parents of the third complainant since his birth. The third complainant has never had a mother in fact either. Exercising her free will and on the basis of a contractual arrangement upheld by the court prior to the birth of the child, the woman who gave birth to the child handed over the child to the custody of the first and second complainant immediately after the delivery.

38. It should also be pointed out that, in the instant case, there is no suspicion of illegal conduct on the part of the complainants, which means that, also through the existence of family life between the complainants, it is different from the ECtHR Judgment in the case of Paradiso and Campanelli v Italy

dated 24 January 2017, application No. 25358/12, in which the ECtHR did not find any violation of the complainants' rights consisting in the fact that the Italian authorities had refused to recognise the decision on determination of parenthood from abroad.

39. The complainants intend to travel from time to time to the Czech Republic, where part of the complainants' wider family live. When travelling here, however, the second and third complainants, whose relationship the Czech Republic has not yet been recognised, may face several difficulties, whether in the areas of healthcare provided to the third complainant or in the area of border control, and so forth, as described in the constitutional complaint by the complainants and the guardian of the third complainant as well. In this respect, the current situation is also contrary to the requirement for the protection and safety of a particular child, as on the other hand, this situation exposes the third complainant to the risk of a number of inconveniences and difficulties, if accompanied only by the second complainant. In addition, what cannot be underestimated is the child's interest in material security and the absence of his right to maintenance or inheritance in the Czech Republic vis-à-vis the second complainant, in the event that any such relevant situation occurs in the future.

40. The Constitutional Court therefore concludes that it is in the best interests of the third complainant to have his factual and (in the country of residence also) legal relationship with the second complainant as a parent recognised in the territory of the Czech Republic as well. If this relationship were not recognised, then in the Czech Republic, the third complainant would be forever deprived of the possibility of development and upbringing in a full family in which he is actually growing up.

C. The Right of the Second and Third Complainant to Family Life

41. The reason provided by the Supreme Court in the contested judgment for the non-recognition of the Californian judgment in relation to the parenthood of the second complainant consisted in the protection of the traditional family, i.e. the fact that the child could not have two parents of the same sex. This is obvious from the reasoning of the contested judgment, which refers to the judgment of the Constitutional Court protecting the traditional family and the undesirability of the situation in which the child would have two parents of the same sex.

42. In its case law, the Constitutional Court accepts the protection of the traditional family as a legitimate aim [see, for instance, Judgment file reference Pl. ÚS 10/15 dated 19 November 2015 (44/2016 Coll.); or more specifically the Judgment file reference Pl. ÚS 7/15 dated 14 June 2016 (234/2016 Coll.), especially paragraph 37]. After all, this aim is accepted as legitimate by the ECtHR case law as well (X. and others v Austria dated 19 February 2013, application No. 19010/07, paragraph 138). In addition, refusing to allow for the child to have two parents of the same sex may also serve to protect the child's interest, which is undoubtedly a legitimate interest.

43. However, the interest in protecting the traditional family, even though it is generally a strong legitimate interest, cannot outweigh all contradictory interests. For instance, in the above-quoted Judgment file reference Pl. ÚS 7/15, the Constitutional Court did not find this reason sufficient to justify the disparate treatment of civil partners when adopting children. The Constitutional Court emphasised that such an approach turns civil partners into de facto "second class" persons, groundlessly imposing on them a certain stigma, evoking the idea of their inferiority, the fundamental difference from others (apparently "normal" ones), and possibly even the incapacity (unlike other persons) to properly take care of the children.

44. In the instant case, the Constitutional Court primarily considers it essential that the contested judgment refuses to formally recognise the existing parent-child relationship between the second and third complainants. The complainants reside in the USA, where they create a formally recognised family. It is therefore a completely different situation than in the case of creating a new family relationship.

45. As already stated above, case law of both the Constitutional Court and the ECtHR clearly emphasises that in the case when there is already a family life established between individuals, it is the duty of all public authorities to act in such a manner that this relationship may develop and legal guarantees must be provided to allow the integration of the child in a family (see paragraph 33 above). According to the ECtHR, it is essential that a de facto family life be legally recognised (see, for instance, X. and others v Austria, paragraph 145). For instance, the ECHR found discrimination on the

grounds of sexual orientation if the state did not allow same-sex couples adoption by the second parent ("second parent adoption", "l'adoption coparentale") in the event that it had allowed it for unmarried couples of different sexes (X. and others v Austria, quoted above).

46. Even though the complainants enjoy a family life, then when visiting the Czech Republic, at the moment of disembarking an aircraft at Václav Havel Airport, any legal relationship between the second and third complainant ceases to exist as a consequence of the contested judgment. This is solely due to the fact that the first and second complainants are a homosexual couple, i.e. on the grounds of their sexual orientation. In the Czech Republic, the contested judgment thus turns the first and second complainant into second-class individuals on the grounds of their sexual orientation, even though, as already adjudicated by the Constitutional Court, sexual orientation is not a matter of choice but rather a personal characteristic which cannot be changed (see the above-quoted Judgment file reference Pl. ÚS 7/15).

47. According to the Constitutional Court, in this specific case, it is unacceptable that such a stigmatisation of the complainants should occur under the pretext of maintaining traditional family values. Once again, it needs to be emphasised that in the instant case, the complainants live as a family in the place of their domicile. This applies not only de facto but also legally, as the first and second complainants are spouses in the USA and registered parents of the third complainant. Recognising the parenthood of the second complainant thus does not consist in creating a new relationship. It is a situation substantially different from allowing the establishment of new family relationships between homosexual couples and children, which is at the full discretion of the legislature, who is not obliged to lay the legal foundations for such relationships if substantiated by the protection of the traditional family.

48. Recognising the parenthood of the second complainant does not have a negative impact on the interests of any third parties, and it is not capable of jeopardising the traditional family either. In addition, the Constitutional Court has not found any negative impact on children's interests, i.e. on the interests of the third complainant in this particular case, which are essential. On the contrary, as concluded above, the contested judgment is contrary to the best interest of the child.

49. What also amounts to an interference with the rights of the second complainant is the fact that the Judgment of the Supreme Court dated 22 May 2015, through which the first complainant was recognised as the parent of the third complainant, does not make it at all obvious why the Supreme Court decided to recognise the parenthood of the first but not the second complainant. At the same time, though, both the first and second complainants have had an identical factual and legal relationship with the third complainant, and they both enjoy identical parental rights under the originally recognised Californian judgment. The decision in favour of the parenthood of the first complainant and to the detriment of the second complainant is thus an arbitrary and unsubstantiated interference with the rights of the second complainant.

50. The Constitutional Court emphasises in its established case law that it respects the legitimate interest in protecting the traditional family. However, in this specific case, when allowing the complainants' application, it would not have been jeopardised in any significant manner, as it would not have resulted in creating any new family relationship but rather recognising the existing bond. After all, the Supreme Court, by means of its first judgment in relation to the complainants' family (dated 22 May 2015) recognised that recognising parenthood out of surrogacy or recognising the realisation of the parenthood of a homosexual couple through surrogacy had not amounted to a manifest violation of the Czech public order. The Constitutional Court does not have jurisdiction to interfere with either of these conclusions of the Supreme Court, as this decision has not been contested by means of a constitutional complaint and must thus be accepted by the Constitutional Court as the context in which it decides on the complaint of the second and third complainant. Therefore, the interference with the family life of the second and third complainants and disparate treatment of the second complainant (albeit reasoned with a legitimate interest in protecting the traditional family) is not appropriate in this particular situation.

51. The duty of the state to respect the right to a family life does not merely consist in the fact that it must not prevent individuals with mutual family bonds from residing together and realising these relationships. In the event that there has already been a family life established between individuals on a lawful basis, it is the duty of all public authorities to act in such a manner that this relationship may

develop and it is necessary to respect the legal guarantees protecting the relationship of the child and their parents. The contested judgment, dismissing the recognition of the family bond between the second and third complainants, thus violated the right of the second and third complainants to respect for family life under Art. 10, para. 2 of the Charter.

D. The Right not to be Discriminated Against in the Right to Respect for Family Life

52. The first and second complainants further allege that they were treated in a discriminatory manner as an unmarried heterosexual couple would have been treated differently, and both parents would have been registered in the Czech birth certificate without further notice. However, it was not necessary to deal with this argumentation of the first and second complainants any further, as the Constitutional Court found that the rights of the first complainant had not at all been interfered with, as the Supreme Court had allowed his application in its entirety. As far as the rights of the second complainant are concerned, the Constitutional Court, in its decision stipulated above, recognised his parental rights, owing to the existence of family life between the second and third complainants. In this respect, the Constitutional Court merely notes that it did not find any interference with the first complainant's right to family life because his parenthood in relation to the third complainant had been recognised and the contested judgment did not interfere with his relationship with the second complainant either.

E. Other Objections of the Complainants

53. The Constitutional Court adds that, in the contested judgment, it did not find any violation of the complainants' right to due process, even on the grounds that the Supreme Court allegedly lacked jurisdiction on the matter. According to them and the guardian, the matter should have been decided by the District Court pursuant to § 63 of the PILA regulating the recognition of adoption decisions.

54. Above all, the Constitutional Court notes that it was the complainants themselves who filed the application with the Supreme Court, rather than the District Court. The issue of whether ordinary courts should have proceeded in accordance with § 55 of the PILA or § 63 of the PILA is primarily an issue of interpretation of the sub-constitutional law, which is beyond the Constitutional Court's jurisdiction, subject to exceptions. The Constitutional Court has not found, in the interpretation of the Supreme Court, any arbitrariness or obvious error. Furthermore, as the Constitutional Court has already found above, the judgment of the Californian Court, the recognition of which was sought by the complainants, is a judgment determining the complainants' parenthood, not concerning adoption at all. Recognising the judgments determining parenthood falls within the scope of jurisdiction of the Supreme Court.

F. Conclusion

55. The Constitutional Court thus concludes that failure to recognise a foreign decision determining parenthood to a child of two persons of the same sex in a situation in which family life was de facto and legally constituted between them in the form of surrogacy on the grounds that Czech law does not allow the parenthood of two persons of the same sex is contrary to the best interest of the child protected by Article 3, para. 1 of the Convention on the Rights of the Child. In the case that there has already been a family life established between individuals on a legal basis, it is the duty of all public authorities to act in such a manner that this relationship may develop and it is necessary to respect the legal guarantees protecting the relationship of the child and their parents. The Supreme Court therefore erred when dismissing the application seeking the recognition of the decision on determining the parenthood of the second complainant towards the third complainant. Allowing the application was not barred by the provisions of § 15, para. 1, letter e) of the PILA applied by the Supreme Court.

56. Pursuant to § 15, para. 1, letter e) of the PILA, it is impossible to recognise a foreign decision if the recognition obviously violated public order. The reserve of public policy must be perceived as a defence against the consequences of the application of foreign law which is unbearable and unsustainable in the domestic environment. Public policy is an indefinite legal term which undoubtedly provides space for constitutional interpretation. What may hardly violate the Czech public order is a situation which is, on the contrary, fully consistent with the constitutional order of the Czech Republic, i.e. the fundamental values of the Czech legal order, as explained above. It should be noted that even any contradiction with the public order and private international law may not be, in general, used as an

argument for violating the fundamental rights of the parties to the proceedings and ignoring the best interests of the child, as emphasised in the case law of the European Court of Human Rights (Mennesson v France dated 26 June 2014, application No. 65192/11, paragraph 84).

57. At the same time, it should be noted that application of this provision requires not only that a foreign decision should be contrary to public order, but that it should also be "obvious". This means that the application of this institute is limited to exceptional cases in which it has been established that there is a genuine and sufficiently serious threat to any of the fundamental interests of society (cf. a similar interpretation of the Court of Justice of the European Union in the context of the EU law – for more details, see BŘÍZA, Petr, BŘICHÁČEK, Tomáš. § 4 Výhrada veřejného pořádku [§ 4 Reserve of Public order]. In: BŘÍZA, Petr, BŘICHÁČEK, Tomáš, FIŠEROVÁ, Zuzana, HORÁK, Pavel, PTÁČEK, Lubomír, SVOBODA, Jiří. Zákon o mezinárodním právu soukromém [Private International Law Act]. Prague: C. H. Beck, 2014, p. 24). However, in the contested judgment, the Supreme Court failed to explain how it perceived the serious threat to the fundamental interest of society in the event of recognition of the parenthood of the second complainant to the third complainant. Even if we disregarded the necessary constitutional law argumentation mentioned above, it cannot be inferred from the fact that the Czech law does not foresee the parenthood of two persons of the same sex that this situation in the case of the complainants' facts is so intensely contrary to public order to amount to a manifest contradiction. Czech law already recognises the possibility that a child will have two parents of the same sex. If one of the parents changes their gender, they do not cease to be the parent of their child. Thus, if this option is permitted by our legal order and one of the parents is not deprived of parental rights and obligations after the change of their gender, the existence of a child with same-sex parents is generally acceptable from the perspective of public order. The manner in which such a situation has arisen is not essential from the perspective of the best interest of the child. What matters is the impact on the child's personal situation, i.e. who is responsible for them, who should nourish the child, from whom the statutory succession passes onto the child, etc. After all, there is a causal link between the decision of the second complainant to have a child and the birth of the third complainant and therefore, the second complainant should bear the parental responsibility for that decision. As the guardian of the third complainant noted in her statement, one may also refer, for instance, to the fact that the legal order itself already takes into account that children are brought up by same-sex couples. Pursuant to § 13, para. 3 of the Civil Partnership Act, if one of the partners takes care of the child and both partners share a common household, the other partner is involved in raising the child as well; child protection and development obligations also apply to this partner.

58. It should also be noted that the need to prioritise the best interest of the child and the conclusion that it does not manifestly violate the public order as for the recognition of the social parenthood of a same-sex couple acquired through surrogacy has also been emphasised by doctrinal opinions, even though they are generally critical towards the institute of surrogacy (see KRÁLÍČKOVÁ, Z. Mater semper certa est! O náhradním a kulhajícím mateřství [Mater semper certa est! On Surrogate and Limping Motherhood]. Právní rozhledy No. 21/2015, p. 731).

59. It may be added that, in the instant case, the best interest of the child serves as an interpretative rule when interpreting indefinite legal concepts of "public order" and "manifestly violate public order" in a particular case considered by the court. Therefore, the best interest of the child was not used to deny the unambiguous wording of the act, which is considered inadmissible by the Office in its opinion.

60. Finally, the Constitutional Court considers it appropriate to reiterate that the present case did not concern generally allowing parenthood to same-sex couples, let alone joint adoption by homosexual couples. The Constitutional Court merely decided whether the factual and legal reality will be recognised in the Czech Republic, i.e. whether the second complainant has the right to protection of his family life already de facto and legally established with the third complainant and the failure to recognise that the family bond amounts to a violation of the third complainant's right to have the best interest of the child as the primary perspective when making decisions concerning him.

61. For the reasons specified above, pursuant to the provision of § 82, para. 2, letter a) of Act No. 182/1993 Coll., on the Constitutional Court, the Constitutional Court allowed the constitutional complaint of the second and third complainant, as it had found that by means of the contested judgment, the Supreme Court had violated the duty to take into account as the primary perspective the best interest of the child under Art. 3, para. 1 of the Convention on the Rights of the Child, and had

violated the right of the second and third complainant to family life. Pursuant to the provision of § 82, para. 3, letter a) of the same act the Constitutional Court thus annulled the contested judgment. On the contrary, the Constitutional Court dismissed the complaint of the first complainant as inadmissible, being manifestly unfounded, pursuant to the provision of § 43, para. 2, letter a) of Act No. 182/1993 Coll., on the Constitutional Court, as amended, as it did not find that the contested judgment had interfered with the rights of the first complainant.
Instruction: The Judgments of the Constitutional Court cannot be appealed.

In Brno, 29 June 2017

Kateřina Šimáčková
Presiding Judge