Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

The First Czech Case of Full Recognition of Same-Sex Parenthood Established through Surrogacy

Question(s) at stake:

Does refusal to recognize the legal relationship between two same-sex parents and their child, born through a surrogacy agreement outside of the Czech Republic, contradict the principle of the best interest of the child?

Outcome of the ruling:

Where there is a pre-existing family life – established both de facto and legally – on the basis of a surrogacy agreement, it is inconsistent with the principle of the best interest of the child – enshrined in Article 3 of the Convention on the Rights of the Child (CRC) – to refuse recognition of a foreign court decision that establishes parenthood of a same-sex couple on the basis that their parenthood is impermissible under Czech law.

Topic(s):

- Personal Status, Family and Inheritance

Keywords:

- Fatherhood
- Kinship and filiation
- Public order
- Situations created abroad
- Surrogate parenthood/motherhood

Tag(s):

- Parentage

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Country:

Czechia

Official citation:

Constitutional Court of the Czech Republic, Judgement of 29 June 2017, I. ÚS 3226/16 (I. ÚS 3226/16 ze dne 29. 6. 2017)

Link to the decision:

https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezy/2017/I._US_3226_16_an.pdf

ECLI:

ECLI:CZ:US:2016:1.US.3226.16.1

Date:

29 June 2017

Jurisdiction / Court / Chamber:

Constitutional Court

Remedy / Procedural stage:

Last instance, exceptional revision for the reasons of possible interference with individual rights protected by the constitutional order.

Previous stages:

- Supreme Court of the Czech Republic, case number: 28 Ncu 187/2015-6

Subsequent stages:

- • Supreme Court of the Czech Republic, case number: 28 Ncu 139/2017-11

Branches / Areas of law:

Private international law; Conflict of laws; Human rights

Facts:

A gay couple, one Czech and the other Danish, resorted to surrogacy in California. The gametes were donated by an anonymous female donor and both of the future fathers – they used a mixture of their sperm. Following the surrogacy arrangement, the identity of the biological father remained unknown to the two men. The Supreme Court of the State of California, District LA, consummated the surrogacy arrangement. It ruled that the surrogate mother was not a legal parent of the child yet to be born and that the same-sex couple would be recognized as the legal parents. Accordingly, when the child's birth certificate was issued, it mentioned the men's names as parents. The Czech man was registered as the male parent while the Danish man was registered as a female parent.

The couple then applied to the Municipal Council of Prague 1 for a certificate of Czech citizenship for the child. For children of Czech citizens born abroad, obtaining the certificate of citizenship is a mandatory step for being registered in the Czech Civil Registry and accordingly, for a Czech citizen's parental status to be recognized and registered by the competent administrative body. The body competent for registration (*de facto* recognition) is the Special Civil Registry Office for Registration of Foreign Origin Civil Registry Changes (further as the Special Civil Registry).

The Municipal Council of Prague 1 advised the applicants to submit an application to the Supreme Court of the Czech Republic to obtain recognition for the foreign court decision on the establishment of their parenthood in accordance with the provisions of the Act on Private International Law (Act on PIL) no. 91/2012 Coll. (para. 55 in conjunction with para. 51 of the Act on PIL).

After the couple submitted their claim, the Supreme Court recognized only the parenthood of the Czech father. It applied a provision of the Act on PIL stipulating that “it is sufficient for a recognition of foreign judgement establishing parenthood that this decision was reached in compliance with the local law’’. The Supreme Court ruled that the fact that the parenthood had been established through a surrogacy agreement was not incompliant with the Czech law. Consequent to this decision, the Municipal Council of Prague 1 granted citizenship to the child and the Special Civil Registry issued a birth certificate in which the Czech man was named. The name of the mother was left blank.

Consequently, the Danish father submitted a new claim to the Supreme Court requesting the *full* recognition of the foreign court’s decision, i.e., recognition of his legal relationship with the child. In this second proceeding, the Supreme Court decided that recognizing the other father’s relationship with the child would breach public order according to para. 15(1) lit. e) of the Act on PIL. The court specified that doing so would be to *de facto* legalize joint adoption by same-sex partners, which is not allowed under the Czech substantive law. The Czech substantive law only allows joint adoption by a married couple, and this couple needs to be heterosexual as the Czech law defines marriage as a union between a man and a woman. The court also noted that defining the limits of same-sex couples’ access to legal parenthood was a matter to be solved at the level of legislature and not by judiciary.

Eventually, the couple submitted the claim to the Constitutional Court of the Czech Republic where they argued that although they were residing in California, they often travelled to the Czech Republic. They claimed that these trips were fraught with legal risks since the Danish father had no legal relationship with the child in the territory of the Czech Republic. Thus, in case of a need to act on behalf of the child, e.g., an emergency medical treatment, the family was exposed to legal uncertainty as the Danish father might not be allowed to make decisions on behalf of his child. The same was true in situation where the Danish father would enter the Czech Republic alone with the child.

The child was represented by a procedural guardian, i.e., a lawyer with role to make claims on behalf of the child in this particular proceeding, as the interests of the parents could be contrary to the child's interests. The procedural guardian suggested that in order to respect the best interest of the child, the Court should comply with the claim since the complainants were already forming a family with the child.

Ruling:

The Constitutional Court invited the Office for International Protection of Children (hereafter the Office) to make a third-party intervention in the proceeding. In its intervention, the Office contested the way in which the recognition had been evaluated under the Act on PIL. The Office suggested that the matter should have been regarded as a foreign decision on adoption instead of a foreign decision on the establishment of parenthood. The Office suggested therefore that the Constitutional Court should quashed the previous judicial decision. In addition to that, the Office claimed that discrimination has taken place because the Czech father had been treated better than the Danish father.

The Constitutional Court thus reviewed first the objection that the best interest of the child had not been respected and then the objection that there had been discrimination.

The Court found that family life had been established by the complainants and the child. According to the Court, the complainants had been acting as social parents to the child in the US, and according to US law, they were also legal parents. Additionally, the Court stressed that it was not clear which of the men was the biological parent. The Court found that Article 8 of the European Convention on Human Rights applied both to the relationship between the men, as well as to the relationship between them and the child.

Regarding the relation between the institute of adoption and the surrogate agreement, the Court argued that in the case of the surrogate agreement that there had previously been no legal parents before the parents who signed the agreement. In the court's understanding, in such a case, the parenthood is

judicially established before the child is born and becomes effective at the moment of birth. Therefore, the qualification contested by the third-party intervention was originally conducted in compliance with the law, because the given situation is to be qualified as a foreign decision on establishment of parenthood rather than a foreign adoption order.

Regarding the possible interference of the institute of surrogacy agreement with the public order in the Czech Republic, the Court noted that Czech law does not regulate the institute of surrogacy agreement, while Californian law makes this agreement legal and California is the jurisdiction in which the couple concluded it. The court therefore agreed that surrogate agreement was not against the Czech public order.

The Court then examined whether the best interest of the child was taken into account in a due manner in the appealed decision. It noted that when adjudicating on matters impacting an individual child, the argumentation for such decision must indicate that the best interest of the child was taken into consideration. The Court found that the appealed decision did not mention the best interest of the child. The previous instance court merely considered whether legalising same-sex parenthood would pose an interference with the public order.

The Court noted that according to the Convention on the Rights of the Child (CRC), the best interest of the child has not only the above-mentioned procedural role, but is also a substantive right and an interpretative principle. With reference to UN CRC General Comment No. 14, the court ascertained that a case where the language interpretation does not lead to unambiguous results, the interpretation must most effectively support the best interest of the child.

According to the Court, the subject matter in this decision is the determining whether or not a legal parent-child relationship exists. In other words, the decision is concerned with a status question. The Court notes that the regulation of status is primarily in the hands of the legislator. However, this decision does not lead to establishing a new form of parenthood but instead to a formal recognition of an already-existing parental relationship between the complainants

and the child. “The legal bond between the subjects would not be established by this decision but the Court would merely recognize a legal bond constituted by the legal order of the state where the complainants permanently live’’. Thus, the Court found that the appealed decision was not in the best interest of the child. Contrariwise, it would be in the best interest of the child to have his relationship with his parents validated in the state of residence and also recognized in the Czech Republic.

The Court noted that in this case, the complainants did not attempt to act illegally or avoid the law of the forum (referring to the case of *Paradiso and Campanelli v Italy*, App. No. 25358/12, 24 January 2017). They permanently lived in California; thus, they did not travel there for the purpose of avoidance of law.

Finally, the Court addressed the arguments applied by the court of previous instance as overruling. The Court reasoned that the argumentation of the appealed decision implies that the Californian decision on establishment of parenthood was denied recognition to protect the traditional family. At the same time, it claimed that although the protection of the traditional family is generally a strong and legitimate interest, it cannot outweigh all competing interests. The Court stressed that according to its interpretation, the decision did not concern the creation of a new form of family. It was, rather, about recognizing a pre-existing form of family. Additionally, the Court named numerous situations where the couple could face hindrances of the exercise of parental responsibility due to the non-recognition of the parenthood of both fathers. It concluded that it was “unacceptable that such stigmatization of the complainants would take place with the aim of protecting traditional family”. The Court thus concluded that the interference in the family life of the complainants and the different treatment given to the Czech and Danish father was not proportionate to the aim sought.

In the end, the Court ruled that it would be incompliant with the principle of the best interest of the child – protected by Article 3 of the CRC – to refuse to recognize a foreign court decision establishing a same-sex couple’s parenthood when there is a pre-existing family life – both *de facto* and legally – through a surrogacy agreement on the basis that same-sex parenthood is not allowed under

the Czech law. As a result, the decision was returned to the lower court with a binding effect of the Constitutional Court's opinion.

Main quotations on cultural or religious diversity:

- "In the adjudication of matters regarding children, abstract principles cannot be prioritized before the best interest of the child". (I. ÚS 3226/16, para. 27)
- "The legal bond between the subjects would not be established by this decision. The Court would merely recognize a legal bond established by the legal order of the state where the complainants permanently live". (I. ÚS 3226/16, para. 32)
- "The application of provisions of Private International Law should not prevail over the social reality and the best interest of the child, which plays a primary role". (I. ÚS 3226/16, para. 34)
- "If the forum state refuses to recognize a formal relationship between a parent and a child established [previously] by a legal order of another state, it undermines the identity of the child in the local society and will therefore most often undermine the best interest of the child". (I. ÚS 3226/16, para. 34)
- "The argumentation of the appealed decision implies that the Californian decision on the establishment of parenthood was denied recognition to protect the traditional family. [...] The protection of traditional family, while generally a strong and legitimate interest, cannot outweigh all competing interests". (I. ÚS 3226/16, para. 41, para. 43)
- "It arises from the sustained case law of the Court that the legitimate interest of protecting the traditional family must be safeguarded. In this case, however, the interest would not be interfered with substantively because the Court does not establish any new form of a family but rather recognizes an already existing family". (I. ÚS 3226/16, para. 50)

- “Not recognizing a foreign court decision establishing the parenthood of two people of the same sex, due to the fact that same-sex parenthood is not allowed under the Czech law would be incompliant with the principle of the best interest of the child protected by Article 3 of the CRC. In a situation where family life between the subjects already legally exists, the relevant public authorities must act to let this relation develop and to respect the legal guarantees protecting the relationship of the child and its parents” (I. ÚS 3226/16, para. 55).

Main legal texts quoted in the decision:

- Para. 55, para. 63 of Act on Private International Law (Act on PIL) no. 91/2012 Coll.
- Civil Code, Act no. 89/2012 Coll.
- Article 2(2) of the Constitution of the Czech Republic, Act no 1/1993 Coll.
- Article 10(2) of the Charter of Rights and Freedoms of the Czech Republic, Act no 2/1993 Coll.
- Article 8 of the European Convention on Human Rights
- Article 3 of the Convention on the Rights of the Child
- General comment No. 14 on the right of the child to have his or her best interests taken as primary consideration, from 29 May 2013, CRC/C/GC/14, para. 6 and para. 29

Cases cited in the decision:

European Court of Human Rights:

- *Anayo v. Germany*, App. no. 20578/07, 21 December 2010 ECLI:CE:ECHR:2010:1221JUD002057807
- *Gözüm v. Turkey*, App. no. 4789/10, 20 January 2015 ECLI:CE:ECHR:2015:0120JUD000478910
- *Menneson v. France*, App. no. 65192/11, 26 June 2014 ECLI:CE:ECHR:2014:0626JUD006519211

- *Paradiso and Campanelli v. Italy*, App no. 25358/12, 24 January 2017 ECLI:CE:ECHR:2017:0124JUD002535812
- *Penchevi v. Bulgaria*, App no. 77818/12, 10 February 2015 ECLI:CE:ECHR:2015:0210JUD007781812
- *Wagner and J.M.W.L. v. Luxembourg,* App. no. 7624/01, 28 June 2007 ECLI:CE:ECHR:2007:0628JUD007624001
- *X and Others v. Austria [GC]*, App. no. 19010/07, 19 February 2013 ECLI:CE:ECHR:2013:0219JUD001901007

Constitutional Court of the Czech Republic:

- ÚS 709/05
- ÚS 1554/14
- IV. ÚS 2244/09

Commentary

The First Czech Case of Full Recognition of Same-Sex Parenthood Established through Surrogacy

This was the first case in which a same-sex couple sought to have their legal parenthood recognized in the Czech Republic following a surrogacy arrangement abroad. It therefore raised widespread media and scholarly attention.

Some critical academic commentaries arose as well. The critical perspective argued that the Court seemed to have prioritized the best interest of the child over the Czech public order. However, the Czech public order also aims to protect the best interest of the child. This set the stage, therefore, for a clash of two different ideological conceptions of how the best interest of the child should be protected. In the end, the Czech Constitutional Court chose the foreign conception (Telec 2017).

Other commentaries considered the activism of the Constitutional Court as it is currently composed (e.g. Koudelka 2017; Břicháček 2017). Through their personal blogs, the critical scholars suggested that this argumentation of the Court might be used in the future to legalize polygamy and increases uncertainty about the

content of the Czech legal provisions.

The fact that the Constitutional Court is composed of more liberal than conservative judges has been pointed out by a legal scholar, whose textbook on Czech Private International Law was referred to as a part of the Court's argumentation. He disagreed with the Court's interpretation of his book and argued that the Court used it to "advocate for leftist-progressive visions and destruction of the concept of public order" (Břicháček 2017).

Presently, the legislators do not aim to address this issue, probably due to its political nature. This leads to a situation that is unfair to same-sex couples that are unable to afford similar treatments abroad.

Literature related to the main issue(s) at stake:

- Břicháček, Tomáš. 2017. "PRÁVO: Pokrokáři v talárech", available at: https://neviditelnypes.lidovky.cz/spolecnost/pravo-pokrokari-v-talarech.A170801_230006_p_spolecnost_wag/tisk accessed 27 May 2024.
- Bříza, Petr, Tomáš Břicháček, Zuzana Fišerová, Pavel Horák, Lubomír Ptáček, Jiří Svoboda. 2014. Zákon o mezinárodním právu soukromém. Praha: C.H. Beck.
- Koudelka, Zdeněk. 2017. "Ústavní soud - ohrožení demokracie", available at: http://blog.aktualne.cz/blogy/zdenk-koudelka.php?itemid=29650 accessed 27 May 2024.
- Králíčková, Zdeňka, 2015. "Mater semper certa est! O náhradním a kulhajícím mateřství". Právní rozhledy, 23(21), 725-732.
- Mostowik, Piotr (ed.). 2019. Fundamental Legal Problems of Surrogate Motherhood: Global Perspective. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości.
- Pauknerová, Monika, Naděžda Rozehnalová, Marta Zavadilová et al. 2013, Zákon o mezinárodním právu soukromém. Komentář. Praha: Wolters Kluwer ČR.
- Peng, Lina. 2013. "Surrogate Mothers: An Exploration of the Empirical and the Normative". American Journal of Gender, Social Policy and the Law, 18

(3), 555-582.

- Telec, Ivo. 2017. "Kritický pohled na nález Ústavního soudu: uznání kalifornského rodičovského statusu stejnopohlavního manžela" available at: < https://zdravotnickepravo.info/kriticky-pohled-na-nalez-ustavniho-soudu-uznani-kalifornskeho-rodicovskeho-statusu-stejnopohlavniho-manzela/> accessed 27 May 2024.

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