



FIRST SECTION

CASE OF X v. POLAND

(Application no. 20741/10)

JUDGMENT

Art 14 (+ Art 8) • Discrimination • Family life • Refusal to grant applicant full parental rights and custody over her youngest child based solely or decisively on considerations regarding her sexual orientation • Decisive and discriminatory reliance on importance of male role model

STRASBOURG

16 September 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of X v. Poland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Ksenija Turković, *President*,

Krzysztof Wojtyczek,

Gilberto Felici,

Erik Wennerström,

Raffaele Sabato,

Lorraine Schembri Orland,

Ioannis Ktistakis, *judges*,

and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 20741/10) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Ms X (“the applicant”), on 18 March 2010;

the decision to give notice to the Polish Government (“the Government”) of the complaints concerning Article 6 and Article 14 taken in conjunction with Article 8 of the Convention;

the decision not to have the applicant’s name disclosed;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the Polish National Chamber of Legal Advisers (*Krajowa Izba Radców Prawnych*), the Institute of Psychology of the Polish Academy of Sciences, the Ordo Iuris Institute for Legal Culture, and ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association) on behalf of ILGA and four other organisations: the FIDH (International Federation for Human Rights), KPH (the Campaign Against Homophobia), NELFA (the Network of European LGBTIQ* Families Associations) and the ICJ (International Commission of Jurists), organisations that the President of the Section had authorised to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court);

Having deliberated in private on 6 July 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant alleged that she had been discriminated against on the basis of her sexual orientation in proceedings for full parental rights and custody rights over her youngest child.

THE FACTS

2. The applicant was born in 1970 and lives in L. The applicant was represented by Ms K. Kędziora, a lawyer practising in Warsaw.

3. The Polish Government (“the Government”) were represented by their Agent, Ms J. Chrzanowska and, subsequently, by Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. In 1993 the applicant married Mr Y. Their first two children, A and B, girls, were born in 1993 and 1996 respectively. Afterwards, two boys were born, C in 1998 and D on 24 December 2001.

I. DIVORCE

6. A conflict between the applicant and her husband over custody of their children apparently started in 2005. At that time the applicant became involved in a relationship with another woman, Z.

7. In April 2005 the applicant applied for a divorce.

8. A serious disagreement between the applicant and her parents developed, as they did not accept her decisions about her personal life. They instituted proceedings in which they sought custody of her children. On 28 April 2005 the R District Court, sitting as a single judge, Judge D.T., granted them temporary custody of A, B, C and D. The applicant and her husband appealed against the decision. On 16 June 2005 the S Regional Court allowed their appeal and quashed the impugned decision. The court noted that although the family had been going through a difficult period due to the impending divorce, both parents had been caring for their children properly. There had been no justification for such a profound interference by the authorities and the children’s removal and placement in the custody of their grandparents. The appellate court also considered that the first-instance court had incorrectly and to the largest extent based itself on statements of the grandparents, ignoring other evidence.

9. On 6 June 2005 the S Regional Court granted a divorce in the proceedings initiated by the applicant. The court pronounced a no-fault divorce and granted the applicant full parental rights and custody of the parties’ four children. The applicant’s former husband’s parental rights were restricted. Neither the applicant nor Y appealed against the judgment; no written grounds for it were prepared. The divorce judgment became final on 28 June 2005.

II. FIRST SET OF CUSTODY PROCEEDINGS

10. On 2 October 2006 the applicant's former husband applied to change the custody arrangement ordered in the divorce judgment.

11. On 16 May 2007 an expert opinion was obtained from the Głogów Family Consultation Centre (*Rodzinny Ośrodek Diagnostyczno Konsultacyjny*, "RODK"). The experts were firstly asked to give an opinion on the existence of family bonds between all four children, the applicant, and Y. Secondly, they examined what parenting abilities (*predyspozycje wychowawcze*) both parents had, and which parent should be given full parental rights. Lastly, they were asked to consider whether the children's interests justified them being separated, so that some children would live with one parent and some would live with the other. The experts drew the following conclusions:

"On the basis of the assessments, it is established that the children, who are minors, are emotionally attached to both parents, however currently the father is of paramount importance (*pierwszoplanowy*) to them, [and] their relationship with the mother has been disrupted (*uległy zaburzeniu*).

The minors A, B and C have better contact with their father, [and] in [their] relations with him they are open, show their feelings and expectations, [and] feel secure, accepted and important.

In [their] relations with their mother, A and B have feelings of regret, rejection, [and a] lack of interest and understanding. The girls expect the mother to change her attitude towards them, withdraw from her relationship with Z, concentrate on matters relating to them, [and] take into account their expectations and feelings.

The minor D is disoriented in the family situation. In comparison with [his] older siblings, he demonstrates his frustration to a lesser degree, [since] he holds a privileged position in the family and receives more attention from the mother and her girlfriend. However, the results of the assessments show the child's serious emotional instability, which disrupts his social and cognitive development.

C still wishes to stay in his father's care, [and] rejects the possibility of returning to live with the mother because of strong traumatic experiences linked with her violent behaviour towards him. The boy has emotional bonds with his siblings, is in permanent contact with them, and wishes to be raised with them, in his father's care.

The assessments show that Y currently has better parenting abilities than [the applicant], more meaningful contact with the children, [and a] better understanding of their needs, and [he] meets their expectations to a larger extent.

The minors receive interest [from their father], trust him, [and] feel [that they are] important to him. He is stable in [his] relations with the children, [and] gives them a sense of stability. However, [the applicant] is at times excessively tense, irritated and erratic, which does not help their emotional stability and distances them from her emotionally. The applicant's excessive concentration on herself and on her relations with Z means that she is not involved in matters relating to the children to a sufficient degree, does not take into account their feelings and expectations, [and] requests acceptance of her behaviour in spite of the resistance and opposition from the children.

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In difficult situations relating to parenting, [the applicant] cannot cope with her emotions and can be too radical in her actions.

It would be possible for [the applicant] to continue to have care of the children, provided that she decisively corrects her attitude, excludes Z from family life, and continues psychological therapy aimed at improving her relations with the children.

Owing to [her] symptoms of excessive tension and impulsivity, the applicant should consult a psychiatrist.

It is proposed that A, B and D, who are relying on a positive change in the mother's attitudes and have ties to their current place of residence, conditionally remain in the care of [the applicant], with supervision from the court guardian.

The psychological situation of C indicates that he should stay in the care of his father and have relations with his siblings. [The applicant] should take actions to re-establish his trust and rebuild their relations.

In the event of a lack of positive change in [the applicant's] behaviour as a mother, it will be necessary to give direct care to the father, for the best interests of the children and for their further correct social and emotional development."

12. On 9 October 2007 another expert issued an opinion in which she answered a question from Judge D.T. as to what the children's preferences were. When questioned by the expert, the applicant had been directly asked whether she had had sexual intercourse with Z and whether she was a homosexual. The expert concluded that the children would prefer to live with their father. The opinion stated:

"[the applicant] was not and is not in a homosexual relationship with Z, who has sometimes stayed overnight owing to lengthy conversations, but they have not had sexual intercourse."

13. On 16 October 2007 the R District Court, sitting in a composition of one professional judge, Judge D.T., and two lay judges, granted the application by the applicant's former husband and restricted the applicant's parental rights in respect of her four children. The court granted full parental rights to Y and issued a custody order in his favour. It considered that the applicant's marriage had broken down because in 2004 she had started a relationship with another woman, Z.

14. The court took into account the wishes of the applicant's three older children – aged thirteen, eleven and eight at the time – to live with their father. The court noted that the applicant's former husband had started a new relationship and considered that the children had accepted his new partner. The court stated "[the applicant] doesn't want to abandon [her] excessive intimacy with Z in order to improve [her] relations with [her] children".

15. The court held:

"It is clear from the expert opinions that [the applicant], although declaring [that she has a] strong emotional bond with the children, does not notice their needs and problems and does not meet their expectations. She expects them to accept and submit

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to the current situation. She does not want to abandon her excessive proximity to Z for the sake of her relations with [the children].

When having contact with the children, [the applicant] is tense, irritated, erratic and aggressive. Her relations with the children are superficial ...

Her current parental behaviour is incorrect, owing to her personal problems and emotional involvement in a relationship with another woman, [a woman] who interferes with family life, evokes strong and negative feelings in the children, and destabilises the parenting atmosphere.

It would have been possible for the applicant to continue to exercise [her] parental rights, if she had decisively corrected her attitude, excluded Z from family life, and continued psychological therapy aimed at improving her relations with the children.

However, [the applicant] has not been able to correct her behaviour, in spite of the signals coming from the children and the clearly destructive influence which her serious involvement in the relationship with her girlfriend has on family life.

In comparison with [the applicant], Y is totally different. He has a mature approach to [his] parental duties. His attitude towards the children does not raise any concerns. In [his] relations with the children, he is warm, cordial [and] communicative, and able to have close contact [with them], ease tension, [and] encourage the open expression of feelings ...

The children, who are minors, are emotionally attached to both parents, however currently the father is of paramount importance to them, [and] their relationship with the mother has been disrupted ...

Taking into account those circumstances, the court considers that there has now been a change in circumstances, which justifies changing the ruling on the parties' parental rights over the children.

The court considers that there is no guarantee that the applicant will provide her children with the correct care, owing to her serious involvement in her relationship with Z.

Although the children did not accept the mother's relationship or her girlfriend, the applicant forced them to be nice to Z and show her respect.

The court considers that the applicant, despite declaring [that she has] a strong relationship with the children, is unable and actually unwilling to revise her behaviour, [and this] undoubtedly has a negative influence on the children's emotional and psychological development.

The court considers that, for the well-being of the children, at present it is necessary to grant Y parental rights and limit the applicant's parental rights."

16. The applicant appealed. In her appeal, she contested the court's conclusions that her children would prefer to live with their father and had not accepted Z. She complained that the experts had distorted their words, and that they were too young to be given responsibility for decisions about which parent they wanted to live with. The applicant emphasised that she had been the main carer for the children during the marriage and after its dissolution; her former husband had not spent time with all four children, and had either not used his contact rights or left the children with their maternal grandparents.

17. On 10 January 2008 the S Regional Court held a hearing at which the applicant's former husband proposed that the applicant retain custody of D. He acknowledged that his youngest child had a stronger bond with his mother and that taking custody of him, although possible, would be difficult. At the same hearing, the court dismissed the applicant's appeal.

III. PROCEEDINGS TO CHALLENGE THE JUDGE

18. On 26 May 2008 the applicant lodged an application whereby she challenged the impartiality of Judge D.T. She submitted that the judge had known her parents from the time when they had been lay judges, from 2000 until 2003. Her mother had worked at that court as a guardian since the 1980s. Moreover, the judge had clearly shown bias against the applicant in the past in granting her parents temporary custody of her four children. There had been no justification for such a decision, as had been noted by the appellate court in 2005. In the applicant's opinion, there was no doubt that the judge had sympathised with her parents and former husband.

19. On 2 June 2008 the R District Court dismissed the challenge. The court, which was the same court where the challenged judge sat, considered that there was no objective justification for challenging Judge D.T.'s impartiality.

20. The applicant appealed against the decision.

21. On 16 September 2008 the S Regional Court dismissed her appeal. The court considered that the applicant had failed to justify the allegation that Judge D.T. had the type of personal relationship with her parents which could raise doubts as to the judge's lack of impartiality.

IV. SECOND SET OF CUSTODY PROCEEDINGS

22. Subsequently, the applicant's three older children moved to live with their father, as ordered by the courts. The applicant refused to return her youngest child, D, to her former husband.

23. On 15 April 2008 the applicant had requested that the custody order be revised in respect of D and that she be granted parental rights. She had submitted that the child had always lived with her, even after the order of 16 October 2007. The child had strong emotional ties to her and refused to move to live with his father.

24. On 21 April 2008 the applicant obtained a private opinion from a psychologist, L.W.-M., concerning D, which confirmed that the child had a very strong bond with her, as he had lived with her all his life. He was less attached to his father. This opinion was not taken into account by the R District Court; however, it was referred to by the S Regional Court in the final ruling of 17 September 2009 (see paragraph 34 below).

25. On 25 April 2008 a “local assessment” (*wywiad środowiskowy*) report was drawn up by a court guardian. In the interview conducted, the child recounted a violent incident in which his father had attacked Z in his presence, which had had a negative impact on him. The child manifested his attachment to his mother throughout the interview and also expressed some fear of his father. The court guardian also commented positively on the mother as a carer for her child. The domestic courts referred to the report in all subsequent rulings.

26. On 8 May 2008 the R District Court, sitting as a single judge, Judge D.T., dismissed the applicant’s application for an interim measure by allowing her to retain custody of D for the duration of the proceedings. The judge relied on the expert opinion by the RODK of 16 May 2007 and the second opinion of 9 October 2007 (see paragraphs 11 and 12 above), considering them recent and relevant, although they had been issued in the previous set of proceedings. The court held that the father had showed that he was more able to care for D. He was emotionally stable and had a strong bond with the child. As regards the applicant, the court held that she “had concentrated excessively on herself and her relationship with her girlfriend (*przyjaciółka*)”.

An appeal by the applicant against that interim ruling was dismissed by the S Regional Court on 16 September 2008.

27. On 27 May 2008 the R District Court, sitting as a single judge, Judge D.T., ordered the court guardian to forcefully remove D from the applicant’s care. On 3 June 2008 the court guardian took the child from his kindergarten and handed him over to the applicant’s former husband. D was six years old at that time.

28. In the course of the proceedings, the R District Court ordered the same Głogów RODK to prepare a fresh expert opinion. The opinion, submitted to the court in March 2009, concluded that both the applicant and her former husband had similar parenting abilities. The experts considered that D should continue living with his siblings in a stable environment and be in permanent contact with his mother. In view of his age, the experts considered that the father’s role was more important for the child’s building of his “male role model” (“*męski wzorzec osobowy*”).

29. The court held a hearing on 8 June 2009 at which it heard evidence from the applicant and her former husband, Y. The latter explained that the maternal grandparents and D’s older siblings helped with everyday life and the raising of D. They would take D to school and pick him up on most days, and when Y had night shifts at work D would sleep at his maternal grandparents’ home. Before the court, Y stated:

“I did not contribute to the breakdown of the family. [The applicant] wanted such a solution, she took [Z] under her roof. I am against such an arrangement. They should not be raising D together. A child should be raised by a man and a woman, not by two women or two men. It is for natural reasons; we were created that way.”

30. On 8 June 2009 the R District Court, sitting in a composition of one professional judge, Judge D.T., and two lay judges, dismissed the applicant's application for amendment of the custody order of 16 October 2007 and for parental rights and custody rights over D. The court repeated the facts of the case which it had established on 16 October 2007 and re-examined the course of the proceedings since the divorce judgment in 2005. In respect of the period of time between 2005 and 16 October 2007, the date on which the same court had changed the custody arrangement with respect to the four children, the court stated:

“[the applicant] remained in a relationship with Z, whom she would meet in her flat and go for walks with, or to the cinema. The friend would also stay the night in [the applicant's] flat.”

31. The court noted the conclusions of the experts who had held that both the applicant and her former husband had a similar parenting approach and abilities as regards caring for D. They both aimed to secure the child's best development and accepted that the presence of both parents in his life was a necessity. The experts recognised that both parents had made attempts to cooperate with each other for the best interests of their youngest child. With respect to the father, Y, the court noted that in November 2008 he had had a child in a new relationship, but the relations between all siblings were good. Y did not live with his girlfriend and their child. The court noted that the arrival of a new brother had been difficult for D, but it had not led to his being neglected by his father.

32. The court decided that D should continue living with his siblings and father so that his correct emotional and social developmental needs could be met. The court stated:

“Leaving [D] to live with his father is also justified by the current stage of the child's development and the father's larger role in creating [the child's] male role model.”

The court also noted that since the child had been living with his father, the applicant had secured contact rights. She spent every weekend with D, more time than was provided for in the officially established arrangements, in agreement with her former husband. The court emphasised that it had been necessary for D's well-being for him to have regular contact with his mother.

33. The applicant appealed, claiming that D's best interests required that he return to live with her. She submitted that in his father's home, D's sisters and grandparents took care of him. The applicant relied on other private opinions submitted in the proceedings which emphasised that she had been the child's primary carer and had the strongest bond with him. Moreover, the child had clearly expressed his wish to live with the applicant, and the court had acknowledged that this did not necessitate further evidence. The applicant dismissed the court's arguments about the

importance of the “male role model” as arbitrary. She noted that the R District Court had failed to provide any jurisprudence of the national courts, including the Supreme Court, to support the argument that the gender of the parent with custody should be decisive in adjudicating on a parental dispute. She considered that the court had failed to examine many important elements and recognise that the interests of the child were of paramount importance. She also noted that her former husband had always been openly hostile to Z, had never accepted the applicant’s choices, and had presented his homophobic opinions to the court and the experts. He had repeated them to all the children and forbidden them to play with Z or even greet her. The court, however, when assessing D’s best interests, had failed to take into consideration the father’s approach to the applicant and her partner, and the negative influence which his behaviour must have had on the children.

Lastly, the applicant also raised the argument that the court’s decision had been discriminatory on the basis of her sexual preferences. The applicant argued that the main grounds for the court’s decisions had been her relationship with another woman.

34. On 17 September 2009 the S Regional Court dismissed the appeal. The court reiterated that both the applicant and Y had similar parenting abilities and attitudes. The court stated:

“It should be stressed that the opinion of the RODK has the advantage of being based on access to the files and the examination of all the persons concerned, which was not the case for the private psychological opinion, therefore it cannot be regarded as fully authoritative and decisive. There are and were no grounds for ordering another opinion from another RODK and an additional psychologist, because the existing expert opinion does not contain any deficiencies, contradictions or ambiguities and does not differ from the other evidence. There is no contradiction with the opinion of the psychologist L.W.-M., which, owing to the lack of aforementioned qualities, cannot constitute evidence in this case ...

The appellate court finds that the dismissal of her application was not on the grounds of the applicant’s sexual orientation, even if she perceives it that way. The issue of raising a child in a same-sex relationship is very controversial, but there was no need to examine it. However, the applicant’s relationship is a fact, therefore one of the circumstances of the case, and one which caused a particular reaction from the three older children that in turn led to consequences for the whole family, [something] which could not be ignored during the examination of [the applicant’s application to amend the custody order].

The applicant’s older children had difficulties in accepting their mother’s relationship, which is and should be understandable, as it is not a common situation with which children are familiarised from a very young age. On the contrary, very young people are confronted with a different family model every day, one which they perceive as natural, as they see this around, in their home or in the homes of their peers [or of] distant family members, on the street, at school. The minor D, unlike his older siblings, does not refer to his mother’s situation, [and] this is justified by his age, but as stated above, any declarations made by D should be seen through the prism of his extensive psychological and pedagogical knowledge, because without that it is

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impossible to properly balance the welfare of a growing child who has found himself in a situation which is emotionally very difficult.

The experts from the RODK took this situation into account and formulated certain conclusions with which it is impossible not to agree – the arguments of the experts regarding the role of the father and the need to grow up with siblings are most convincing and relevant. For any boy from a broken family, a male role model is important, and its importance increases as the child grows older. It is undoubtedly most desirable that this role model be the boy's father, whose parenting abilities are subject to examination in the course of the taking of evidence. However, in the case of [the applicant's former husband], there are no such objections, as he has the appropriate parental attitude, and it is also thanks to him that D's siblings have settled down, he himself also finds his place there, and it is important for the children to grow up together. Using other family members in exercising parental authority is not a sign of irregularity, and in the case of numerous offspring there is even a necessity, therefore such a ground of appeal does not automatically result in it being accepted.

When examining the appeal, one has to remember the circumstances in which the original decision on parental rights – contained in the divorce judgment and granting the applicant custody of her children – was changed. The change took place in 2007, and this was a period during which the applicant had been stabilising her personal life, something that had influenced her parental behaviour in such a way that important corrective measures had been necessary. The positive improvement in this field was confirmed by the most recent opinion by the RODK, which, in contrast to the previous [opinion], did not indicate that there were irregularities in the applicant's parental attitude. Her behaviour has improved over the years and can no longer raise objections. However, in the meantime, D has grown older. He is no longer a little child, and undoubtedly the role of [his] father, with whom he has been living for one year, has increased. Here again is the important element of being raised with siblings, and this has been categorically emphasised by the experts and is obvious from life. [There is a] need for stability, which in D's case means the necessity to spare him new changes, since those which he has already experienced have exceeded the adaptation capabilities of a small child ...

The [impugned] ruling is not discriminatory on the grounds of sexual preference, which is what the applicant relied on. It has to be noted that not all differences in how a person is approached amount to discrimination; it is important if the grounds for such an approach were rationally justified. In the circumstances of the case, the rational justification was that the siblings should stay [together] with one parent, since the parents didn't want to be together. For the reasons indicated above, [the applicant] cannot be that parent, ... because the other children are not with her."

35. The applicant was notified of that decision on 6 October 2009.

V. FURTHER DEVELOPMENTS

36. The applicant continued to build and maintain relations with her children while they were living with their father.

37. C and D moved to live with the applicant and her partner Z in January 2013 and October 2017 respectively. Both children chose to live with them while attending high school, and their father accepted their move.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. The Constitution

38. The relevant provisions of the Constitution of the Republic of Poland read as follows.

Article 47

“Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation, and to make decisions about his personal life.”

Article 32

“1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.”

B. Family law

39. Article 106 of the Family and Custody Code of 1964 (*Kodeks Rodzinny i Opiekuńczy*), as in force at the material time, read:

“If circumstances change and the best interests of a child so require, a court dealing with custody may amend orders included in a decision on divorce concerning the manner in which the parties’ minor children should be cared for.”

40. Article 107 § 1 of the Family and Custody Code, as in force until 13 June 2009, read:

“If parents, both of whom exercise parental authority, are not married, the court dealing with custody may grant custody rights to one parent and restrict the custody rights of the other.”

41. On 13 June 2009 Article 107 of the Family and Custody Code was amended and now reads as follows:

“1. If parents, both of whom exercise parental authority, do not form one household, the court dealing with custody, having regard to the best interests of a child, may issue orders concerning the manner in which the parties’ minor children should be cared for.

2. The court may grant custody rights to one parent and restrict the custody rights of the other ...”

C. The Code of Civil Procedure

42. Article 557 of the Code of Civil Procedure of 1964 (*Kodeks Postępowania Cywilnego*) provides:

“The court dealing with custody can alter its decision if the best interests of the person whom [the decision] concerns so require.”

II. INTERNATIONAL MATERIAL

A. Council of Europe

43. The Recommendation adopted by the Committee of Ministers on 31 March 2010 (CM/Rec(2010)5) on “measures to combat discrimination on grounds of sexual orientation or gender identity” gave the following recommendations to Member States, in so far as relevant:

“2. ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them; ...

5. ensure by appropriate means and action that this recommendation, including its appendix, is translated and disseminated as widely as possible.”

The appendix to the above Recommendation states, in so far as relevant, as follows:

“IV. Right to respect for private and family life

...

26. Taking into account that the child’s best interests should be the primary consideration in decisions regarding the parental responsibility for, or guardianship of a child, member states should ensure that such decisions are taken without discrimination based on sexual orientation or gender identity.

27. Taking into account that the child’s best interests should be the primary consideration in decisions regarding adoption of a child, member states whose national legislation permits single individuals to adopt children should ensure that the law is applied without discrimination based on sexual orientation or gender identity.

....”

44. The Parliamentary Assembly of the Council of Europe (PACE) issued Resolution 2239 (2018) Private and family life: achieving equality regardless of sexual orientation. The relevant part reads as follows:

“4. ... the Assembly calls on Council of Europe member States to:

4.1 ensure that their constitutional, legislative and regulatory provisions and policies governing the rights of partners, parents and children are applied without discrimination on grounds of sexual orientation or gender identity, eliminating all unjustified differences in treatment based on these grounds ...”

Its Explanatory Memorandum by Mr Jonas Gunnarsson, rapporteur, states, in so far as relevant:

“Summary

The right to respect for private and family life is a fundamental right, enshrined in Article 8 of the European Convention on Human Rights. This right is of equal

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importance in everyone's lives, yet progress towards achieving equality in this field regardless of sexual orientation is uneven. This poses real and serious problems in ordinary people's everyday lives. Discrimination unfortunately remains a reality for many rainbow families.

Since the Parliamentary Assembly last examined this issue in 2010, there have been significant developments in European case law, and important advances towards greater equality for rainbow families have been achieved in member States. These developments show that more efforts are however still required from member States in order to achieve equality in the field of private and family life regardless of sexual orientation.

4.3 Well-being of children in rainbow families

47. One of the arguments most frequently raised against granting legal recognition to same-sex partnerships is that doing so will "open the door" to same-sex couples raising children, and that this will harm children. Such arguments are however fallacious, on at least two very basic grounds. First, same-sex couples are already raising children, and second, research has consistently shown that children raised in rainbow families have the same levels of well-being as other children....

49. At the hearing held by our committee in Paris on 5 June 2018 we examined the situation of children in rainbow families through a scientific lens, thanks to the presentation by Ms Kia Aarnio of a recent research project on the well-being and experiences of children in rainbow families financed by the Finnish Ministry of Education and Culture. This study, which involved 129 children aged 7 to 18 growing up in rainbow families and their parents, showed that it was not parental gender or sexual orientation that affected children's well-being but the functioning of the family. Children in rainbow families had similar numbers of friends, similarly positive school experiences, similar family lifestyles and similar symptoms of anxiety or depression to their peers. LGBT parents were found to be very committed to parenthood, and supported and encouraged their children a lot. The same vulnerabilities affected children in rainbow families as other children, for example if their parents had divorced.

50. The negative aspects of living in rainbow families related to other people's attitudes – annoying questions from peers, offensive comments from other family members or other adults. Ten- to twelve-year-olds in rainbow families were bullied more than their peers, but they nonetheless had the same levels of psychological well-being as their peers, possibly due to more motivated parenting and good friendships. One in seven children had a grandparent who had ceased contact with the child's family because of the parent's sexual orientation or gender; however, in many cases, other family members or close friends of the child's family replaced this negative relationship, and the child expressed no negative consequences as a result. When asked what they would like to change in the world to make life even better for them in a rainbow family, children wished that other people would know more about sexual minorities and rainbow families and would accept diversity. ...

52. To put it another way, research consistently shows that it is not same-sex parents but societies that are not accepting of diversity that harm children in these families. We must base our public policy decisions as regards rainbow families, not on misconceived notions of "traditional" families as the only, irreplaceable, family format that can provide a healthy upbringing for a child – a notion that can also be harmful to children in single-parent families and in blended (step-)families – but on the need both to ensure acceptance of the diverse families, whether "traditional" or "non-traditional", that exist in all our societies, and to promote a discrimination-free

environment for all parents and children. Indeed, as the Inter-American Court of Human Rights has made clear, and as was already implicit in the reasoning applied by the European Court of Human Rights nearly 20 years ago, a parent's sexual orientation has no bearing on their capacity to raise and provide for a child."

B. The Inter-American Court of Human Rights

45. In the case of *Atala Riffo and daughters v. Chile* ((Merits, Reparations and Costs), judgment of 24 February 2012, Series C No. 239), the Inter-American Court of Human Rights considered that the decision of the Chilean courts to remove three children from the custody of their homosexual mother constituted discriminatory treatment against her on the basis of her sexual orientation, in breach of her right to equality (Article 24, in conjunction with Article 1 § 1 of the American Convention on Human Rights) and her right to private and family life (Article 11 § 2 and 17 § 1 of the American Convention).

The court noted, *inter alia*, that the abstract reference to "'the child's best interest' ... without specific proof of the risks or damage" to children that could result from the mother's sexual orientation could not serve as a suitable measure to restrict a protected right (paragraph 110 of the judgment). As regards the expectation that Ms Atala Riffo ended her relationship, an argument used by the Chilean courts, the court observed as follows (footnotes omitted):

"139. In this regard, the Court considers that the prohibition of discrimination due to sexual orientation should include, as protected rights, the conduct associated with the expression of homosexuality. Furthermore, if sexual orientation is an essential component of a person's identity, it was not reasonable to require Ms. Atala to put her life and family project on hold. Under no circumstance can it be considered "legally reprehensible" that Ms. Atala made the decision to restart her life. Furthermore, it was not proven that the three girls suffered any harm.

140. Therefore, the Court considers that to require the mother to limit her lifestyle options implies using a "traditional" concept of women's social role as mothers, according to which it is socially expected that women bear the main responsibility for their children's upbringing and that in pursuit of this she should have given precedence to raising her children, renouncing an essential aspect of her identity. Therefore, the Court considers that using the argument of Ms. Atala's alleged preference of her personal interests, does not fulfill the purpose of protecting the best interest of the three girls."

THE LAW

I. PRELIMINARY REMARKS – SCOPE OF THE CASE

46. The Court notes that in her observations the applicant limited her complaints to the dispute concerning parental rights over her youngest child D, which ended on 17 September 2009. The applicant lodged her

application with the Court on 18 March 2010. The Court thus concludes that the case at hand concerns solely the proceedings regarding D, and that it is not called upon to deal with the complaints about the proceedings concerning the applicant's other children A, B and C, which were concluded by way of a final decision on 10 January 2008.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

47. The applicant complained that the domestic courts had refused to grant her custody of her child D on the grounds of her sexual orientation, which amounted to discrimination in the enjoyment of her Convention rights, in breach of Article 14 taken in conjunction with Article 8 of the Convention. These provisions read as follows:

Article 8

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 14

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

A. Admissibility

48. The Government raised a preliminary objection that the applicant had failed to comply with the six-month time-limit in respect of the set of proceedings which had ended on 10 January 2008. The applicant repeated that the final decision regarding parental rights and custody rights over D had been given on 17 September 2009, and she had been notified of it on 6 October 2009.

49. In the light of the parties' submissions and the Court's conclusions concerning the scope of the case (see paragraph 46 above), the Court considers that the applicant lodged her application with the Court on 18 March 2010, within six months of the final decision concerning D issued on 17 September 2009. The Government's preliminary objection should therefore be dismissed.

50. The Court notes that this part of the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

51. The applicant submitted that her sexual orientation had consistently been at the centre of the domestic courts' deliberations and had been omnipresent at every stage of the proceedings. The courts had been biased against her, which was shown, for instance, by the arbitrary finding that she "[had] not want[ed] to abandon her excessive proximity to Z for the sake of her relations with her children". This showed that she had been deprived of custody of her child on a discriminatory basis related to her sexual orientation and her relationship with another woman.

52. The applicant drew attention to the arguments of the Government emphasising the alleged importance of a male role model in the children's upbringing. Those arguments had been raised in the domestic proceedings. According to the applicant, such arguments would never be raised in a case concerning heterosexual parents, and they showed bias against same-sex couples. They also showed bias on the part of the Government and the domestic courts against same-sex families, in particular lesbian ones.

(b) The Government

53. The Government acknowledged that restricting the applicant's parental rights over her children had constituted an interference with her rights under Article 8 of the Convention. However, the domestic courts' decisions regarding custody of A, B, C and D had been given in accordance with the law and had been guided by their best interests. The Government emphasised that the child's interests should always be of primary importance and had to prevail over both the interests of the parent and administrative and logistical reasons. The domestic courts had taken into account the preferences of the older children which had been stated during the proceedings. In sum, the courts had held that it had been in the children's best interests to be raised together in their permanent place of residence by a parent who had been considered to provide the best guarantees as regards their care. The decisions of the courts had been justified in a fair and neutral manner, and they had been taken in a way that had minimised the damage to the children resulting from the crisis within the biological family.

54. The Government considered that the applicant had not been discriminated against on the grounds of her sexual orientation. No statement

proving such allegations could be found in the wording of the domestic decisions. The Government referred in particular to the District Court's decision of 16 October 2007 which had concluded that there had been a deterioration in the applicant's relations with her children, as had been established by the experts (see paragraph 13 above). The Government also emphasised that in the final ruling of 17 September 2009 the S Regional Court had clearly dismissed the allegation that the applicant's homosexuality had been the grounds for the interference (see paragraph 30 above). According to the Government, the clear statements contained in that ruling "should be taken into account as the final position of the Polish courts". As it contained relevant and sufficient grounds for the decision to maintain the father's custody of D, it "would not be appropriate to attribute to the Polish courts any ulterior and discriminatory motives".

55. The Government emphasised that the domestic courts had referred to the applicant's relationship with Z, but only as part of the factual circumstances of the case, as it had affected her relations with the children. Moreover, the domestic courts had not made any value judgments about the applicant's behaviour.

2. *Third parties*

(a) **National Chamber of Legal Advisers**

56. The Committee of Human Rights of the National Chamber of Legal Advisers (*Krajowa Izba Radców Prawnych*) submitted its comments on the case. The intervener considered that in the light of the principles recognised by Polish and international law, the sexual orientation of a parent should not play any role in assessing his or her parental rights. They emphasised that contemporary scientific research proved that there were no negative consequences of parents' homosexuality as regards the raising of children.

57. The intervener considered that Polish society was undergoing rapid changes; according to a recent poll from 2019, the majority of respondents accepted civil partnerships between same-sex persons, and 41% accepted same-sex marriages. Also, acceptance of homosexual families had been rising in that society. In Europe, many countries accepted same-sex marriages and allowed adoption by homosexuals. The Convention, as a living instrument, should evolve alongside such developments.

(b) **ILGA-Europe**

58. ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), the FIDH (International Federation for Human Rights), KPH (the Campaign Against Homophobia), NELFA (the Network of European LGBTIQ* Families Associations) and the ICJ (International Commission of Jurists) submitted a joint intervention to the Court. They maintained that in spite of the progress being made, the

LGBT community in Europe faced discrimination both in law and in practice. The interveners reiterated the most relevant case-law of the Court, stating that differences based on sexual orientation required particularly serious reasons by way of justification, and a State's margin of appreciation was narrow.

59. ILGA-Europe, on behalf of the other interveners, emphasised that numerous studies had shown that the children of lesbian and gay parents were not disadvantaged in comparison to the children of heterosexual parents. In respect of studies of "rainbow families" and children, the interveners also pointed to Resolution 2239 by PACE (see paragraph 44 above) and its Explanatory Memorandum.

60. Furthermore, the interveners referred to a judgment of the Inter-American Court of Human Rights in the case of *Atala Riffo y Ninas v. Chile* which prohibited discrimination on the basis of sexual orientation. Moreover, a number of European and North American jurisdictions had affirmed the right to equal access to children without discrimination based on sexual orientation.

(c) Institute of Psychology of the Polish Academy of Sciences

61. The intervener concentrated on analysing the available statistical material regarding the situation of homosexual families and their children in Poland. They emphasised that Poland did not allow for civil partnerships between same-sex couples, and marriage was reserved for the union of a man and a woman. In consequence, there were many inequalities in legal and practical matters, which directly affected same-sex families raising children. The intervener considered that the public attitude in Poland towards the LGBT+ community was negative and homophobic, and this had been exacerbated by the position of the current Government. In reality, LGBT+ couples raising children in Poland were most often formed by so-called "patchwork families" with children from previous heterosexual unions; however, younger generations of LGBT+ persons were expressing a wish to have children, which might lead to an increase in non-heterosexual families with children in Poland.

62. The intervener emphasised that in Poland, children statistically had contact with a role model whose gender was opposite to that of their same-sex parents. Non-heterosexual families with children had strong and significant relations with their families of origin. However, they were not necessarily perceived as families, and thus couples spent Christmas or Easter separately, returning to their families of origin. Non-heterosexual families with children tended to have little support from each other, as the vast majority of couples did not know any other non-heterosexual families with children.

63. The intervener emphasised that members of the public and professionals who were in contact with LGBT+ families often held

stereotypes and showed prejudice concerning LGBT+ parenthood. However, studies showed that there were no differences between the well-being of children raised by gay and lesbian parents and that of children raised by heterosexual parents, as regards a range of matters, including: gender and sexual identity, general health, emotional and behavioural difficulties, success in school, social and cognitive development. Furthermore, studies showed that children raised by lesbian mothers had better contact with their biological fathers than the children of heterosexual women, after a break-up.

(d) Ordo Iuris

64. In its intervention, the Ordo Iuris Institute for Legal Culture emphasised that in accordance with Polish law, parental authority should be exercised in such a way as to ensure a child's best interests, as well as the best interests of society as a whole. It stated "the existence of a harmonious family in which parents care for the development of their children, guard their property and interest and prepare them for future independent life is in the best interest of the whole society".

65. The intervener stated that Polish law had allowed the courts to employ measures considered to be the most adequate where there had been irregularities in the manner in which parental authority had been exercised in a given situation. Therefore, this had granted the courts a significant degree of freedom when making such decisions. In reaching decisions that could interfere with the manner in which parental authority was exercised, the courts were obliged to seek assistance from specialist experts (especially experts working as part of specialist family consultation centres).

3. The Court's assessment

(a) General principles

66. The Court reiterates that Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions, and to this extent it is autonomous, there can be no room for its application unless the facts in issue fall within the ambit of one or more of the latter (see, for instance, *E.B. v. France* [GC], no. 43546/02, § 47, 22 January 2008, and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 72, ECHR 2013).

67. In order for an issue to arise under Article 14, there must be a difference in the treatment of persons in analogous or relevantly similar situations. In other words, the requirement to demonstrate an analogous position does not require that the comparator groups be identical (see, with

further references, *Molla Sali v. Greece* [GC], no. 20452/14, § 133, 19 December 2018).

68. However, not every difference in treatment will amount to a violation of Article 14. Only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14 (see *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 September 2017, with further references to the Court’s case-law). In this context, the Court reiterates that the words “other status” have generally been given a wide meaning in its case-law (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 70, ECHR 2010), and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see *Clift v. the United Kingdom*, no. 7205/07, §§ 56-59, 13 July 2010). For example, a discrimination issue arose in a case where the applicant’s status, the alleged basis for the discriminatory treatment in question, had been determined in relation to his family situation, namely his children’s place of residence (see *Efe v. Austria*, no. 9134/06, § 48, 8 January 2013). It thus follows, in the light of its objective and the nature of the rights which it seeks to safeguard, that Article 14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person’s status or protected characteristics (see *Guberina v. Croatia*, no. 23682/13, § 78, ECHR 2016; *Škorjanec v. Croatia*, no. 25536/14, § 55, 28 March 2017; and *Weller v. Hungary*, no. 44399/05, § 37, 31 March 2009).

69. The Court also reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations. For the purposes of Article 14, a difference of treatment is discriminatory if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised (see *Molla Sali*, cited above, § 135, and *Fabris v. France* [GC], no. 16574/08, §§ 56, ECHR 2013 (extracts)).

70. The prohibition of discrimination under Article 14 of the Convention duly covers questions related to sexual orientation and gender identity (see *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 28, ECHR 1999-IX; *Alekseyev v. Russia*, nos. 4916/07 and 2 others, § 108, 21 October 2010; and *P.V. v. Spain*, no. 35159/09, § 30, 30 November 2010). The Court has also repeatedly held that, just like differences based on sex, differences based on sexual orientation require “particularly convincing and weighty reasons” by way of justification. Where a difference in treatment is based on sex or sexual orientation, the State’s margin of appreciation is narrow. The scope of the margin of appreciation will vary according to the circumstances, the

subject matter and its background; in this regard, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States. Differences based solely or decisively on considerations of sexual orientation are unacceptable under the Convention (see *Pajić v. Croatia*, no. 68453/13, § 84, 23 February 2016; *Ratzenböck and Seydl v. Austria*, no. 28475/12, § 32, 26 October 2017; *Beizaras and Levickas v. Lithuania*, no. 41288/15, §§ 106-116, 14 January 2020, with further references to the Court’s case-law; *Salgueiro da Silva Mouta*, cited above, § 36; and *E.B. v. France*, cited above, §§ 93-96).

71. The first paragraph of Article 8 of the Convention guarantees to everyone the right to respect for his or her family life. As is well established in the Court’s case-law, the mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by this provision. Any such interference constitutes a violation of this Article unless it is “in accordance with the law”, pursues an aim or aims that is or are legitimate under its second paragraph and can be regarded as “necessary in a democratic society” (see, among other authorities, *K. and T. v. Finland* [GC], no. 25702/94, § 151, ECHR 2001-VII, and *Strand Lobben and Others v. Norway*, no. 37283/13, §§ 202-213, 30 November 2017).

(b) Application of the above principles to the present case

72. It is undisputed by the parties that the facts of the case, namely the refusal to award the applicant full parental rights and custody rights over her youngest child D, fall within the ambit of Article 8 of the Convention (see paragraph 71 above). Consequently, Article 14 taken in conjunction with Article 8 applies to the facts of the case.

(i) Whether there was a difference in treatment

73. The Court notes that the final domestic decision in the case was given on 17 September 2009, when the S Regional Court refused to overturn the ruling of 16 October 2007 and award full parental rights over D to the applicant instead of her former husband. In that most recent set of proceedings, the S Regional Court and the R District Court took into account the course of the entire legal dispute between the parents which had started in October 2006 (see paragraphs 26 and 30 above). Accordingly, and with regard to the decision on the scope of the case (see paragraph 46 above), the Court will consider the elements of the first set of proceedings to the extent they were taken into account, directly or indirectly, in the second set of proceedings.

74. In particular, the Court takes note of two expert opinions obtained in 2007 in the first set of proceedings concerning the change in the parental

rights arrangement in respect of A, B, C, and D (see paragraph 11 and 12 above). Without quoting those opinions again, the Court notes that the RODK experts concluded that it would be possible for the applicant to keep her children if she decisively corrected her attitude and excluded her girlfriend from family life. The second expert openly questioned the applicant about her intimate relations with Z, in order to establish whether she actually was or had been a homosexual. Her suspected homosexuality and sex life featured in the second opinion which concluded that the children would prefer to live with their father.

75. It has to be emphasised that these two opinions were the basis of the ruling of 16 October 2007 which placed all four children in their father's care and limited the applicant's parental rights. The R District Court unconditionally accepted the experts' assessment, quoting them extensively (see paragraph 15 above). In particular, it resulted from these opinions that:

- there was no guarantee that the applicant would provide her children with the correct care, owing to her excessive involvement in her relationship with Z;
- the applicant did not want to abandon her excessive proximity to Z for the sake of her relations with the children;
- the applicant's parental behaviour at that time was incorrect, owing to her personal problems and emotional involvement in a relationship with another woman;
- it would have been possible for the applicant to continue to exercise her parental rights, if she had decisively corrected her attitude and excluded Z from family life;
- despite signals coming from the children and the clearly destructive influence which her serious involvement in the relationship with her girlfriend had on family life, the applicant had not been able to correct her behaviour.

76. In view of the foregoing, the Court finds that the references to the applicant's homosexuality and relationship with Z were predominant in the first set of proceedings concerning D and his siblings.

77. Moreover, the Court considers that the above-described expert opinions, and the ruling of 16 October 2007, had a decisive bearing on the final set of domestic proceedings concerning D. In that set of proceedings, the applicant sought to change the custody arrangement in respect of D. When refusing the interim measure, the R District Court relied directly on both expert opinions from 2007. On 8 May 2008 the court, sitting in the same composition, as a single judge, Judge D.T., repeated its conclusions from 16 October 2007 that the applicant "had concentrated excessively on herself and her relationship with her girlfriend" (see paragraph 26 above).

78. The Government emphasised that the final ruling in the case, the ruling of 17 September 2009, had clearly dismissed the applicant's allegations that her homosexuality had been the grounds for the domestic

decisions. However, the Court notes that in that ruling, the S Regional Court also considered that “the issue of raising a child in a same-sex relationship [was] very controversial”, and that the older children’s difficulties in accepting the applicant’s new partner were “understandable” (see paragraph 34 above).

79. Thus, notwithstanding the precautions taken by the S Regional Court to justify the extent to which the references to the applicant’s relationship with Z featured in all sets of the proceedings, the inescapable conclusion is that her sexual orientation and relationship with another woman was consistently at the centre of deliberations in her regard and omnipresent at every stage of the judicial proceedings (see *E.B. v France*, cited above, § 88).

80. The Court concludes that there was therefore a difference in treatment between the applicant and any other parent wishing to have full custody of his or her child. This difference was based on her sexual orientation, a ground which is covered by “other status” (see paragraphs 68 and 70 above).

(ii) Whether the difference in treatment was justified

81. Not every difference in treatment will amount to a violation of Article 14. The Court has consistently held that a difference in treatment is discriminatory if it has no objective and reasonable justification – in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see paragraph 69 above).

82. The Court accepts that the domestic decisions concerning parental rights and custody pursued a legitimate aim, namely the protection of the rights of others (see paragraph 53 above).

83. Consequently, it remains to be established whether the difference in treatment was justified.

84. The Court notes that both the applicant and her former husband were considered to have similar parenting abilities and qualities. As repeated by the Government, Polish law makes it clear that in cases of this nature, the interests of the child are of primary importance.

85. The Court notes that in the most recent set of proceedings the courts refused to alter the status quo as regards custody of D, on the basis of two main arguments: the advantages of all the siblings living together, and the importance of a “male role model” in the boy’s upbringing. As stated in the ruling of 17 September 2009, the applicant could not be the parent with full parental rights and custody rights over D because the other children were not with her. The Court will consider whether these arguments were appropriate to fulfil the purpose declared in these proceedings, namely to protect the best interests of the child. In so doing, the Court must necessarily

evaluate whether either or both reasons given by the Court were based on discriminatory considerations.

86. In this connection, the Court reiterates, in so far as the family life of a child is concerned, that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance (see, among other authorities, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, ECHR 2010). Indeed, the Court has emphasised that in cases involving the care of children and contact restrictions, the child's interests must come before all other considerations (see *Jovanovic v. Sweden*, no. 10592/12, § 77, 22 October 2015, and *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX).

87. In the instant case, the domestic courts appear to have made reference to the purpose of protecting the best interests of D. Such a reference may not be abstract, and it is for the Court to determine whether, as the applicant maintained, her sexual orientation did in fact have a decisive influence on the domestic decisions. The Court points out that in *Fretté v. France* (no. 36515/97, § 26, ECHR 2002-I) the applicant complained that the rejection of his application for authorisation to adopt had implicitly been based on his sexual orientation alone. In that case, the Court conceded that the reason given by the French administrative and judicial authorities for their decision had been the applicant's "choice of lifestyle", and that they had never made any express reference to his homosexuality. The Court nevertheless concluded that this criterion implicitly yet undeniably made the applicant's homosexuality the decisive factor (*ibid.*, § 32).

In the case at hand, the Court is not persuaded that the grounds relied on by the domestic courts were appropriate to achieve the declared purpose of protecting D's best interests. In particular, although the authorities noted the benefits of the stability resulting from the siblings living together, they discarded the strong bond which D was clearly shown to have with his mother, the applicant, as opposed to his father. Furthermore, the reference to the "male role model" was repeated at every stage of the final set of proceedings as an essential consideration in the assessment of the child's best interests. In its decision of 17 September 2009, the S Regional Court stated (see paragraph 33 above): "for any boy from a broken family, a male role model is important, and its importance increases as the child grows older." This stereotypical view was not supported by the first-hand report of the court guardian, which showed D to be well-adjusted when living with his mother and considered his home to be with her (see paragraph 24 above). It is further noted that the expert RODK report did not find anything of concern about D's actual stage of development, well-being or any real and proven damage or risk to the child. Moreover, the final judgment failed to take due account the uncontested fact that the applicant was D's primary

carer before the latter's forced removal on 3 June 2008. The Court notes that D was six years old on that date, and three years old at the time of the applicant's divorce. The strong bond between the child and the applicant was acknowledged by all the experts and even by the applicant's former husband, who, in the first set of proceedings, proposed that the applicant retain custody of D because of their strong relationship (see paragraph 17 above). Moreover, granting custody to the applicant would not have deprived D of contact with his father. There is no indication that the authorities were concerned about the possibility of the applicant hindering the father's contact with the child and the experts recognised that the applicant understood the need for the presence of both parents in D's life (see paragraph 31 above). Their reliance on the male role model was thus discriminatory.

88. The Government submitted that the applicant's relationship with Z had been taken into consideration only as part of the factual circumstances of the case. The Court agrees that the questions related to the applicant's partner, with whom she had been in a stable relationship, were not without interest or relevance in assessing the case (see *E.B. v France*, cited above, § 76). The Court has held that where a male or female applicant has already set up home with a partner, that partner's attitude and the role he or she will necessarily play on a daily basis in the life of the child joining the home set-up require a full examination in the child's best interests (*ibid.*). However, the Court cannot but note that in the present case the domestic authorities never examined the applicant's partner's attitudes and the role she played. It was the impact of the applicant's relationship with Z on the former's parenting abilities that was negatively assessed.

89. Although the final ruling of 17 September 2009 concerned only D, the S Regional Court repeated earlier findings about the allegedly negative impact of the applicant's relationship with Z on the older children. At the same time, the relationship between D and Z had not been separately assessed. No suggestion had been made that D had been adversely affected by the presence of Z in his mother's life. It is apparent from the earlier expert opinions that D had been in a privileged position, as he had received more attention from the applicant and Z than his siblings, and had developed a relationship with Z (see paragraph 11 above).

90. Regard being had to the above, the Court considers that the discriminatory reference to the importance of a male role model for the boy's upbringing, the need for which would apparently increase as the child grew older, was a decisive factor in the dismissal of the applicant's requests for custody of D. This consideration outweighed the other arguments: D's young age, strong bond with the applicant and well-being while living with his mother (see paragraphs 24 and 25 above); the father's acknowledgment that D should remain with his mother (see paragraph 17 above); and the

courts' acceptance that the applicant's behaviour as a parent could no longer raise any objections (see paragraph 34 above).

91. Lastly, the Court cannot ignore that the domestic courts considered that a positive assessment of the applicant's competencies as a primary carer for her children depended on her stopping her relationship with Z. The courts referred to her relationship as "excessive involvement" and an "attitude" which needed to be "corrected" and expected the relationship to be "abandoned" and Z to be "excluded from family life". Although this argumentation, omnipresent in the first set of proceedings, was not directly referred to in the final ruling of 17 September 2019, that judgment did not address D's relationship with Z and her role in the applicant's household. In any case, there is no evidence whatsoever of any negative impact that Z might have had on D's development and well-being. On the other hand, the new relationship of the applicant's former husband, as a result of which he had another child, and the fact that D was being raised with the daily help of his grandparents and other siblings were fully accepted.

92. Having regard to the foregoing, the Court concludes that, in refusing to grant the applicant full parental rights and custody rights in respect of D, the domestic authorities made a distinction based solely or decisively on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention (see *Salgueiro da Silva Mouta*, cited above, § 36, and *E.B. v France*, cited above § 96).

93. There has accordingly been a breach of Article 14 of the Convention taken in conjunction with Article 8.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

94. The applicant complained that Judge D.T. had not been impartial and alleged a breach of Article 6 § 1 of the Convention which, in so far as relevant, reads as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an ... impartial tribunal established by law."

95. The Government raised a preliminary objection that the applicant had failed to comply with the six-month time-limit, as the proceedings in which she had attempted to challenge the judge had ended on 16 September 2008.

96. The Court notes that on 15 April 2008 the applicant requested that the custody order be revised in respect of D. On 8 May 2008 Judge D.T. dismissed her application for an interim measure in that set of proceedings. On 26 May 2008 the applicant challenged the judge, alleging that she lacked impartiality and that this was demonstrated in all the decisions given by her in the proceedings concerning the applicant and her children. The applicant submitted that Judge D.T. was biased against her because of the amicable

relations she had had with her parents. The applicant's challenge was dismissed by way of a final decision by the S Regional Court on 16 September 2008 (see paragraph 21 above).

The Court notes that after that date the applicant raised no further complaints or challenges against Judge D.T. In particular, in her appeal against the decision of 8 June 2009, the applicant did not submit any argument to the effect that the R District Court, whose composition had included Judge D.T., had not been impartial (see paragraph 33 above).

97. The Court thus considers that the final decisions concerning this part of the application was given on 16 September 2008. The applicant lodged her application with the Court on 18 March 2010, which was more than six months afterwards.

98. Accordingly, the remainder of the application has been lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention. The Government's preliminary objection must be thus allowed.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

100. The applicant claimed 3,430 euros (EUR) in respect of pecuniary damage, and EUR 50,000 for non-pecuniary damage.

101. The Government contested the claims.

102. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

103. The applicant, who was represented by a lawyer of her choice, did not make any claim in respect of the costs and expenses incurred before the domestic courts or the Court.

C. Default interest

104. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses*, unanimously, the Government's preliminary objection on compliance with the six-month rule in respect of the complaint under Article 14 of the Convention in conjunction with Article 8;
2. *Declares*, unanimously, the complaint concerning Article 14 of the Convention in conjunction with Article 8 admissible, and the remainder of the application inadmissible;
3. *Holds*, by 6 votes to 1, that there has been a violation of Article 14 of the Convention in conjunction with Article 8;
4. *Holds*, by 6 votes to 1,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 September 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Renata Degener
Registrar

Ksenija Turković
President

X v. POLAND JUDGMENT

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

K.T.U.
R.D.

DISSENTING OPINION OF JUDGE WOJTYCZEK

I respectfully disagree with the majority’s view that there has been a violation of Article 14 of the Convention in conjunction with Article 8. In my view, the judgment triggers three types of objection: (i) the proceedings raise serious reservations from the viewpoint of procedural justice; (ii) the factual findings made by the Court are not fully accurate; and (iii) the legal assessment of the merits of the case appears incorrect.

1. Procedural justice

1.1. Procedural justice requires that all persons whose rights and interests may be affected by the outcome of the proceedings should be heard before a decision is taken (see, in particular: the powerful joint concurring opinion of Judges Ravarani and Elósegui, appended to the judgment *A.M. and Others v. Russia*, no. 47220/19, 6 July 2021; P. Pastor Vilanova, “Third Parties Involved in International Litigation Proceedings. What Are the Challenges for the ECHR?” in *Judicial Power in a Globalized World. Liber Amicorum Vincent De Gaetano*, P. Pinto de Albuquerque, K. Wojtyczek (eds.), Springer 2019; I refer also to my separate opinions, appended to the judgments in the cases of *Bochan v. Ukraine (no. 2) [GC]*, no. 22251/08, ECHR 2015; *Kosmas and Others v. Greece*, no. 20086/13, 29 June 2017; *A and B v. Croatia*, no. 7144/15, 20 June 2019; and *Smiljanić v. Croatia*, no. 35983/14, 25 March 2021; also to K. Wojtyczek, “Procedural justice and the proceedings before the European Court of Human Rights: who should have the right to be heard?” in: *Fair trial: regional and international perspectives: Liber Amicorum Linos-Alexandre Sicilianos./ Procès équitable : perspectives regionales et internationales : Liber Amicorum Linos-Alexandre Sicilianos*, R. Spano et al. (eds.), Limal, Anthemis 2020). Moreover, it is never possible to predict whether and how the Court’s findings and statements may be used by the parties in possible future domestic proceedings.

1.2. The instant case was brought in connection with a dispute, at the national level, between two private parties, affecting also the rights and interests of several other persons. In particular, the proceedings before the Court touch upon the rights and interests of the father, four children, the mother’s partner and the father’s partner. The violation of the applicant’s rights found in the present judgment stems from judicial decisions in the domestic proceedings granting rights (namely, certain parental rights on an exclusive basis) to the applicant’s opponent. In the majority’s view, the rights granted to the applicant’s opponent were granted in violation of the Convention. Moreover, the reasoning of the Court’s judgment contains

findings and statements which may have an impact upon the rights and interests of the persons listed above. However, none of them has been heard by the Court, or even invited to present observations. Even the child most directly concerned (D) was not invited to present his view.

The fact that the Government pleaded in favour of declaring the application inadmissible or of finding a non-violation does not address this problem. The role of a respondent Government is to defend the State's interests while treating all of the domestic parties in an equal and impartial manner. Pleading by the Government in favour of a non-violation is a very different task from defending the interests of the private party which won the case at the domestic level.

In the instant case, the file includes the applicant's and the Government's submissions to the Court, numerous official documents, the applicant's submissions in the domestic proceedings and private documents commissioned by the applicant. The positions and submissions of the applicant's opponent are available only from second-hand sources, in the form of short summaries in the judicial decisions and other official documents. As a result, there is a fundamental asymmetry in the pleadings which favours one party to the domestic proceedings at the expense of the other party. One litigant was able to put forward and highlight all of the important points for the defence of her rights and interests, the other was not. The injustice is even more visible because the reasoning in the present judgment is based mainly on a certain number of points raised by one of the litigants and accepted by the majority.

2. Factual basis

2.1. The instant case shows the difficulty of establishing facts in international human-rights proceedings. The factual part of a judgment has to present, in a concise manner and in English, all the relevant factual elements of the case before the Court, on the basis of the parties' submissions and numerous official and private documents written in the official language of the respondent State. Preparing this part of the judgment is a difficult task which requires identifying what is relevant and what is not. The choice may often be open to debate, and the matter is difficult as the judges in the composition themselves may have divergent views on these questions.

The present case is factually complex, and the relevant elements are very numerous. It would have been useful to have longer excerpts from several documents which bring out further relevant elements in favour of one or the other party to the domestic proceedings. In my view, the factual findings

made by the Court omit some relevant circumstances and may therefore convey to the readers a picture of the case which is not fully accurate. Without claiming to provide an exhaustive picture of the complicated circumstances of the case, I should like merely to draw attention to a few elements.

2.2. The father, in his application dated 2 October 2006 (referred to in paragraph 10), formulated, *inter alia*, the following compliant:

“The party [i.e. the applicant mother] has remained for years in a homosexual relationship with Z. The partner often stays overnight and the children find the two persons in intimate situations.”

As no copy of the father’s submissions has been provided, the quote is taken from the summary in the expert opinion dated 9 October 2007.

2.3. According to the opinion of 16 May 2007 (referred to in paragraph 11), the following problems, *inter alia*, were raised by the children:

“A feels emotionally neglected by her mother and feels grievance towards her because of an excessive concentration on the relationship with Z, whom she blames for the crisis in the family. ...

B fears compulsive and aggressive reactions of her mother ...

C fears the party to the proceedings [the mother], her nervousness and aggressiveness, does not want to return under her care and expects that he and the siblings will be taken care of by the father”.

2.4. In the judgment of 16 October 2007 (mentioned in paragraph 12) the District Court established, *inter alia*, the following factual circumstances:

“The mother’s friend interferes with the family life of the children and their mother. She meddles with the upbringing of children and tries to buy D.’s favour with toys.

The minor children do not accept the mother’s friend, whereas the party to the proceedings obliges them to show sympathy vis-à-vis Z.; when the children refuse, she reacts with aggression.

The party is not able to handle difficult educational situations and becomes too radical in her actions, which is attested by the beating of C. on the back of his head while doing the homework.”

2.5. The minutes of the appeal hearing on 10 January 2008 (referred to in paragraph 17) contain, *inter alia*, the following statement by the father:

“I accept the situation in which the party to the proceedings [the mother] takes care over D because he has stronger ties with the mother.”

2.6. On 30 April 2008 the District Court issued a decision (not mentioned in the reasoning) ordering the applicant to hand D. over to his father. The order was based, *inter alia*, on the following factual findings:

“In connection with this the applicant [i.e. the father] contacted the other party to the proceedings and proposed that the minor spend half of the month with the mother and half of the month with him. [The mother] did not accept and the next day took the minor from the nursery school.

...

Since 10 April 2008 D has not been attending the nursery school. In telephone communications, the mother justified this absence by an illness and refused to speak about this topic with the father. On the telephone, the minor started to utter words, addressed to the father, that he had not been using before.

On 24 April 2008 the applicant [i.e. the father] travelled to [the city X.] in order to take the minor [D.] to his home. He met the [mother’s] friend, Z. who was leading D along, holding his hand. The applicant ran to the son and took him by the hand, but at this moment Z started insulting [the father], beating, kicking and punching him. The minor fled to the staircase of the building. The police came to intervene and the mother, alerted by Z, arrived and took the son with her.

Since this moment, the applicant [i.e. the father] has had no contact with his child.”

2.7. On 27 May 2008 the District Court issued a decision (not mentioned in the reasoning) ordering that a court guardian should take D from the applicant and hand the child to the father.

2.8. The District Court’s judgment of 8 June 2009 (related in paragraph 32-33) took account, *inter alia*, of the following elements:

“The arguments raised by the applicant, to the effect that a son was born to the [other] party to the proceedings and that for this reason care for the minor D came in second place and that the child does not accept the half-brother, is not a justification for changing the judgment in respect of the parental rights over the minor D.

There are no doubts that the birth of a half-brother is a new situation for the minor D, who may feel “threatened” by the fact that he is no longer the youngest member of the family, but this is a natural reaction. One cannot reproach the party of the proceedings that because he has had another child he is neglecting the minor D and his siblings. [The father] takes care of the children in the same way as previously and benefits in this respect from the maternal grandparents’ help, in the context of the three-shift working system.

It is also necessary to note that the party’s partner does not live with him, and the party pays a visit to her once a month when his children are under their mother’s care. The minor’s father took them to his partner’s place of residence in order to familiarize them with the new situation. She herself came with the minor child to the applicant’s place, where she stayed for two weeks. The relationship between her and the children is normal, especially because their father’s relationship has lasted for three years and the children got to know the father’s partner previously and have accepted her. They now express joy that they have a brother.”

2.9. When information provided in an applicant’s submissions to the Court is not supported by any evidence, the Court usually introduces it with the following formulas: “the applicant alleged that” or – in the case of information that the Government are in a position to verify – “as alleged by the applicant and not contested by the Government.”

The factual findings presented in paragraphs 36 and 37 are based solely on the applicant’s submissions. Given the requirement of protection of privacy, it is difficult to accuse the Government of failing to verify their accuracy and of having not pronounced on this question. It would have been preferable to accompany the factual findings in question by the usual disclaimer.

3. The question of discrimination

3.1. In my view, the reasoning concerning the substance of the case is unconvincing. The Court has developed an elaborated methodology for discrimination cases (see, for instance, *Molla Sali v. Greece* [GC], 2018, §§ 133-137, 19 December 2018, and *Guberina v. Croatia*, no. 23682/13, §§ 66-74, 22 March 2016). This approach requires it, in particular, to assess “whether there was a difference of treatment between persons in relevantly similar positions or a failure to treat differently persons in relevantly different situations”. For this purpose, it is necessary to establish: (i) which positions are similar and which ones are different; and (ii) whether the State in its legislation or practice treats all the persons concerned in a different or a similar way. This well-established methodology has not been followed by the Court in the present case and, as a result, two questions have been left unanswered.

3.2. The reasoning triggers further objections concerning some detailed arguments.

3.2.1. In paragraph 79, the majority relies on the following argument:

“Thus, notwithstanding the precautions taken by the S Regional Court to justify the extent to which the references to the applicant’s relationship with Z featured in all sets of the proceedings, the inescapable conclusion is that her sexual orientation and relationship with another woman was consistently at the centre of deliberations in her regard and omnipresent at every stage of the judicial proceedings (see *E.B. v France*, cited above, § 88).”

I note in this context that the applicant’s relationship with Z was placed at the centre of deliberations by the applicant’s children and also by the applicant’s former husband (see, for instance, points 2.2. and 2.4 above.). The issue was presented by the children themselves as crucial. The interviews with them showed their suffering, caused by this relationship and by the fact that they felt neglected by the mother. The domestic courts and the court-appointed experts had no other option but to respond to the grievances raised by the children and the father.

3.2.2. The majority blames the authorities for references to the “male role model” (see paragraph 87):

“In its decision of 17 September 2009, the S Regional Court stated (see paragraph 33 above): “for any boy from a broken family, a male role model is important, and its importance increases as the child grows older.” This stereotypical view was not supported by the first-hand report of the court guardian, which showed D to be well-adjusted when living with his mother and considered his home to be with her (see paragraph 24 above).”

The majority’s argumentation triggers the following remarks. Firstly, the English translation (“male role model”) of the Polish term “*męski wzorzec osobowości*” may create some confusion. The original term means “*a masculine personality pattern*” or “*a masculine pattern for constructing one’s own personality.*”

Secondly, the Court blames the domestic courts for repeating a “stereotypical view”. I note in this context that, firstly, the domestic courts relied upon an opinion which was issued by a group of experts and was based on scientific knowledge. The professional competence of these experts was not challenged in the domestic proceedings and I see no reason to call it into question. The criticised statement stems from their professional opinion. It belongs to the domain of psychology and its assessment requires advanced psychological knowledge. In order to rebut such a statement, the Court would have had to rely on alternative expert knowledge. No evidence was provided to demonstrate the veracity of the opposite view, i.e. that for a boy from a broken family a masculine personality pattern is not important and that its importance does not increase as the child grows older. Under such circumstances, the negation of the experts’ view seems itself to be based on a stereotypical view.

I note further that the role of the father for the development of children and their personalities has been the subject of scientific research for decades. Here is a minuscule sample: W. J. Yeung, G. J. Duncan, M. S. Hill “Putting Fathers Back in the Picture”, *Marriage & Family Review*, vol. 29 (2000), pp. 97-113; Lamb M.E: “Fathers: Forgotten Contributors to Child Development”, *Human Development* vol. 18 (1975), pp. 245-266; C. Lewis, M.E. Lamb, “Fathers’ influences on children’s development: The evidence from two-parent families”, *European Journal of Psychology of Education* vol. 18 (2003), pp. 211–228. I am not able here to present a synthesis of the relevant scientific knowledge. I merely note very briefly that there is ample scientific evidence indicating that the presence of a father is crucial for the construction of a son’s personality and that the father’s absence has far-reaching detrimental effects.

Thirdly, the argument relying upon “the first-hand report of the court guardian” is a logical mistake. It does not support the thesis which is argued. The report by “the court guardian, which showed D to be well-adjusted when living with his mother and considered [this to be] his home”

neither supports nor disproves the impugned statement made by the experts. It is completely irrelevant for the sake of argument. The purpose of the court guardian’s report was not to evaluate any future psychological needs.

Fourthly, I note that the term “*męski wzorzec*” (masculine pattern) is often used in Polish case-law concerning compensation for non-pecuniary damage resulting from the death of a person’s father (see, for instance, the judgment of the Regional Court in Nowy Sącz, 21 November 2013, III Ca 718/13).

3.2.3. In paragraph 87 the majority states as follows: “There is no indication that the authorities were concerned about the possibility of the applicant hindering the father’s contact with the child...” This not accurate. The authorities established that the applicant refused to comply with the domestic courts’ orders and hindered not only the father’s contact with his child but also the father’s exercise of his parental rights (see, for instance, point 2.6. above).

3.2.4. In paragraph 88 the majority states: “However, the Court cannot but note that in the present case the domestic authorities never examined the applicant’s partner’s attitudes and the role she played.”

I note that this view is contradicted in paragraph 89 by the following assertion: “It is apparent from the earlier expert opinions that D had been in a privileged position, as he had received more attention from the applicant and Z than his siblings, and had developed a relationship with Z (see paragraph 11 above).”

The majority further express the following view in paragraph 91: “In any case, there is no evidence whatsoever of any negative impact that Z might have had on D’s development and well-being.”

I note in this context that the applicant’s partner’s attitudes, and the role played by her, are assessed several times in the official documents (see, for instance, points 2.4. and 2.6. above). The factual findings in the domestic judicial decisions show that Z did not respect the father’s parental rights and acted in overt defiance of the domestic courts’ final decisions.

3.2.5. In paragraph 92 the majority states as follows: “On the other hand, the new relationship of the applicant’s former husband, as a result of which he had another child, and the fact that D was being raised with the daily help of his grandparents and other siblings were fully accepted.”

They fail to add that the mother’s relationship with Z was strongly rejected by the children, whereas the father’s relationship with his new partner was assessed by the domestic courts, which established that it was accepted by the children. The domestic courts took account not of the

heterosexual or homosexual natures of the respective relationships, but of the children’s attitudes and concerns.

3.2.6. In paragraph 90 the majority refers to “the father’s acknowledgment that D should remain with his mother (see paragraph 17 above)”. This argument triggers two objections. Firstly, the father did not acknowledge that D should remain with his mother, he simply stated at a certain stage of the proceedings that he accepted this solution (previously decided by the first-instance court). Secondly, the father expressed different views at a later stage in the proceedings. For instance, at one stage of the proceedings he proposed that D spend half of the month with the mother and the other half of the month with him, but this proposal was rejected by the mother (see point 2.6. above).

3.2.7. The domestic courts invoked, *inter alia*, the necessity of keeping the siblings together. Bringing up siblings together is an entirely legitimate objective. The fact of siblings being able to stay together usually contributes positively to their development. The Court has addressed several times the issue of siblings’ separation in the context of disputes over parental rights. In its judgment in the case of *Mustafa and Armağan Akin v. Turkey*, no. 4694/03, 6 April 2010, the Court expressed the following views:

“21. In the present case the Court considers that the decision of the Ödemiş Court separating the two siblings constituted an interference with the applicants’ right to respect for their family life. It not only prevented the two siblings from seeing each other, but also made it impossible for the first applicant to enjoy the company of both his children at the same time. Having regard to the facts of the present application, and in particular the fact that the domestic courts have been requested on a number of occasions by the applicants to reconsider their decisions, the Court deems it more appropriate to examine whether the respondent State complied with its positive obligation and whether its authorities acted with a view to maintaining and developing the family ties.

...

23. The Court notes at the outset that the custody of the second applicant and his younger sister was determined by the Ödemiş Court of its own motion; neither parent had requested the judge to make such a determination. In fact, the mother had asked the Ödemiş Court for the custody of both children (see paragraph 6 above). The Court is thus struck by the absence of reasoning justifying the separation of the children.

24. The Government submitted that the decisions adopted by the domestic courts had not prevented the two siblings from seeing each other because the children were living in the same neighbourhood and it was thus possible for them to keep in contact. The Court cannot accept that argument and considers that maintaining the ties between the children is too important to be left to the discretion and whim of their parents. Indeed, it is not disputed by the Government that the children were prevented by their mother from even speaking to each other when they saw each other in the street.

...

30. In the light of the foregoing, the Court considers that the domestic courts' handling of the applicants' case, during which they failed to have due regard to the best interests of the family, fell short of the State's positive obligation.

There has therefore been a violation of Article 8 of the Convention.”

I note in this context that the question of keeping the siblings together was assessed on an individualised basis in respect of the child D (in contrast to the situation in *Vujica v. Croatia*, 56163/12, § 102, 8 October 2015; compare also *Cristescu v. Romania*, 13589/07, 10 January 2012).

3.3. In paragraph 80, the majority formulates the following conclusion: “*The Court concludes that there was therefore a difference in treatment between the applicant and any other parent wishing to have full custody of his or her child.*”

This statement gives rise to two remarks. Firstly, the finding that there is a difference in treatment amounts to finding that, under Polish practice or case-law, other persons in a similar situation are treated differently. As mentioned above, such a finding would have required a thorough justification. To demonstrate this point, it would therefore have been necessary to analyse the case-law of the domestic courts in similar cases. However, the majority made no effort whatsoever to establish the domestic practice in respect of “other parent[s] wishing to have full custody of his or her child”.

Secondly, in the instant case the domestic courts have thoroughly assessed the best interest of the children. The available information does not show the existence of a difference in treatment. It would appear that, had the applicant been involved in a heterosexual relationship, the outcome of domestic proceedings would have been precisely the same. It is instead the approach advocated by the majority which entails a risk that the two litigants might be treated differently from any other parents involved in disputes over parental rights before the Polish courts.

3.4. The majority's approach thus transforms the Court into an appeal body which reassesses the factual findings of the domestic courts and also the application of the domestic law.

4. Conclusion

4. In conclusion, the proceedings in the instant case are, in my view, fundamentally flawed from the standpoint of procedural justice. Such proceedings, by their nature, cannot provide a comprehensive and accurate picture of the facts. The majority have established a difference in treatment

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without providing sufficient evidence that the applicant was treated differently from another class of parents in a similar situation. In any event, the contested domestic judgments remain within the scope of the margin of appreciation of the respondent State.