Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 3

sciendo

DOI: 10.15290/bsp.2022.27.03.14

Received: 25.01.2022
Accepted: 24.04.2022

Bożena Gronowska
Nicolaus Copernicus University in Toruń, Poland
bogro@lumk.pl
ORCID ID: https://orcid.org/0000–0001–9709–7686

Commentary to the Judgment of the European Court of Human Rights of 16 September 2021 in the Case of X v. Poland (appl. no. 20741/10)

Abstract: At first sight, the commented judgment raises serious dilemmas regarding the basic attitudes of some parts of the Polish society towards a traditional model of marriage and of family relations in confrontation with same-sex emotional bonds. The complicated factual picture of the case comprises both the adult family members and, even more importantly, the minors who are facing the break-up of their family. The European Court of Human Rights tried to properly connect and find a fair balance of all the colliding interests, with necessary exposition of the rights of the youngest child involved in this difficult situation. Dealing with the case the European Court of Human Rights obviously was under the influence of its margin of appreciation doctrine, which is traditionally very important in cases with so-called 'moral' content. While approving the final verdict the present commentary confronts mainly the divergent opinion to the judgment, written by the Polish judge, who – as the only one – took a different view to the other members of the Chamber.
Keywords: consistency of the case law, doctrine of margin of appreciation, fair balance of the colliding interests, homosexual union, discrimination, the best interests of the child

Introduction

Against the background of this case some crucial values, like those of the general clause of the welfare of the family[1] as well as the best interests of the child confronting

1 For more about this constitutional value see: A. Sylwestrzak, O klauzuli generalnej dobra rodziny, 'Studia Prawnoustrojowej UWM' 2019, no. 45, p. 314, 316.

the breakdown of his/her family relations, become relevant. In this commentary the best interests of the child will be identified with '*a general clause, i.e. a particular kind of indefinite phrase referring to values or judgments functioning in a social group and it provides that these judgments or values be taken into account when applying the law*'[2]. Surely, in such a situation the rights of other family members should also be taken into account, namely those of the divorced parents, the siblings and even the grandparents. Nevertheless, the main thesis of this commentary exposes the necessity to focus primarily on the situation of the youngest child, while searching for a fair balance of all the colliding interests. This obvious reflection should be seen strictly in the context of the so-called doctrine of margin of appreciation, which – leaving aside the different critical comments – exists in the work of the Strasbourg judges, and moreover undergoes its own evolution[3]. It also means that in the contemporary European social realities the so-called 'commonality' has started to play an important role in the sphere of the adjudication of the European Court of Human Rights (hereinafter: ECtHR). As European domestic attitudes towards same-sex unions have visibly changed lately (especially during the past decade), this obviously has its own impact on the 'limits' of the margin of appreciation accepted by the ECtHR in the relevant cases[4]. Bearing all of this in mind, it is rather uncomfortable to state that the commented ECtHR judgment reveals a rather persistent homophobic mentality of some parts of Polish society towards the independently increasing phenomenon of 'rainbow families' in the current European realities[5] (as well as in the contemporary world).

This was however just one additional factor to be taken into account by the domestic courts dealing with this particular case. Independently of such problematic and numerous circumstances the present commentary concentrates mainly on the protection of a child in the face of complicated relations appearing in the world of

2 M. Andrzejewski, Application of the Clause of the Good of the Child: Reflections Inspired by the Decision of the Supreme Court on the Creation of Foster Families, 'Studia Iuridica Lubliniensia' 2021, vol. XXX, no. 5, p. 36.

3 See e.g. S. Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights, Strasbourg, July 2000, passim; H.Wiczanowska, Oddziaływanie doktryny marginesu uznania na rozstrzyganie konfliktu pomiędzy wolnością wypowiedzi a wolnością sumienia i wyznania w praktyce orzeczniczej Europejskiego Trybunału Praw Człowieka, 'Przegląd Europejski' 2020, no. 2, pp. 91–95 and the first Polish monograpgh on the topic: A. Wiśniewski, Koncepcja marginesu oceny w orzecznictwie Europejskiego trybunału Praw Człowieka, Gdańsk 2008.

4 See mutatis mutandis E.H. Morawska, Poszukiwanie konsensusu europejskiego przez Europejskim Trybunałem Praw Człowieka w sprawie adopcji dziecka przez osoby i pary homoseksualne, 'Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego, A.D. MMXVII', vol. XV, pp. 29–49.

5 It is enough to say that in 2021 among the 27 member states of the European Union in 24 of them there exists legal recognition of different forms of homosexual unions, from civil partnerships to the status of marriage with the right to adoption. For more details see: https://www.ilga-europe.org/rainboweurope/2021 (10.01.2022).

his/her adult next of kin. Nonetheless, in the background a dilemma of equal protection for all families, regardless of sexual orientation, arises.

1. Overview of the Case

The applicant (X) – a divorced mother of four children (the youngest a boy of three at the time of divorce) – had become involved in an intimate relationship with another woman (Z) while still married. During the divorce proceedings a serious disagreement between the applicant and her parents developed as far as her personal life was concerned. Consequently, the grandparents of the children launched parallel proceedings hoping to obtain custody of their grandchildren. On 28 April 2005 the R District Court granted them such a temporary custody of all the children. However, the applicant X and her husband Y reacted immediately together and appealed against that order, which resulted in a quashing of the previous decision on 16 June 2005. According to the opinion of the S Regional Court both parents had been caring for their children adequately. This aspect of the factual case is worth remembering, as the conflict had its origin in the attitudes of the grandparents, i.e. persons of an older generation.

On 6 June 2005 the S Regional Court granted a no-fault divorce. It also pronounced full parental rights and custody for the applicant (X). Consequently the parental rights of the applicant's ex-husband were restricted. Importantly, the children's father (Y) did not appeal against this judgment, which became final on 28 June 2005. On 2 October 2006 he then unexpectedly applied to the court to change the custody arrangements established in the divorce judgment. This initiated the first set of long custody proceedings.

2. New Proceedings Concerning the Correction of Rights to the Youngest Child

Even at this stage it is proper to underline the procedural difficulties faced by the applicant's (X) whole family in a relatively short time. However, during this new set of proceedings two interesting and somehow confusing expert opinions were obtained. Firstly, on 16 May 2007 the Family Consultation Centre established that:

a) the children were emotionally connected with both parents, however this state of emotion was not stable enough;

b) the youngest son (D) was visibly disoriented and had serious emotional instability;

c) the older son (C) wished to live with his siblings in custody of the father; he also claimed that his mother exhibited violent behaviour towards him;

d) the mother (applicant X) was sometimes excessively tense, irritated and erratic, which was harmful for the children's emotional stability;

e) the applicant (X) could continue the care of the children under the condition that she corrected her attitude and excluded her present female partner from family life; and finally

f) in the event of no any positive corrections in the applicant's behaviour [*underlining: B.G.*], the direct care would be transferred to the father[6].

Then, a second expert opinion of 9 October 2007 provided information that the applicant (X) expressly denied her homosexual orientation, explaining that the relation with Z was strictly of a platonic nature[7]. There was no doubt as to the rather biased statements of the applicant, who desperately wanted to have the children back.

At this stage of the case the R District Court in its judgment of 16 October 2007 granted full parental rights in respect of the four children to the father (Y). Additionally, it was mentioned that Y had started a new relationship and had had a new child with his present partner. In respect of the applicant (X) it was stated that she did not finish intimacy and excessive proximity with Z, thus she did not improve her relations with the children [*underlining: B.G.*]. Moreover, the applicant (X) was constantly unwilling to change and revise her behaviour, which had a negative influence on the emotional and psychological development of the children.

Obviously, the applicant (X) appealed and contested the court's conclusions. According to her the court omitted the fact that during the marriage and later she was the main carer for the children (aged thirteen, eleven, eight and three at the time of divorce). This resulted in a change in the father's (Y) attitude, which was confirmed in S Regional Court (10 January 2008), as far as the applicant's right to custody of the youngest son (D) was concerned. Thus once again child D returned to his mother's house. After this starting point, the applicant (X) on 15 April 2008 requested that she was granted parental rights in respect of D. Consequently, on 25 April 2008 a 'local assessment' report was prepared in which the attachment of D to his mother was mentioned as well as the child's fear of his father.

3. New Set of Proceedings

Surprisingly, on 27 May 2008 the R District Court ordered the court guardian to forcefully remove D from his mother's (X) care. D was six years old by this point, and the action took place in front of the group of some other children. All the efforts of X

6 See § 11 of the judgment.
7 See § 12 of the judgment.

concerning interim measures allowing her to keep D under her care for the duration of the further proceedings were dismissed. The judge relied here mainly on the previous opinion of the Family Consultation Centre.

During this stage of the proceedings, based on an updated expert opinion, the R District Court in March 2009 concluded that both parents had similar parenting abilities and approaches. Nonetheless, on 8 June 2009 the court decided that D would live with his siblings in the father's house, but with the securement of his mother's contact rights. Once again, according to the court the stay of D with his father would be beneficial for his development and additionally '*the father's larger role in creating [the child's] male role model*'[8] was highlighted as an important point in favour of the court's standpoint. Likewise, the father of the boy openly criticized his ex-wife relation saying that '*I am against such an arrangement. /…/ 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*'[9].

The applicant (X) immediately appealed, but her motion was dismissed by the S Regional Court on 17 September 2009. Among the arguments in the justification of this new decision some interesting wording appeared. The following is worth highlighting:

a) The issue of raising a child in a same-sex relationship is very controversial;

b) the applicant's older children had difficulties in accepting their mother's relationship;

c) very young people are confronted with different family models every day [*underlining: B.G.*];

d) the minor D … has found himself in a situation which is emotionally very difficult; and lastly

e) in the meantime, D has grown older, thus the role of his father has increased, especially (which was highlighted in the report) as far as 'male role model'[*underlining: B.G.*] was concerned[10].

This long and extremely complicated case reached its conclusion outside of the courts. In January 2013 and October 2017 respectively, C and D (i.e. both the sons) decided quite by themselves to live with their mother and her female partner (Z). Surprisingly, the father (Y) accepted their decision. Thus, real life ended the family conflict, at least for the time being.

8 See § 32 of the judgment.
9 See § 29 of the judgment.
10 See § 34 of the judgment.

4. Legal Issues in Front of the ECtHR

In such a complex state of affairs the applicant lodged her complaint to the ECtHR on 18 March 2010. She complained that the Polish authorities violated Article 14 taken in conjunction with Articles 6 and 8 of the European Convention of Human Rights (hereinafter: ECHR or Convention). The key dilemma concerned the discrimination on the basis of the applicant's sexual orientation in the proceedings for full parental and custody rights over her youngest child (D). After a long period of 11 years (!) the ECtHR sitting as a Chamber delivered its judgment on 6 July 2021 (notified in writing on 16 September 2021) in which a breach of Article 14 of the Convention taken in conjunction with Article 8 was found. The above-mentioned violation was held by a majority of the Chamber (6 votes to 1), thus in clear favour of the applicant. In its conclusion the ECtHR expressed that 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*'[11].

Similarly, the Court noted that in the most recent set of proceedings the Polish courts refused to change their standpoint as regards the custody of the youngest child by invoking two arguments: 1) the benefit of common life of the siblings and 2) the importance of a 'male role model' for the upbringing of a boy[12]. The last argument '*was repeated at every stage of the final set of proceedings as an essential consideration in the assessment of the child's best interests*'[13].

As in each claim concerning discrimination the ECtHR started by considering if '*a difference in the treatment of persons in analogous positions or relevantly similar situations*' could be identified in the case of the applicant. In this regard the ECtHR reminded that '*only differences in treatment based on an identifiable characteristic, or status, are capable of amounting to discrimination within the meaning of Article 14*'. Likewise the Court repeatedly held that '*differences based on sex, differences based on sexual orientation require particularly convincing and weighty reasons by way of justification*' and that '*where a difference of treatment is based on sex or sexual orientation, the State's margin of appreciation is narrow*'[14].

The ECtHR Chamber reached its decision bearing the above-mentioned principles in mind and against the background of the established facts. Additionally, the ECtHR Chamber awarded the applicant EUR 10,000 as a just satisfaction in respect of non-pecuniary damage.

At the moment of writing this commentary the request for referral to the Grand Chamber is still pending.

---

11 At this point the ECtHR made a reference to its previous and significant judgment, i.e. Case of E.B. v. France,[GC], 22 January 2008, appl. no. 43546/02, § 96.

12 See § 85 of the present judgment.

13 See § 87 of the judgment.

14 See § 70 of the judgment.

5. The ECtHR's Argumentation

The complicated deliberations concerning the above conclusion were undertaken by the ECtHR with additional active participation of third parties, namely the National Chamber of Legal Advisers, ILGA Europe, Institute of Psychology of the Polish Academy of Sciences (all three in favour of the applicant) and Ordo Iuris (in favour of the domestic courts). However, most of the subjects engaged at this stage of proceedings of the case under consideration gave their material and arguments in favour of the applicant.

Lastly, some interesting elements for the further comments can be found in the differing opinion of the Polish judge. He disputed among other things the manner of presenting the factual findings. According to him this led to some relevant circumstances being omitted, and consequently making a true picture of the case 'not fully accurate'. This argument is rather surprising, as the ECtHR judge sitting in respect of a respondent state is certainly the best qualified to read all the documents in their original language. Likewise, it is up to him/her to direct the attention of other judges to important parts of evidence and – given all the circumstances of the case – it is obvious that the final choice of argumentation in favour of the Chamber's majority can be open to debate, in which the 'domestic' judge can (and should) be fully active. Some interesting phrases can be found in the documentation, like for example the document in which one can read as follows: '*The minor D … in comparison with his older siblings … holds a privileged position in the family and receives more attention from his mother and her girlfriend …*'[15].

The comments concerning the final conclusion of the ECtHR should start with the information that the majority of the Chamber's judges represented states in which same-sex relations have already been positively regulated in one way or another by the domestic laws. Thus, the dissenting Polish judge was in a minority also in this respect. Nonetheless, some remarks concerning the arguments given by the dissenting judge are worth commenting on. The huge amount of documentation allows any lawyer involved in this case to find a proper and convenient confirmation of a particular viewpoint during the proceedings. Sometimes this can be just one sentence taken out of context or even a whole passage exposing for example conflicting relations of the children with the female partner of their mother. However, one cannot forget that this written information was not confirmed by the mere behaviour of the younger siblings, who finally decided themselves to join their mother in her household. Thus, a thorough examination of conflict in family cases needs a proper combination of facts on paper with the facts which appear in real life.

Moreover, in the whole documentation there was no information about the professional procedural examination of the applicant's female partner (Z), against whom

15 See § 10 of the judgment.

serious doubts were invoked. This person, so important for the applicant (X), simply stayed 'behind the scenes' during the whole case. This 'evidence' appears only in the negative emotional statements of the former husband (Y). Even such prosaic and normal acts like Z buying toys for D was interpreted as Z trying to '*buy D's favour*'[16]. On the other hand, the domestic court did not find any suggestion that D had been adversely affected by the presence of Z in his mother's life. To the contrary, he had a privileged position and received more attention from X and Z than his older siblings. Conversely, there was also no information in the official documentation that the youngest son of the applicant had developed a relationship with Z[17]. However, there was no evident obstacle to diminish or even logically deny the first-hand report of the court's guardian that '*D [is] well adjusted when living with his mother and considered his home to be hers*'[18].

Consequently, taking all the documents into account, it seems that the parts of evidence exposed in the ECtHR judgment are sufficient to come to the conclusion that there were evident moments of homophobic attitudes of the Polish courts when dealing with the present case (which are still, unfortunately, visible, especially in small-town environments). However, at this stage of our understanding of the issue at stake it seems simply improper to expose something like a 'male role model' or even the more adequate translation – as proposed by the dissenting judge – 'a masculine personality' or 'a masculine pattern for constructing one's personality'. In general human rights concepts both possible translations can lead to the same consequences, namely to a necessity of creating such an environment for the child in which it could experience the traditional roles of traditional heterosexual patterns in family life.

Further, the dissenting judge criticized the majority view concerning a lack of proper examination of the role of the mother's female partner Z in the family life (as already mentioned above). It is true that in some parts of the judgment there were brief references to this issue. However it was only information received from the second-hand evidence. Nonetheless, some phrases quoted by the dissenting judge, taken from the documents, can be considered as selective with a tendency of confirming the particular thesis. The dissenting judge never took into account the position of D, and then of C, towards her mother's new family life when they decided to join it. Moreover, he highlighted that X's partner often stays overnight 'and the children find two persons in intimate situations'. Actually, this type of event can happen in every family with small children and limited accommodation possibilities. Thus, it would be rather difficult to defend the obscenity objection or lack of parental responsibility of the mother. On the other hand information about the father attacking Z in the

16 § 2.4 of the separate opinion.
17 See § 11 of the judgment.
18 See § 24 of the judgment.

presence of the youngest son was included in the documentation.[19] This fact cannot be neglected because, as a result, some objections concerning 'aggressive' attitudes of D's parents have been of a mutual nature. Consequently, the applicant (X) could not be disqualified as a carer for her youngest child. Actually, in the early sets of proceedings concerning custody matters none of the courts denied that both parents had similar abilities and approaches in that regard (see the R District Court's opinion of March 2009).

Long and well-documented considerations of the dissenting judge led him to the opinion that the conclusions in the present case departed from the typical procedural justice, which by its nature cannot provide a comprehensive state of the facts. But, even if this remark is true, one cannot forget that in the whole Strasbourg case law this is not a precedence and in many other cases the same ECtHR's mode of examination met a common acceptance.

For sure, the dissenting judge (despite his evident erudition and professionalism) as a native-speaker judge has been in the best position as far as the orientation in original materials in all legal aspects and details which appeared during the proceeding of the case was concerned. However, he was also empowered, and even obliged, to turn the attention of other Chamber members to specially controversial points of deliberations. If it did not work it meant that his views and argumentation were not convincing enough for the majority.

However, honestly speaking, the dissenting judge was in a difficult position, especially in confrontation with the majority of judges, bearing in mind their domestic experiences and personal understanding of the dilemmas experienced and faced by same-sex unions with children and conflicts with ex-partners.

Final Remarks

Some of the conclusions and arguments have already been presented in the preceding points, wherever it was necessary. The detailed picture of the problem given in the factual background of these comments was quite intentional as it allows the complete and complex scope of individual tragedies of a broken family to be seen. As always in this and similar situations it is mainly the children who suffer in their own way and who have a very specific lack of stability and emotional sense of security. Despite this individual aspect, the problem at stake still belongs to very controversial ones against the background of social tradition as well as emotional discussions not only in Poland, but also still in other European countries[20].

19 See § 25 of the judgment.

20 Italy is a good example in this regard. For more see e.g. M.M. Winkler, Italy's Gentle Revolution: The New Law on Same-Sex Partnership, 'National Italian American Bar Association Jour-

This 'rainbow' climate has gradually been appearing in which family law (recognition of homosexual relationships and families) is one of the currently discussed issues. The traditional patriarchal model is undergoing unavoidable change[21]. At the moment at the domestic levels, when looking around, it cannot be denied that we are facing in the worldwide context an increasing number of same-sex marriages or different models of civil homosexual partnerships[22]. In other words, it is impossible to stop this trend, as it is based on numerous deep personal and intimate desires and choices. For example, one can find in literature on the topic a very clear statement that '*most countries, at different times and different paces, go through a standard sequence of legislative steps recognising homosexuality*'[23]. Western European countries as well as the USA are the best examples confirming this tendency. The opinion that a re-definition of traditional paradigms of family law is necessary is convincing[24]. At the same time, 'in an era of shaky familial relations, child custody and principles of the best interest of the child emerged with more strength and fortified protection than ever before'[25].

Thus, leaving aside strictly personal preferences and attitudes, one should try to find some neutral and objective arguments in favour of the conclusions accepted by the Strasbourg Chamber's majority. The main arguments – as compared to the separate opinion – can refer to the following items:

1) The overarching value in this category of cases, namely the best interests of a child (the good of the child), seems to be limited, not to say neglected. There is a common consensus concerning this value both in the broad literature on the topic and in numerous international documents[26]. It is worth remember-

nal' 2016, vol. 25 (1), pp. 22–31; A. Targońska, Legal Evolution of Same-Sex Marriage in Ireland, 'Studia Iuridica Lubliensia' 2022, vol. 3 no. 2, pp. 229–241.

21 For more see: M. Adamowicz, Rodzina w systemie prawnym Szwajcarii. Kilka uwag o historii i rozwiązaniach współczesnych, 'Białostockie Studia Prawnicze' 2017, vol. 22, no. 3, pp. 128–130; E. Kużelewska, Same-Sex Marriages – A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriages in Europe, 'Białostockie Studia Prawnicze' 2019, vol. 24, no. 1, pp. 13–27.

22 For example, among the 47 European countries there are 42 which provided for different models of regulating same-sex unions, including those with children. See: *https://www.ilga-europa.org* (10.01.2022).

23 See K. Waaldijk, Taking same-sex partnership seriously: European experiences as British experiences?, Fifth Stonewall Lecture 2002, International Family Law 2003, p. 84.

24 A. Breczko, Tradycyjne paradygmaty prawa rodzinnego w dobie rewolucji biotechnologicznej, 'Białostockie Studia Prawnicze' 2017, vol. 22, no. 3, pp. 93–97.

25 M. Cudowska, Child Custody in Minnesota and in Poland. The Best Interest Factors – A Comparative Overview, 'Białostockie Studia Prawnicze' 2017, vol. 22, no. 3, pp. 133–143.

26 It started with the Geneva Declaration of the Rights of the Child, adopted on 26 September 1924, League of Nations. In this early document there is a significant phrase that the states '*recognize that mankind owes to the child the best that it has to give*'. Then in the UN Declaration of the Rights of the Child, proclaimed by the General Assembly in Resolution 1386 (XIV) of 20 September 1959 stating that '*In the enactment of law … the best interest of the child shall be the paramount con-*

ing that the traditional, previous concept of the 'child's well-being' has developed into 'the best interests of the child' (Article 3 of the Convention on the Rights of the Child).[27] Additionally with Article 12 (principle of inclusion and participation), the status of the child has been changed. According to this new position there was '*a shift in the perception of a child from that of a passive object of law … to an active participant in the process of decision-making*'[28].

Due to the elaborated standards a child should be treated as an autonomous subject with respect to his/her recognizing abilities. Thus, the child's opinion and preference with whom he/she would like to stay with and live under the care of should absolutely be taken into account. Otherwise, judicial decisions will be strictly of 'formal and technical' value, resulting in very objective treatment, i.e. the situation which cannot be accepted in child custody cases. The same can be read at the regional level. Thus, according to Article 6, paragraphs 1 and 2 of the Convention on contacts concerning children,[29] '*1. A child considered by internal law as having sufficient understanding shall have the right, unless this would be manifestly contrary to his or her best interests: to receive all relevant information; to be consulted; and to express his or her views. 2. Due weight shall be given to those views and to the ascertainable wishes and feelings of the child*'.

Even if in the present case these provisions seemed to be restricted to some point, the final judgment was in favour of the youngest son, who needed his mother's close presence and in his own way confirmed this situation.

2) The position of the majority of the Chamber can also be explained through the necessity of securing the coherency and consistency of the hitherto Strasbourg line of interpretation, which seems quite an appropriate attitude for any court. It is important to remember that similar (obviously, *mutatis mutandis*) cases had already been dealt with by the ECtHR. Here, it is enough to highlight two French cases, in which much more 'delicate' and subtle formulations concerning the applicant's life choices appeared (as compared to those underlined at the beginning of the present commentary) and nonetheless in one of them the ECTHR found a violation of the prohibition of discrimination because of sexual orientation, as far as their private and family life should have been protected. Thus, first in the case of Frette v. France[30] a single man of ho-

sideration …'. Today this list of documents is longer and comprises the newer international treaties on the topic, especially those dealing with general prohibition of discrimination for any reason.

27 Convention of the Rights of the Child, adopted by the General Assembly on 20 November 1989, Resolution 44/25.

28 Committee of the Rights of the Child, Fifty-first session, Geneva, 25 May – 12 June 2009, General Comment No. 12 (2009). The right of the child to be heard, CRC/C/GC/12, 20 July 2009, p. 5, and pp. 6–11.

29 Adopted on 15 May 2003, Strasbourg, ETS No. 192.

30 Judgment of 26 February 2002, appl. no. 36515/97.

mosexual orientation was denied adoption based exclusively on unfavourable prejudice about his sexual orientation. In this case the ECtHR did not find a violation of Article 14 in conjunction with Article 8 of the Convention making a reference to the right of national authorities to consider the right to adopt, without referring to personal choices of the applicant's 'way of living'. However, this was the first case of this category.

The second, and even more interesting example is connected with the case of E.B. v. France[31], where a homosexual female applicant seeking the authorization of single adoption was denied this only because of her sexual orientation. This time the Grand Chamber found a violation of Article 14 in connection with Article 8 of the Convention. It should be stressed that the state authorities did not refer *expressive verbis* to 'homosexual orientation' but instead to the applicant's 'way or style of living' (whatever that means).

For sure, against the background of the two above cases a visible trend towards a broader and more positive protective approach of the ECtHR towards same-sex civil rights had appeared. While making a simple comparison of the above patterns with the Polish case, it is evident that the domestic organs quite often referred to homosexuality (or even promiscuity of the applicant). In one of the expert opinions there was an expressive requirement, that '*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*'[32].

Without any detailed discussion of the above passage the position of the younger children (especially the youngest D) should be considered. He would be in a constant state of emotional instability and in future life possibly under the influence and conviction of his mother's true 'pathology' which ruined his and his siblings' lives. We should not speculate on his attitude towards such relationships as an adult.

Thus, the sexual orientation of the applicant certainly played a visible (if not a leading) role in all the sets of domestic proceedings. One cannot negate the dramatic setting of the children in a broken family, especially that of the youngest boy. It seems that he was treated as an object, wandering from one parent to another. It is easy to imagine all the emotional frustration which accompanied the boy during the sets of procedures and after them. Thus, a significant question should arise, namely if the predominant condition of 'the best interests' was actually met. Let us remember here that both boys finally decided quite by themselves to return to their mother and her new household, and it happened without any formal objection of their father.

31 See footnote 6.

32 § 11 of the judgment.

The confrontation of the youngest child with a homosexual pattern of living was assessed by the divergent judge as dangerous and conflicting with the dominating Polish social realities. However, in my opinion, in the contemporary world adult family members should first of all create a climate of understanding and tolerance as a prerequisite for becoming familiar with the new trends in interpersonal relations which are unavoidable due to dynamic social changes[33]. Moreover, the dissenting judge left without any comment the professional documentation presented by ILGA-Europe, confirming that according to previous experiences, the children of same-sex parents '*were not disadvantaged* ' as compared to children of heterosexual families[34]. And further, '*research has consistently shown that children raised in rainbow families have the same levels of well-being as other children*'[35]. The dissenting judge concluded that '*there is ample scientific evidence indicating that the presence of a father is crucial for the construction of a son's personality*'[36].

It should be noted that Polish courts have already dealt with different legal aspects of same-sex unions. Let us recall here the famous case of Kozak v. Poland[37], which is still frequently the point of reference both in case law and literature. Then, the administrative domestic cases concerning child under the foreign custody of same-sex persons which appeared in front of Polish courts[38]. Thus, the door has already been opened, but the results are still controversial and depend on the attitudes

33 Despite all signals from different reports it is just enough to recall the position of the statute organs of the Council of Europe. See especially the Parliamentary Assembly Resolution 2239(2018) – 'Private and family life: achieving equality regardless of sexual orientations' or many written questions of the Parliamentary Assembly sent regularly to the Committee of Ministers, e.g. Question No. 768 by Mr. Fourat Ben Chikka: 'Violation of the human rights of LGBTI people in Hungary' resulting in the Decision of the Committee of Ministers of 8 September 2021, CM/Del/Dec (2021)1410/3.1a.

34 § 59 of the judgment.

35 § 44 of the judgment. Information taken from the Explanatory Memorandum (J. Gunnarsson) to the Parliamentary Assembly of the Council of Europe Resolution 2239 (2018) – see footnote 23 above.

36 Point 3.2.2. of the separate opinion.

37 Kozak v. Poland, judgment of 2 March 2010, appl. no. 13102/0.

38 For more details see: P. Sadowski, Gloss on the judgment of the Polish Administrative Court of 10 October 2018, II OSK 2552/16, Ius Novum 2020, no. 1, pp. 179–192; P. Mostowik, Resolving Administrative Cases Concerning Child Under the Foreign Custody of Same-Sex Persons Without Violating National Principles on Filiation as Ratio Decidendi of the Supreme Administrative Court (NSA) Resolution of 2 December 2019, 'Prawo w Działaniu'. Sprawy Cywilne 2021, no. 46, pp. 185–203.

of strong groups of some sections of Polish society that present rather traditional preferences.[39] In that context, education together with respectful pressure is necessary for groups still adherent to tradition. This is certainly a difficult and complex task, however still a possible one.

There are without doubt different motivations in defence or denial of same-sex families (mainly the issues of 'nature' or 'tradition')[40]. Returning to the case under consideration in this paper it should be stressed that the decision is not for now only, as it will influence the further lives of all the children involved in the case. Imagine that the son D would have stayed with his father and siblings in an atmosphere of negative reception to new social trends which are contrary to the traditional vision of family relations. In such a situation he would be under constant pressure to accept this traditional vision, which could be to the detriment of his future presence in the world of different adults in his surroundings, not counting his new homosexual family. In other words he would not be prepared for confrontations with everyday trends and problematic situations. Surely, this could not be assessed as in the best interests of the child.

As for the Polish judiciary' position towards homosexual couples it is, it seems, under a slow evolution. An interesting argument can be found in the judgment of the Polish Supreme Court in which a problem of common property of a same-sex couple appeared. Here the Supreme Court finally rejected that such a union could be considered a 'de facto marital relationship', but nonetheless it did not exclude the possibility of the application of relevant rules by analogy to the conflict of the same-sex couple's claims for division of their common property[41].

Bearing these relatively hopeful trends in mind, it should be stressed that the ECtHR judgment was sent to the Grand Chamber, whose position on the issue of same-sex couples is still unclear. In the latest group case the ECtHR's Grand Chamber confirmed that the state enjoys a wide margin of appreciation and consequently a certain freedom of choice of the most favourable form of same-sex registration, taking into account a special social and cultural context[42].

Returning to the main issue of the commented case it should be concluded that traditionally a system for the protection of human rights has been built upon the principle of fair balance between the colliding justified aims. However, this system

39 Quite unexpectedly, the last Polish Centre of Research of Social Opinions (CBOS) discovered that as compared with the same questions from two years earlier, there was a visible improvement in the attitudes of Polish society towards homosexuality as such, and similarly same-sex marriages. Acceptance levels were the highest in the history of such research – CBOS Newsletter 33/2021.

40 For more reading see: L. Trappolin, A, Gasparini, R. Wintemute, Confronting Homophobia in Europe. Social and Legal Perspectives, Oxford/Portland, Oregon 2012, pp. vii–viii.

41 Judgment of 6 December 2007 (no. IV CKS 301/07).

42 See case of Fedotova and others v. Russia, 3 July 2021, appl. no. 40792/10, no. 30538/10, no. 43439/10.

cannot be inert or 'blind' to the interests at stake. It should be accepted that the best interests or the general welfare of the child belongs to the specially qualified values. The environment of love and care, obviously under the condition of being professionally verified and established, is of course of predominant importance for every child. In that sense it should prevail in confrontation with the social morals as specified in Article 8 § 2 of the ECHR.

REFERENCES

Adamowicz M, Rodzina w systemie prawnym Szwajcarii. Kilka uwag o historii i rozwiązaniach współczesnych, 'Białostockie Studia Prawnicze' 2017, vol. 22, no. 3.

Andrzejewski M., Application of the Clause of the Good of the Child: Reflections Inspired by the Decision of the Supreme Court on the Creation of Foster Families, 'Studia Iuridica Lubliniensia' 2021, vol. XXX, no. 5.

Amato P.R., The well-being of children with gay and lesbian parents, 'Social Science Research' 2012, vol. 41.

Bastionelli C., Farris M., Farris E., Benagiamo G., The Welfare of the Children in Same-sex Families. An Update, 'Journal of Gynecology and Women's Health' 2017, vol. 4, issue 1.

Breczko A., Tradycyjne paradygmaty prawa rodzinnego w dobie rewolucji biotechnologicznej, 'Białostockie Studia Prawnicze' 2017, vol. 22, no. 3.

Case of Fretté v. France, judgment of 26 February 2002, appl. no. 36515/.

Case of E.B. v. France, [GC], judgment of 22 January 2008, appl. no. 43546/02.

Case of Kozak v. Poland, judgment of 2 March 2010, appl. no. 13102/0.

Case of Fedotova and others v. Russia, judgment of 3 July 2021, appl. no. 40792/10, no. 30538/10, no. 43439/10.

Case of X v. Poland, judgment of 16 September 2021, appl. no. 20741/10.

Convention of the Rights of the Child, adopted by the General Assembly on 20 November 1989, resolution 44/25.

Committee of the Rights of the Child, Fifty-first session, Geneva, 25 May – 12 June 2009, General Comment No. 12 (2009). The right of the child to be heard, CRC/C/GC/12, 20 July 2009.

Cudowska M., Child Custody in Minnesota and in Poland. The Best Interest Factors – A Comparative Overview, 'Białostockie Studia Prawnicze' 2017, vol. 22, no. 3.

Decision of the Committee of Ministers of 8 September 2021, CM/Del/Dec (2021)1410/3.1a.

Domenech C.B., Perez Zafrilla P.J., Esteve J.S. (eds.), Current social and legal challenges for a changing Europe, Comares 2013.

Geneva Declaration of the Rights of the Child, adopted on 26 September, 1924, League of Nations.

Greer S., The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights, Strasbourg, July 2000.

Knut P. (ed.) Orzecznictwo – Prawa osób LGBT w Polsce, Kampania Przeciw Homofobii, Warsaw 2015.

Kużelewska E., Same-Sex Marriages – A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriages in Europe, 'Białostockie Studia Prawnicze' 2019, vol. 24, no. 1.

Morawska E.H., Poszukiwanie konsensusu europejskiego przez Europejskim Trybunałem Praw Człowieka w sprawie adopcji dziecka przez osoby i pary homoseksualne, 'Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego, A.D. MMXVII', vol. XV.

Mostowik P., Resolving Administrative Cases Concerning Child Under the Foreign Custody of Same-Sex Persons Without Violating National Principles on Filiation as Ratio Decidendi of the Supreme Administrative Court (NSA) Resolution of 2 December 2019, Prawo w Działaniu. Sprawy Cywilne 2021, no. 46.

Parliamentary Assembly Resolution 2239(2018) – 'Private and family life: achieving equality regardless of sexual orientations', adopted on 10 October 2018.

Pennings G., Evaluating the welfare of the child in same-sex families, 'Human Reproduction' 2011, vol. 26, no. 7.

Sadowski P., Gloss on the judgment of the Polish Supreme Administrative Court of 10 October 2018, II OSK 2552/16, Ius Novum 2020, vol. 1.

Supreme Court judgment of 6 December 2007 (no. IV CKS 301/07).

Targońska A., Legal Evolution of Same-Sex Marriage in Ireland, 'Studia Iuridica Lubliensia' 2022, vol. 3 no. 2.

Trappolin L., Gasparini A., Winemute R., Confronting Homophobia in Europe. Social and Legal Perspectives, Oxford-Portland, Oregon 2012.

UN Declaration of the Rights of the Child, proclaimed by General Assembly in resolution 1386(XIV) of 20 September 1959.

Waaldijk K., Taking same-sex partnership seriously: European experiences as British experiences?, Fifth Stonewall Lecture 2002, International Family Law 2003.

Wiczanowska H.,Oddziaywanie doktryny marginesu uznania na rozstrzyganie konfliktu pomiędzy wolnością wypowiedzi a wolnością sumienia i wyznania w praktyce orzeczniczej Europejskiego Trybunału Praw Człowieka, Przegląd Europejski 2020, no. 2.

Winkler M.M., Italy's Gentle Revolution: The New Law on Same-Sex Partnership, 'National Italian American Bar Association Journal' 2016, vol. 25 (1).

Wiśniewski A, Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka, Gdańsk 2008.