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# Recent case-law of the ECtHR on Non- Discrimination

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## Protocol 16 ECHR – the advisory opinions protocol

- **Entry into force per 1 August 2018**
- **Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, Romania, San Marino and Slovenia**
- **Highest courts (constitutional courts, supreme courts, ...) can request an advisory opinion of the ECtHR**
- **Must concern interpretation or application of the Convention**
- **Court is not obliged to accept requests for advice**
- **Advisory opinions are not binding for the national courts**



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

**Press Release**  
issued by the Registrar of the Court

**ECHR 352 (2018)**  
**23.10.2018**

**The French Court of Cassation has submitted to the European Court of Human Rights the first request under Protocol No. 16, seeking an advisory opinion on the question of surrogacy**



The Court of Cassation, in a judgment of 5 October 2018, decided to submit to the European Court of Human Rights a request for an advisory opinion on the following questions:

“(1) By refusing to enter, in the civil register of births, the birth of a child born abroad to a surrogate mother, in so far as the foreign birth certificate designates the child’s “intended mother” as its “legal mother”, whereas the registration is accepted in so far as it designates the “intended father”, who is also the child’s biological father, will a State party be overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn as to whether or not the child was conceived using the eggs of the “intended mother”?

(2) In the event of an answer in the affirmative to one of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?”

The Court of Cassation is adjourning its proceedings until the Court has given its opinion.

## Family law and reproductive rights related cases

- 1. *Hallier and Others v. France*, 12 December 2017 (dec.), no. 46386/10** – paternity leave for same-sex partners
- 2. *Charron and Merle-Montet v. France*, 16 January 2018 (dec.), no. 22612/15** – medically assisted reproduction for same-sex couple
- 3. *Bonnaud and Lecoq v. France*, ECtHR 6 February 2018 (dec.), no. 6190/11** – mutual delegation of parental responsibility for same-sex couple
- 4. *Leonov v. Russia*, 10 April 2018, no. 77180/11** – residence order
- 5. *Negrea and Others v. Romania*, 24 July 2018, no. 53183/07** – child allowances for non-married Roma couples
- 6. *Petrov and X v. Russia*, 23 October 2018, no. 23608/16** – residence order
- 7. *S.S. v. Slovenia*, 30 October 2018, no. 40938/16** – withdrawal of parental rights of mentally disabled mother

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## Conceptual issues (1) – personal status

### Article 14 ECHR

The enjoyment of the rights and freedoms set forth in this 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.

*Carson v. UK* (GC 2010), paras. 70-71: other status = **personal** status





## Conceptual issues (1) – personal status

### ***Aleksandr Aleksandrov v. Russia, 27 March 2018, no. 14431/06***

18. ... Only differences in treatment based on a personal characteristic (or “status”) by which persons or groups of persons are distinguishable from each other are capable of triggering the application of Article 14.

25. ... the “place of residence constitutes an aspect of personal status for the purposes of Article 14” (see *Carson and Others* ..., §§ 70-71) and can trigger the protection of that Article.



## Conceptual issues (1) – personal status

***Cernea v. Romania*, 27 February 2018, no. 43609/10 → differential treatment because applicant had not been able to stand for the by-elections as his party was not represented in Parliament, whereas he could have done so if his party had already been represented there**

***Bradshaw and Others v. Malta*, 23 October 2018, no. 37121/15 → difference in treatment between owners leasing out property for commercial and non-commercial use**



## Conceptual issues (2) – plurality of objectives

### ***Aleksandr Aleksandrov v. Russia*, 27 March 2018, no. 14431/06**

24. Turning next to the two grounds on which the trial court refused the applicant the benefit of a non-custodial sentence, the Court observes that the first of them, a reference to the “particular circumstances” of the offence, could be taken as an analysis of the *de facto* situation. Even though the trial court did not explain, even in a summary fashion, what in the manner in which the offence had been committed called for a harsher punishment of the applicant, this ground was not discriminatory on the face of it.



## Conceptual issues (2) – plurality of objectives

### ***Aleksandr Aleksandrov v. Russia, 27 March 2018, no. 14431/06***

25. By contrast, the second ground relied upon by the trial court – the applicant's lack of permanent residence within the Moscow Region – calls for a different approach. (...)

26. The Court reiterates that in discrimination cases where more than one ground forms part of an overall assessment of the applicant's situation, grounds should not be considered alternatively, but concurrently. Consequently, the illegitimacy of one of the grounds has the effect of contaminating the entire decision ...

## Gender

***Leonov v. Russia*, 10 April 2018, no. 77180/11**

***Petrov and X v. Russia*, 23 October 2018, no. 23608/16**

88. The Court notes that the residence order was based on an assessment of the best interests of the child in the particular circumstances of the case, rather than on a general assumption in favour of mothers. ...

89. The Court is therefore satisfied that, as regards the examination of the application for a residence order, no difference of treatment on account of sex existed either in the law or in the decisions applying it in the applicant's case. (*Leonov*; see also *Petrov and X*, paras. 128-129)

## Gender

### ***Hülya Ebru Demirel v. Turkey, 19 June 2018, no. 30733/08***

35. In the instant case, the Court observes that the administrative authorities and the Twelfth Division of the Supreme Administrative Court reviewing the conformity of the impugned administrative decision with the law both considered that the post of security officer in the Kilis branch of TEDAŞ had been reserved for men and that therefore the applicant, as a woman, had been excluded. What is more, the decision of the Twelfth Division of the Supreme Administrative Court did not adduce any reasons other than the applicant's sex for her not having been appointed to the post in question. ... Accordingly, ... the Court concludes that there has been a violation of Article 14 taken in conjunction with Article 8 ....



## Same-sex partnerships

***Hallier and Others v. France*, 12 December 2017 (dec.), no. 46386/10**

***Charron and Merle-Montet v. France*, 16 January 2018 (dec.), no. 22612/15**



## Same-sex partnerships

### ***Hallier and Others v. France*, 12 December 2017 (dec.), no. 46386/10**

31. En l'espèce, comme l'a rappelé le Gouvernement, l'institution du congé de paternité visait à renforcer les pères dans leur responsabilité éducative à l'égard de leurs enfants par un investissement précoce auprès de ceux-ci et à faire évoluer le partage des tâches domestiques entre hommes et femmes...

32. La Cour considère qu'il s'agit là en effet d'un but légitime. Elle relève par ailleurs que cette différence de traitement n'est fondée ni sur le sexe, ni sur l'orientation sexuelle, puisque, dans le cadre d'un couple hétérosexuel, le compagnon ou partenaire de la mère qui n'est pas le père biologique de l'enfant ne peut davantage bénéficier du congé de paternité





## Disability

### ***Enver Şahin v. Turkey, 30 January 2018, no. 23065/12***

70. ... la possibilité pour les personnes souffrant d'un handicap de vivre de façon autonome et dans le plein épanouissement du sentiment de dignité et d'estime de soi est d'une importance capitale et elle figure parmi les éléments qui sont au cœur de la CRDPH .... De même, la Cour a elle-même jugé que la dignité et la liberté de l'homme, y compris forcément la liberté de faire ses propres choix, sont l'essence même de la Convention ...

71. ... la solution offerte par le rectorat ne saurait s'inscrire dans ce cadre, car rien dans le dossier ne convainc la Cour qu'elle ait été proposée au terme d'une évaluation réelle des besoins du requérant et d'une considération sincère de ses effets potentiels sur sa sécurité, sa dignité et son autonomie.



## Disability

### ***Enver Şahin v. Turkey, 30 January 2018, no. 23065/12***

74. ... le tribunal a, lui aussi, omis ... de chercher à identifier les vrais besoins du requérant et les solutions susceptibles d'y pourvoir, en vue de permettre à M. Enver Şahin de reprendre ses études dans des conditions, autant que faire se peut, équivalentes à celles octroyées aux étudiants valides, sans pour autant que cela constituât pour l'administration une charge disproportionnée ou indue.

**Thank you for your attention!**

**Questions?**



**More questions?**  
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