In the Supreme Court sitting as the High Court of Justice

בג"ץ 781/15

BEFORE:

The Honorable President A. Hayut

The Honorable Vice President (retired) H. Meltzer

The Honorable Judge N. Handel

The Honorable Judge Y. Amit

PETITIONERS:

1. Itai Arad-Pinkas

2. Yoav Arad-Pinkas

3. A certain (So-and-so) man

4. A certain (So-and-so) man

5. A certain (So-and-so) woman

6. A certain (So-and-so) woman

7. "Proud Fathers" Association

8. Tammuz International Surrogacy Agency Ltd.

AGAINST

RESPONDENTS:

1. The Committee for the Approval of Agreements for Carrying Embryos According to the Agreements for Carrying Embryos Law (Approval of the Agreement and the Status of the Newborn), 5756-1996

2. The Knesset

Update notice on behalf of Respondent 1 dated 6.7.2021; Petitioners' response dated 8.7.2021

On behalf of the petitioners: Adv. Hagai Kelai

On behalf of Respondent 1: Adv. Ran Rosenberg; Adv. Moriah Freeman

On behalf of Respondent 2: Adv. Avital Sompolinski

Complementary judgment

President A. Hayut:

On February 27, 2020, a partial judgment was given in the present petition (hereinafter: The Partial Judgment) and it was determined that the surrogacy arrangement contained in the Embryo Carrying Agreements Law (Approval of the agreement and the status of the newborn), 5756-1996 (hereinafter: The Agreements Act) and in related provisions in the Egg Donation Law, 5769-2010 (hereinafter: The Egg Donation Law), is unconstitutional. This is because the arrangement excludes single men and same-sex couples from its application, while disproportionately violating their right to parenthood and by their right to equality (paragraph 32 of my opinion).

In the majority opinion, it was decided that in view of the complexity of the surrogacy arrangement that requires "a detailed, meticulous and holistic redaction" that corresponds with all the laws dealing with reproduction and fertility, 12 months will be given to the Legislative Power for the purpose of promoting an amendment to legislation that "expresses a commitment to the right to equality and parenthood of single men and same-sex couples".

It was also determined that insofar as such a legislative amendment is not made during this period, we will give a supplementary judgment in the framework of which it was instructed to grant an operative relief (paragraph 37 of my opinion). The justice A. Vogelman, on the other hand, held that the discriminatory parts of the surrogacy arrangement should be annulled already in the partial judgment, while suspending the declaration of nullity for a period of 12 months.

On 1.3.2021, one year after the date of the partial judgment, Respondent 1, the Committee for the Approval of Agreements for Carrying Embryos (hereinafter also: Approval Committee) requested to extend the period of time allotted for the delivery of a final judgment in the proceedings until 1.12.2021, in order to enable the promotion of a legislative solution that would cure the constitutional flaws that fell in the surrogacy arrangement. Respondent 1, whose position was also joined by the Knesset, noted in this context that the Ministry of Health has been required to deal with the spread of the corona

virus in the past year and in these exceptional circumstances has not been able to complete the necessary legislative amendments and the practical implications of expanding access to surrogacy for additional populations. In this context, it was noted that at the beginning of December 2020, an inter-ministerial discussion was held with the participation of representatives of the Ministry of Health, the Ministry of Welfare, the Population and Immigration Authority and legal advice on the implementation of the partial ruling. It was further argued that the dissolution of the 23rd Knesset on December 23, 2020 constitutes a "significant change in the circumstances of the regimes" that also supports the request for an extension. Petitioners objected to Respondent 1's request and held that the court should grant effective relief which would take effect immediately, and at least give a final judgment which would determine the date of entry into force of the relief.

3. On 10.3.2021 we instructed the respondents to submit an update notice on their behalf by 1.7.2021 regarding the progress of the legislative processes. In the interim, elections were held for the 24th Knesset and the 36th government was formed. Respondent 1 is now updating that a meeting was held chaired by the incoming Minister of Health on 30.6.2021, following which it was clarified that "at present there is no practical political feasibility for advancing legislative proceedings on the issue in question". Respondent 1 further stated that insofar as the court orders the granting of operative relief, the Minister of Health requests that a period of organization be provided for the purpose of preparing the relevant parties for its implementation, in a manner that will adequately address all the complex issues at hand. At the same time, the Attorney General reiterated that his principled position is that in view of the complexity of the issue and its sensitivity, the principal way of regulating it is through the promotion of legislative amendment. The petitioners, for their part, claim that in view of the position of Respondent 1, it is clear that the time is ripe for a final judgment in the petition. The petitioners further add that in the circumstances of the case and after more than one year after the partial judgment, there is no need to grant an additional period of organization before the remedy takes effect.

4. As noted in the partial judgment, due to the importance of the constitutional dialogue between governmental authorities and the complexity involved in changing the surrogacy arrangement, it would have been better for the legislature to give its opinion on flaws in the existing arrangement, amending the provisions of the Agreements Act and Egg

Donation Act accordingly. As part of the promotion of such an amendment to legislation, it was possible to comprehensively consider and arrange the aspects on which Respondent 1 stood in the update notice on its behalf dated 1.3.2021, including: protection of surrogate women; reducing harm to women in need of a surrogate for medical reasons; a comprehensive series of egg donation procedures; the consideration of options such as limiting the amount of payment to the surrogate, arranging an "altruistic surrogacy model" or limiting the number of children that can be born through a surrogate. Because of this complexity, the legislature was indeed given a stay of more than a year to be required for the said issues. During this period, however, there has been no real progress in terms of the necessary legislative amendments, and meanwhile the severe violation of the right to equality of single men and same-sex couples and their right to parenthood continues – a right for which it has long been determined that it is "at the foundation of all the foundations, at the foundation of all infrastructures, is the existence of the human race, is the aspiration of man" (HCJ 2458/01 New Family v. Committee for the Approval of Embryo Carrying Agreements, P.D. No. (1) 419, 447, (2002)). Needless to say, as early as 2010 Petitioners 1-2 filed a petition against the decision of Respondent 1 not to approve a surrogacy procedure - a petition that was deleted following the establishment of a public committee headed by Prof. Shlomo Mor Yosef on the issue of legislative settlement of fertility and reproduction. The petition before us was filed in 2015. It has been pending for over six years, and as part of the hearing in which partial judgments were given in 2017 and in 2020. In these circumstances, it is not possible to come to terms with the continuing serious violation of human rights caused as a result of the existing surrogacy arrangement, and "once a constitutional right has been violated, a constitutional remedy derived therefrom must be recognized" (HCJ 1661/05 Gaza Coast Regional Council v. Knesset of Israel, PD Net (2) 481, 590 (2005)).

When it was clarified in the State Notice dated 30.6.2021 that the Ministry of Health shares the position that the existing arrangement has flaws but due to "political impossibility" it is not possible to promote an appropriate legislative solution at this time - operative relief should be granted to petitioners.

5. In the partial judgment I have addressed the difficulties involved in granting the constitutional remedies sought by the petitioners (paragraphs 37-35 of my opinion). However, in view of the exceptional circumstances described above, the severe harm

caused thereby to the core of human rights and the principle that “one should strive for a reality in which specific difficulties are met with specific remedies, while maintaining the overall framework of the law as much as possible” (HCJ 7385/13 Eitan – Israeli immigration policy v. Government of Israel, paragraph 13 of the opinion of Justice v. Handel (22.9.2014), I will suggest to my colleagues that an instruction be filed at the abolition of the definitions which sweep away from the surrogacy arrangement single men and same-sex couples – that is, the definition of "intended parents", "intended parents who are spouses" and “intended single mother” in section 1 of the Agreements Law (hereinafter: the definitions) - while avoiding further harm to the legislative fabric (see: HCJ 7052/03 Adalah – The Legal Center for the Rights of the Arab Minority in Israel v. Minister of the Interior, PD SA (2) 202, 350 (2006); Aharon Barak “On the Theory of Constitutional Remedies” Law and Business c 301, 350-351 (2017) (hereinafter: Constitutional Remedies)). In my opinion and as I will detail below, after the repeal of these definitions, the other provisions of the Agreements Law and the Egg Donation Law can be interpreted in accordance with the criteria outlined in the partial judgment and the presumption that any legislation seeks to promote human rights and not infringe on them (CA 524/88 "Fruit of the Valley" – Cooperative Agricultural Association Ltd. v. Sde Yaakov – Workers’ session of Hapoel Mizrahi for Cooperative Agricultural Settlement Ltd., PD Ma (4) 529, 561 (1991); HCJ 7803/06 Abu Arafa v. Minister of the Interior, paragraph 46 of the judgment of Justice E. Vogelman (13.9.2017); Knesset, paragraphs 8-15 of Judge’s Vogelman's opinión (15/4/2015)).

6. In accordance with the partial judgment and the principle of equality, two main criteria can be pointed out according to which the provisions of the surrogacy arrangement must be interpreted: First, an interpretation that contradicts the right to equality and the right to parenthood must be avoided; and the second - the provisions of the arrangement should be applied, if possible and with the required changes, equally. As stated in the partial judgment, the relevant equality group with regard to the surrogacy arrangement is “anyone who suffers from a fertility limitation which by its type and nature can be solved only by applying for a surrogacy procedure” and in this aspect, it was noted, “full equality between a woman suffering from a medical problem [...] and a man” (paragraph 7 of Judge Vogelman's opinion; See also: Paragraph 5 of Justice Handel's opinion). The agreements can be interpreted as referring to heterosexual spouses, same-sex couples, single women and single men, and the phrase “donated” in the Egg Donation

Law can be interpreted as referring to "donated" (See: Sections 5-6 of the Interpretation Law, 1981). Similarly, the medical requirements in the Agreements Act (Section 4 (A) (2) of the Act) and in the Egg Donation Act (Section 11 and Section 13 (E) (2) of the Act) should be read as not applicable to single men and male couples, as any other interpretation would comprehensively block their access to the surrogacy arrangement; in contrast, the provision of section 5 (A) (1C) (B) of the Agreements Law, which restricts access to the surrogacy arrangement for those who have at most two children, must be interpreted as applying not only to "if a unit is designated", as the wording of the section, but also to single men.

7. It should be emphasized that the repeal of the definitions leaves the whole of the permanent arrangements in the Agreements Law and the Egg Donation Law intact, and the extension of access to the surrogacy arrangement to additional populations as detailed above does not preclude the purpose of regulating the surrogacy procedure in Israel ("To regulate the existence of the surrogacy procedure in Israel in order to fulfill the right to become a parent, while preserving the dignity and well-being of the pregnant women, and to regulate the status of the newborn and his connection to the intended parents") or its medical purpose ("underrated cases of women who have a medical problem for which they are unable to conceive or carry a pregnancy"; Paragraph 23 of my opinion in the partial judgment). Thus, in this case it can be said that "The valid part stands on its own feet and continues to fulfill its legislative purpose, albeit partially" (HCJ 1715/97 Bureau of Investment Managers in Israel v. Minister of Finance, PD Na (4) 367, 414 (1997)).

8. It should not be extinct, however, that the deletion of the definitions in the Agreements Law expands the approach to the surrogacy arrangement in a way that leaves "the approvals committee with very broad discretion - not to say, absolute - regarding approving applications even though this committee is fundamentally intended to be an implementing committee [...]" (Paragraph 36 of my opinion in the partial judgment). This difficulty indicates the need to install regulations and formulate appropriate guidelines that will determine the criteria and work processes according to which the approval committee will operate (On the need for regulations and guidelines for the purpose of reducing the discretion of administrative bodies, see: OP 1057/99 will be charged v. The Chief Military Prosecutor, P.D. Ng (3) 365, 379-380 (1999); Ref 3676/08 Zeno v. State of Israel, paragraph 37 (27.7.2009)). The Minister of Health himself stated in a letter

dated 4.7.2021 which was attached to the update notice on behalf of Respondent 1 dated 6.7.2021, that "the balances required to protect all rights in this procedure can be created, by establishing guidelines for exercising the discretion of the Approvals Committee [...], This is within the framework of the existing law, and after the final decision of the Supreme Court".

Therefore, I will propose to my colleagues to grant a stay of six months before the proposed remedy takes effect, in order to allow for appropriate administrative organization (hereinafter: the Interim Period). These will not be taken into account in the interim period for the purpose of calculating the "determining age" regarding the maximum age limit in section 5 (a) (1 c) (a) of the Agreements Law and sections 11 and 13 (e) (1) of the Egg Donation Law (see in this context: Constitutional Remedies, pp. 370-373). Needless to say, until the remedy takes effect, the Knesset is open to the possibility of enacting legislative amendments in accordance with the court's rulings in the partial judgment and the criteria outlined in this judgment.

9. *Summary*: Six years ago, the petition in the title was conducted before us and when it was determined that the arrangement was unconstitutional, "the lack of political feasibility" could not justify the continued serious violation of basic rights. As he well noted, the judge (as described then) M. Cheshin: "And discrimination, as we know, is the worst-of-all [...] No wonder then that in every site and in every generation the enlightened members of society have done and are doing to eliminate and eradicate discrimination. And the war is a constant war, a day-to-day war" (HCJ 95/7111 Local Government Center v. Knesset, P.D. No. (3) 485, 503 (1996). These present things should guide the path of the relevant parties in interpreting the arrangement before us.

10. Therefore, I will propose that within six months from the date of this judgment, the definitions "intended parents", "intended parents who are spouses" and "if a single mother" in section 1 of the Agreements Law are abolished, and after the definitions are repealed, the provisions of the Agreements Law As stated in paragraph 6 above. I will further propose that, given the aforesaid result and the long period of time during which the petition was conducted, we will charge Respondent 1 the petitioners' expenses and attorney's fees in the amount of NIS 30,000.

Given today, at Av Htsf"a 11/07/2021.

The President Vice President (retired) Judge

Judge Judge
