In the Supreme Court sitting as the High Court of Justice

HCJ 1779/99

Before: The Honorable Justice D. Dorner
The Honorable Justice D. Beinisch
The Honorable Justice A. R. Zuabi

The Petitioners:

1. Nicole Berner-Kadish
2. Ruti Berner-Kadish
3. Mattan Berner-Kadish

versus

The Respondent:

The Minister of Interior

A Petition for Order Nisi

Date of hearing: 15 Adar A 5760; February 21, 2000

Adv. Hadas Tagari
On behalf of the Petitioners

Adv. Osnat Mandel
On behalf of the Respondent

Abstract

The First and Second Petitioners (hereinafter: the Petitioners,) two women who have been life partners for seven years, are Israeli citizens. Their permanent residence is in the State of California, in the United States. On January 12, 1996 the Second Petitioner (hereinafter: the mother) gave birth to the Third Petitioner (hereinafter: the son,) after having become pregnant via sperm donation. The son was adopted by the First Petitioner (hereinafter: the adoptive mother,) with the mother's consent, according to an adoption decree granted by a California court – where the son was born and where the three Petitioners reside. The adoptive mother was registered as an additional parent in the son's

birth certificate. The Petitioners, who wish to return to Israel and who have been staying in Israel for two years for the purposes of study, notified the registrar of the child's adoption by the adoptive mother, relying on the birth certificate and the American court decision, and asked that the adoption be registered in the Population Registry. The Registrar refused, giving the reason that, biologically, the existence of two parents of the same sex is impossible, and that it has no duty to make registrations that are incorrect on their face. Hence the Petition.

The Supreme Court ruled:

A. 1. The rules of private international law demand, that the personal status of a person be recognized uniformly in all countries. Splitting a status may compromise both the public and the parties' policy. Only in extraordinary cases, when the foreign status compromises the public policy in the state where the registration is requested, it shall not be recognized.

2. The public policy in the country where the registration is requested – which may be compromised should the requested registration be permitted – has been given a limited interpretation.

3. Not recognizing a foreign adoption decree releases the adoptive parents from their duties toward the adoptees and thus infringes the rights and interests of the children.

4. Therefore, it seems the foreign adoption decree is valid in Israel as long as it has not been voided through a judicial proceeding.

B. 1. According to the case law, the Registrar is not authorized to determine the validity of the registration, but it must register what the citizen instructs it to, unless the "incorrectness of the registration is apparent and unquestionable."

2. The registration in the case at hand does not reflect the biological aspect but the legal aspect. But it is obvious that any adoptee has two mothers – a biological mother and an adoptive mother – and the adoption decree does not necessarily sever the legal link between the adoptees and their biological parents.

3. Therefore the Respondent's claim that it may refuse to register because of an apparent incorrectness of the requested registration has no substance.

C. (According to Justice D. Beinisch):

1. The answer as to whether the Third Petitioner's adoption by the First Petitioner would be recognized as valid in our law has yet to be pronounced upon by this Court, and it raises complex issues, including issues of private international law. However, the resolution of these issues is not in the hands of the Registrar.

2. The Respondent's claim in the case at hand that the incorrectness of the requested registration is "apparent" due to the impossibility to recognize two mothers for the same child is but a different framing of the argument that an adoption based on a same-sex relationship between the biological parent and the adoptive parent must not be recognized. This position, which is one possible position on the merits of the issue, may not guide the Registrar when coming to exercise its authorities under the Population Registry Law, 5725-1965.

D. (Minority opinion of Justice A. R. Zuabi):

1. Insofar as the registration of parents' names is concerned, the registration in the Population Registry is *prima facie* evidence of its correctness, according to section 3 of the Population Registry Law.

2. Therefore, protecting the Registry's reliability requires granting the Registrar the authority to examine in depth the correctness of the facts requiring registration. Therefore, when a reasonable doubt arises as to the correctness of the registration or its validity, the Registrar may refuse to make the registration.

3. The meaning of the Registrar's refusal is not that the Registrar is authorized to or capable of examining the validity of foreign judicial decisions or state certificates, and determine their validity. The registrar can only refer the matter to the appropriate court.

4. In the case at hand, a great doubt arises as to the validity of the foreign adoption decree and as to the chances of recognizing it because the Children's Adoption Law. 5741-1981 seemingly prohibits the adoption of a child by a same-sex couple.

5. As apposed to the act of conducting a marriage ceremony, which is essentially a ceremonial act, a foreign court's declaration of a minor's adoption is a meaningful act that changes the status of those involved and impacts their fate and their lives. Therefore, a judicial decision granted in a foreign country that establishes the personal status of one as adopted, has no validity in Israel on its own and in order to be valid must be recognized.

6. Therefore, the Registrar acted reasonably when it refused to register, based on the foreign adoption decree, the First Petitioner as the Third Petitioner's mother, and there is no room to intervene in its discretion.

Judgment

Justice D. Dorner

1. The First and Second Petitioners (hereinafter: the Petitioners,) have been life partners for seven years. They are Israeli citizens. Their permanent place of residence is in the State of California in the United States of America. On January 12, 1996 the Second Petitioner (hereinafter: the mother) gave birth to the Third Petitioner (hereinafter: the son,) after having become pregnant by a sperm donation. The son was adopted by the First Petitioner (hereinafter: the adoptive mother,) with the mother's consent, by an adoption decree granted on July 19, 1996 by a court in California – the birth place of the son and the place of residence of all three Petitioners. The adoptive mother was registered as an additional parent in the birth certificate issued for the child.

   The Petitioners, who wish to return to Israel and who have been present in Israel for about two years for the purposes of their studies, notified the Registrar of the adoption of the son by the adoptive mother, relying on the birth certificate and the American court decision, and requested that the adoption be registered in the Population Registry. The Registrar refused. It argued that biologically the existence of two parents of the same sex is impossible, and thus the incorrectness of the registration is obvious and

apparent. Because the Registrar is not required to make registrations that are incorrect on their face, the Registrar rejected the Petitioners' request.

The Petition before us challenges this refusal.

The Petitioners requested that the Registrar be compelled to register the child's adoption by the adoptive mother in the Population Registry. At the Petitioners request, this Court issued an order nisi.

2. The Petitioners argued that the Registrar was not authorized to refuse to register their notice; that it was required to register the adoption based on the documents presented to it; and that its refusal was a result of improper considerations, rooted in moral objection to adoptions in same-sex families.

In its response to the Petition, the Respondent repeated its arguments as to the biological impossibility. It reasoned that at the basis of the refusal there were no considerations of public policy, which it is not authorized to consider, but the apparent and obvious incorrectness of the requested registration. The Respondent additionally claimed that such a registration is impermissible under the Population Registry Regulations, which require the Registrar to register the names of the "father" and the "mother" whereas the adoptive mother was registered in the American birth certificate as a "parent" – an option that does not exist in the Israel Registry.

In my opinion, the Petition must be accepted.

3. The rules of private international law require that one's personal status be recognized uniformly in all countries. Splitting a status may compromise the public by infringing on the parties' rights. Only in extraordinary cases, when the foreign status harms the public policy in the country where the registration is sought, it must not be recognized. See Amos Shapira, *Comments on the Nature and Purpose of Conflict of Laws in Private International Law*, IYUNEI MISHPAT 10 (1984) 275, p. 290-91.

The public policy of the country where the registration is sought, which may be harmed were the requested registration be approved, was given a limited interpretation. As Justice Cardozo explained in a decision by the New York State Appeals Court:

> "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." [*Loucks v. Standard Oil Co. of N.Y.*, 224 N.Y. 99, 111, 120 N.E. 198, at 202 (1918)].

For example, in England a marriage performed in Nigeria between an adult and a 13-year-old girl was recognized, even though such marriage is prohibited in England and though the girl's best interest required, despite the recognition of the marriage, separating her from her husband. See *Mohamed v. Knott*, [1968] Q.B. 1, at 14. A special status is given to foreign adoption decrees, because of their impact on the best interest of the minors. So, for instance, in a decision by the English Court of Appeals, Lord Dening wrote, that subject to the harm the foreign adoption causes to the public policy "[a validly created foreign adoption] should be universally recognized throughout the civilised worlds" [*In re Valentine's Settlement*, [1965] 1 Ch. 831, at 842].

In the United States, too, foreign adoptions were recognized even when according to the specific state's law such adoptions were impermissible. See for example *Delaney v. First Nat'l Bank in Albuquerque*, 386 P. 2d 711, at 714 (N.M. 1963). Under the same principle, a court in North Carolina rejected the argument that an adoption in a lesbian family may not be recognized due to its harm to the public policy in that State, which does not recognize same-sex marriage. The decision states as following:

> "Enforcing the adoption decree does not require North Carolina to recognize same-sex marriages. Enforcing the decree simply allows the court to determine custody of the child, as between two involved adults, based on the best interests of the child – which is the expressed public policy of the state in resolving custody matters… North Carolina has no public policy denying parental status to an individual based upon that person's sexual preferences. It cannot be known at this stage how the trial court will resolve the custody dispute. Enforcing the adoption decree only ensures that a best interest hearing will be held which is not a result that offends the good morals, natural justice or interest of North Carolina citizens." [*Aviva S. Starr v. Sheryl R. Erez*, No. 97 CVD 624 (D. N.C. Aug. 29, 1997)].

Indeed, non-recognition of a foreign adoption decree releases the adoptive parents from their duties toward the adoptees, and thus compromises the rights and interests of the children, in regards to whom wrote Justice Zilberg that "it is unacceptable to ignore the interests [of the children] under no set of circumstances" (CA 209/54, *Steiner v. The Attorney General*, IsrSC 9 241, at 251.) See and compare also CFH 7015/94, *The Attorney General v. Jane Doe*, IsrSC 50(1) 48, at 65-66; Pinhas Shiffman, FAMILY LAW IN ISRAEL (vol. 2, 1989), 252-253.

4. It therefore seems that the foreign adoption decree is valid in Israel as long as it has not been voided through a judicial procedure. However, the question as to the validity of the decree does not require determination in our matter. As Justice Zussman wrote in HCJ 143/62, *Funk-Schlesinger v. The Minister of Interior*, IsrSC 17 225 (hereinafter: HCJ Funk-Schlesinger): "We are not here

concerned with the validity or voidance of the marriage. The issue before us is… whether it is justified for the Population Registrar to register the applicant as married."

In that case, which is part of a long and consistent string of case law that started with HCJ Funk-Schlesinger, it was held that the Registrar is not authorized to determine the validity of the registration it is required to make, but that it must register as the citizen instructs it, unless it is a case where the "incorrectness of the registration is apparent and is not in any doubt" (there, at 243.) Justice Zussman explained this as follows:

> "In registering a resident's family status, it is not the role of the Registrar to consider the validity of the marriage. It is incumbent upon the legislature that it did not charge a public authority with a duty it is incapable of fulfilling. It is sufficient that the Registrar, in order to perform its duties and register the family status, that it was presented with evidence that the resident had conducted a marriage ceremony. The question of the ceremony's validity has sometimes various aspects and their exploration is beyond the scope of the Population Registry." [There, at 252.]

See also the words of Justice Haim Cohen in HCJ 72/62, *Rufeisen v. the Minister of Interior*, IsrSC 16 2428, at 2444.

Based on that same case law, the Registrar was compelled to register in the Population Registry as married a non-Jewish woman who married a Jewish citizen of Israel in a civil marriage in Cyprus, and the children of a Jewish man and a non-Jewish woman as Jews (HCJ 58/68, *Shalit v. The Minister of Interior*, IsrSC 23(2) 477); to register people who underwent reform or conservative conversion in recognized communities outside of Israel as Jewish in the religion and nationality markers, while they were citizens and residents of those countries (HCJ 264/87 and Others, *Union of Sepharadic Torah Observers – Shas Movement and Others v. the director of the Population Administration and Others*, IsrSC 43(2) 723); and to register as Jewish a Jewish male citizen of Israel and a non-Jewish woman who were married in Israel at the consular department of the Brazil embassy (HCJ 2888/92, *Goldstein v. the Minister of Interior*, IsrSC 50(5) 89.)

5. The Respondent does not dispute the claim that it is not authorized to determine the validity of the foreign adoption. As noted, its claim is that its refusal is based on the apparent incorrectness of the registration it was called upon to register, whereby the child has two mothers, which is impossible biologically.

This claim does not hold water.

The registration before us does not reflect the biological aspect, but the legal aspect. It is plainly clear that any adoptee has two mothers – the biological mother and the adoptive mother – and that the adoption decree does not necessarily sever the legal link between the adoptees and their biological parents. Thus section 16 of the Child Adoption Law, 5741-1981 recognizes an open adoption where the relationship between the adopted children and their biological family is preserved. This relationship finds expression in the Population Registry, and as it was explained to me, both the biological parents and the adoptive parents are registered there.

Beyond the necessary scope, I will add that the Population Registry does not consider a "mother" and "father" distinctly, but as details among the details that must be registered under the "parents' names" (section 2(a)(2)). Even were the law to address the "mother" and the "father" separately, there would have been no bar to registering the adoptive mother as an additional mother, similarly to the way, as mentioned, decrees as to open adoptions are registered.

Based on the above, I propose to accept the Petition and to make the order nisi absolute.

Additionally, I propose to require the Respondent to pay the Petitioners their costs in the amount of NIS 10,000.

Justice

Justice Beinisch

1. I join my colleague Justice Dorner in my position that the Petition should be accepted, and that the Respondent must register the Petitioners' details in the Population Registry according to the foreign adoption decree.

In its response to the Petition, the State's attorney declared that the Respondent's position is that the Petitioners' matter falls under the rule established by this Court in HCJ 143/62, *Funk-Schlesinger v. The Minister of Interior*, IsrSC 17 229. Therefore, the Respondent's position as reflected in the response is that "the Registrar is not authorized to exercise discretion as to the legal validity, which is in doubt, of a valid document that is presented to it… Indeed, it seems that were the reason for refusing to register the Petitioner as she requests is rooted in casting doubt on the validity of the adoption, the Registrar would have exceeded its authority" (section 9-10 of the response.) Further the State's attorney stated in the response that the Respondent routinely guides its staff to register, as a general rule, out-of-country adoptees and their adoptive parents as children and parents, "without digging into the

nature of the adoption and its validity" (section 10 of the response.) Therefore, the response reveals that routinely, and seemingly in the course of implementing the rule established by HCJ 143/62 above, the Respondent tends to be satisfied, for the purpose of registering adoptions, with foreign adoption decrees presented to it, without investigating or examining the substantive validity of the adoption. This policy by the Respondent has apparently been accepted for a significant period of time and it is reasonable on its face.

The State's argument in the Petition before us is that the requested registration under the ordinary policy as to registering adoptions according to foreign adoption decrees must not be made. This is because the case at hand is not one of doubt as to the legal validity of the foreign adoption decree, but one of "incorrectness of the registration that is apparent and is not in reasonable doubt." This reason for the Respondent's refusal to make the requested registration is based on the exception for the registration obligation that HCJ 143/62 above established. I cannot accept this argument. In the case before us, the Respondent cannot point to an obvious and apparent "incorrectness" as mentioned. The requested registration detail is not a biological fact, but a matter that involves a complex legal issue. The answer to the question as to whether the adoption of the Third Petitioner by the First Petitioner might be recognized in our law is not simple. The similar issue of the validity or recognition of a foreign adoption procedure of the type before us, has yet to be considered by this Court, and it raises difficult questions, including those in the area of private international law. Additionally, we must assume that under factual circumstances similar to the case before us, the discussion around the validity of the adoption would focus on the matter of compromising the public policy as an exception to recognizing the adoption. As reflected from my colleague's opinion, such discussion should consider the distinction between the "internal" Israeli public policy and the "external" public policy (on this point see: P. Shiffman, *International Adoption*, ISRAELI REPORTS TO THE XIII INTERNATIONAL CONGRESS OF COMPARATIVE LAW (ed. C. Wasserstein Fassberg, Jerusalem 1990), 42-43; HCJ 143/62, above, at 256; CA 1137/93, *Ashkar v. Hames*, IsrSC 48(3) 641, 651-52; CFH 1558/94, *Naffissi v. Naffissi*, IsrSC 50(3) 626, 628.) Whatever the answer to these questions, and we need not determine this for purposes of the discussion before us, resolving them is not in the hands of the Registrar (compare: HCJ 2888/92, *Goldstein and Others v. the Minister of Interior and Others*, IsrSC 50(5) 89, 94.) The Respondent's argument in this case, whereby the incorrectness of the requested registration is "apparent" because of the impossibility of recognizing two mothers for the same child, is but a different dress to the argument that an adoption based on the same-sex relationship between the biological parent and the adoptive parent should not be recognized. As said, this position – which is one of the possible positions on the merits of the issue – may not guide the Registrar when it comes to exercise its authorities under the Population Registry Law. In the absence of any claim – which is undisputed – challenging the validity of the foreign adoption decree or the

correctness of the requesting parties' details – and in our case there is no such claim – the Registrar must register the Petitioners' details based on the adoption decree and consistently with its policy regarding the usual registration of foreign adoption decrees.

For these reasons I join the opinion of my colleague Justice Dorner.

Justice

Justice A. R. Zuabi:

I read my colleague Justice Dorner's opinion and my colleague Justice Beinisch's opinion with interest, and I regret I cannot join my voice with theirs.

As detailed in my colleague Justice Dorner's opinion, this Petition is concerned with the Petitioners' request that the Population Registrar register the First Petitioner as the mother of the minor – the Third Petitioner – by force of an adoption decree issued in the State of California which granted the Petitioner the status of a parent in terms of her relationship with the minor, a parenthood that exists alongside the biological parenthood of the Second Petitioner.

Relying on Justice Zussman's words in HCJ 143/62, *Funk-Schlesinger v. The Minister of Interior*, IsrSC 17 225 (hereinafter: the *Funk-Schlesinger* case) where it was held that "the duty of the Registrar, under the above ordinance is merely the role of collecting statistical material in order to manage the book of residents, and no judicial authority was granted to it" (there, at 244,) my colleague found that the Registrar lacked the authority to examine the validity of the adoption decree granted abroad and that all it must do is register as the citizen instructs it, except for when the incorrectness of the registration is apparent and is under no doubt. In this case my colleague rejected the argument that the incorrectness of the registration is apparent through finding there is no bar to registering the adoptive mother as an additional mother similarly to the way open adoption decrees are registered.

With all due respect, I believe that the *Funk-Schlesinger* case cannot guide the determination in the case pending before us, and in my view this case can be distinguished from the *Funk-Schlesinger* case, a distinction that must lead to a different conclusion than that which my colleagues reached.

The *Funk-Schlesinger* case involved a Christian woman, a Belgian citizen, who married an Israeli Jewish man in a civil marriage in Cyprus, since the couple could not be married under Jewish law. Following the Cyprus marriage, the woman wished to be register in the Population Registry as married and to change her name to her husband's name. The Registrar refused these requests since it believed a marriage between an Israeli Jew and a Christian woman to be invalid. It referred the applicant to the District Court in order to be granted declaratory judgment as to the validity of the marriage.

The Honorable Justice Zussman, who at the time was joined by the Honorable Justices Berenson, Vitkon and Mani, rejected the Registrar's position and ordered it to comply with the request. However, in the dissenting opinion Justice Zilberg endorsed the Ministry of Interior's position.

Justice Zussman reached the conclusion he did only after informing as to the technical and statistical purpose of the Population Registry Ordinance, 5719-1949, finding on page 249 of the opinion as following:

> "The above Ordinance did not attribute to a registration in the Registry any evidentiary force or made it proof of anything. The purpose of the Ordinance is as noted in HCJ 145/51 (JUDGMENTS 11, 29) to gather statistical data, data that may be true and may be untrue, and no one guarantees its correctness. For the purpose of establishing one's age for conscription the registration in the Book of Residents is used only as *prima facie* evidence, not under the Ordinance above but under the Annexure to Security Service, 5719-1959. Identification Card is issued to a resident under section 7 of the Ordinance as a method of identification, but no one is obligated to act according to it and no one is obligated to identify the holder of the identification card based on it. Holding an identification card grants its holder no rights: HCJ 155/53 (JUDGMENTS 15, 24.)"

As a result, Justice Zussman concluded that the registration of family status should not be used to prove the marriage, particularly when the validity of the marriage in such a situation is a highly complex issue which ought to be determined by the rules of conflicts of laws, when the Registrar has no qualification to determine it. Therefore, it is not the Registrar's position to raise the issue of the marriage's validity, and it must be satisfied for purposes of registration in the Population Registry with *prima facie* evidence that a marriage ceremony was held. And in the language of Justice Zussman on page 251 of the opinion:

> "… I discussed at length the various possibilities of prohibiting or permitting mixed marriages in order to demonstrate that the issue of their validity or their invalidity is weightiest and when a couple seeks to be registered under the Population Registry Ordinance, 5719-1949 it is impossible to determine how the chips may fall. The Registrar cannot guess which court will hear the matter, how the President of the Supreme Court may use its authority under Article 55 of the King's Council, and it cannot predict in advance whether the marriage would be recognized as valid or not."

And he summarizes on page 252:

> "… My opinion leans toward that when registering the family status of a resident it is not the role of the Registrar to consider the validity of the marriage. It is incumbent upon the legislature that it did not charge

> a public authority with a duty that it cannot fulfill. It is sufficient that the Registrar, for purposes of fulfilling its duties and registering the family status, is presented with evidence that the resident held a marriage ceremony. The question of whether the ceremony that was held is valid has aspects in both directions and examining the validity is beyond the scope of the Population Registry."

The Supreme Court repeatedly affirmed this in applying the *Funk-Schlesinger* rule to registering religious and national markers in the Registry [see HCJ 58/68 (the *Shalit* case), HCJ 264/87 (*Shas Movement* case), HCJ 2888/92 (*Goldstein* case)], all of which are cited in my colleague Justice Dorner's opinion.

In the *Goldstein* case similar, though not identical, circumstances to those in the *Funk-Schlesinger* case arose. There, then Deputy President Barak relied on the opinion of Justice Zussman in *Funk-Schlesinger* and held in section 8 of the opinion:

> "…Therefore, were a non-Jewish woman, a citizen of a certain country, and the Jewish man (also a citizen of that same country) to approach the Registrar and present it with registration certificate regarding their marriage which was made by the consul of that certain country, the Registrar must register the two as married. It is true that there is doubt as to the consul's power to perform a marriage under such circumstances, but the Registrar is not authorized to determine this doubt… Indeed, as long as such doubt exists, the Registrar must register the couple as married, because the issue as to the validity of such a ceremony has sometimes various aspects and examining its validity is beyond the scope of the Registry's authorities."

As noted, I believe the *Funk-Schlesinger* case must be distinguished from the case at hand. As a result, I believe a different conclusion than that reached by my colleague Justice Dorner must be reached – that is, the adoption must not be registered in the Population Registry as reasoned below.

First: the *Funk-Schlesinger* case involved the registration of a marriage, to which, as we know, the Population Registry Ordinance, 5719-1949 (hereinafter: the Registry Ordinance) applied. This Ordinance, as Justice Zussman held as cited above, had no probative value – the Ordinance did not even attribute the Registry the force of *prima facie* evidence, and its purpose was merely the collection of statistical information. Therefore, Justice Zussman held that the Registrar, which operates under the Ordinance, must comply with a citizen's request and make registrations per one's request. However, this is not the case here. The Population Registry Law, 5725-1965, which replaced the Registry Ordinance, attributes reliability and evidentiary weight to the details registered in the Registry. The law explicitly stipulates in section 3:

> "The registration in the Registry, any copy or summary of it as well as any certificate issued under this law would serve as evidence as to the

correctness of the registered details listed in paragraphs (1) to (4) and (9) to (13) of section (2)."

This was also established in section 1(c)(4) of the Population Registry Regulations (Registrations in Identification Card), 5750-1990:

> "Under section 3 of the Population Registry Law, 5725-1965, the registered details in such certificate – aside from the registration for "nationality," "personal status" and the "name of the partner" – will serve as *prima facie* evidence of their correctness."

In the *Goldstein* case, the Court applied the *Funk-Schlesinger* rule, though the Population Registry Law was in effect, yet that case, too, concerned marriage – a registration detail that the law, similarly to the state of the law in place when the Registry Ordinance was in effect – negates any evidentiary force, and thus there was no need to distinguish the *Funk-Schlesinger* rule. Still, it is appropriate to reference the words of Professor M. Shawa as to the importance of the Population Registry beyond collecting statistical information, which he wrote in a critical article published following the *Goldstein* judgment: *On The Validity and Registration of Mixed Marriages Performed by a Foreign Consul in Israel*, HAPRAKLIT 42, at 188, quoted by Justice Tal, with consent, in HCJ 1031/93, *Goldstein and Others v. The Minister of Interior and Others*, IsrSC 49(4) 661, at 710:

> "The importance of the registration in the Population Registry and the identification card that is issued according to it must not under any circumstances be underestimated… The registration in the Population Registry has great value in different matters, much beyond 'collecting statistical data.' It is probably to assume that the petitioner in the *Goldstein* case would also be considered as an 'Olah' (ed. note – Jewish immigrant to Israel) as a result of this registration and will enjoy all those rights enjoyed by Jewish immigrants to Israel. Furthermore, we must assume that in reality the different government agencies and authorities, such as the Ministry of Housing, National Insurance, the IDF, tax authorities and others consider the parties as married – in the absence of any other efficient legal tool – based on the registration in the Population Registry and the identification card. They accordingly grant the rights associated with this personal status as long as a court did not invalidate such marriage…"

In our case we are concerned with registering "names of parents." Registering this detail in the Registry serves, under section 3 of the law, as *prima facie* evidence of its correctness. In such instance it is difficult to apply the *Funk-Schlesinger* rule, which at its core is the Registration's lack of evidentiary value or force. Preserving the correctness of the Registration calls for granting the Registrar with authority to examine in depth the correctness of the facts that warrant registration. Things in this spirit were said in the explanatory notes to the Population Registry Bill, published in BILLS 1984, at 266, as follows:

> "… In light of the instructions as to the authorities of the Registrar it was decided that the registration in the Registry, any copy or summary of it as well as any certificate issued according to this law would serve as *prima facie* evidence as to the details of the registration, with the exception of the personal status, nationality, religion and partner's name."

From all of the above it appears that when a reasonable doubt arises as to whether the registration is proper, or as to its correctness or validity, and when registering a detail that serves as *prima facie* evidence as to its correctness, the Registrar may refuse to make the registration. This is particularly true when there is great doubt as to the validity and prospects of recognizing a foreign adoption decree in our circumstances, as seemingly Israeli law bars any possibility of partners of the same sex to adopt a child (see section 3 of the Children's Adoption Law which mandates at the top "There shall be no adoption but by a man and his wife together…" and see also on this matter: Ben Dror, ADOPTING SURROGACY, Cook Publishing 1994, at 223.) It is even possible that this conflicts with the Israeli public policy, which may prevent any option of recognizing the foreign adoption decree (see section 3(3) of Enforcing Foreign Judgments Law, 5718-1958 (Prof. M. Shawa, PERSONAL STATUS LAW IN ISRAEL, Expanded 3rd edition (Massada Publishing) 1991, at 470-76.)

Indeed, the above does not mean that the Registrar is authorized and/or capable of examining and determining the validity of a foreign court decision or foreign certificate. Its decisions in effect do not determine anything and it merely refers the citizen to the proper judicial authority.

On the operation of the Registrar, Dr. Zeev Palk wrote in his article *Registering Marriage in the Book of Population*, HAPRAKLIT 19, 199, 204:

> "In effect Registrars have taken a third tack aside from those described in the opinion (meaning the *Funk-Schlesinger* case – A. R. Zuabi.) They registered details such as age and family status according to an interested party's notice and documents. Should there be any doubt in their hearts, both on the factual level and on the legal level, they forwarded the case to the division's management to consult the legal advisor of the Ministry of Interior. Were the doubt found to be unfounded they would be instructed to register the detail, and where the doubt stood they would be instructed to notify the relevant person that the detail would not be registered until declarative judgment from the competent court may be presented. Though the Registrar is not qualified to reach judicial decisions, it enjoys legal counsel. Additionally – its decisions determine nothing, instead it only refers the citizen to the appropriate court."

In our case, as opposed to the *Funk-Schlesinger* case, the Registrar need not "guess" which is the competent court to recognize and consider the validity of the foreign adoption decree, as section 3(b) of the Family Courts Law, 5755-1995, authorizes the

family court to adjudicate petitions to enforce a foreign court decision in terms of family matters or to recognize it.

Second, in addition to the above, it seems there must be a distinction, for purposes of registration in the Population Registry, between registering a marriage performed abroad and an adoption or divorce granted based on a decision of a foreign court. Performing a marriage is a ceremonial act that requires no judicial determination, and thus the Registrar must be satisfied with a marriage certificate, lawfully drafted. An act that concerns the personal status and requires judicial determination is different. The adoption decree granted by a court determines and changes the status of the adoptee and the adopters – the adoptee becomes their child and not the child of her natural parents, and the adopters become her parents. In an adoption proceeding the court has a significant role, it does not fill a purely formal function, but instead fills a function of the most highly important judicial determination because adoption proceedings are of "the laws of life" which alter status and impact the fate and the life of those they concern.

A decision granted by a foreign court and establishes one's personal status as divorced or adopted is not valid in Israel by its own force and it must be recognized in order to have any validity.

In the *Rosenbaum v. Goli* case (CA 423/63, IsrSC 10) this Court considered the purpose and meaning of section 11(b) of the Enforcement of Foreign Judgments Law, 5718-1958, which concerns incidental recognition. Justice Olshan said there as following:

> "Were it not for section 11, when considering a suit filed in Israel, with in Israeli court, it would have been impossible to permit a party to submit a foreign decision as evidence and such attempt would have been rejected because as long as the decision is not recognized through declaration as enforceable or by granting a decision based on the foreign decision in a filed suit – the court may not recognize it."

Justice Agranat confirmed this in the *Anavi* case (CA 472/64, *Anavi v. The Attorney General*, IsrSC 19(1) 645):

> "The meaning of the above is to demonstrate that the legislative intent was but to remove the procedural difficulty as a foreign court decision may not serve as evidence 'incidentally to the adjudication of another matter' as long as it was not granted validity…"

From this we learn that the foreign decision that has yet to be recognized may not serve as evidence and that the Registrar may request that the parties present a declarative judgment recognizing the foreign decision.

Let us assume for a moment that two partners who are Jewish and who have married according to Jewish law travel abroad and divorce there in a civil divorce based on a foreign decision. Would the Registrar be able to register them as divorced based on the foreign decision that has yet to be recognized? The answer is certainly in the negative, despite the fact that this detail does not serve as *prima facie* evidence. Section 19(e)(b)

authorizes the Registrar to approach the family court and seek a declarative judgment that verifies the correctness of the claims.

My colleague's conclusion does not even serve a desirable policy. Registering an adoption decree in the Population Registry, despite the heavy doubt as to its correctness and validity in Israel, would compromise the Registry's reliability and harm the adopted child's best interest. This may cause a split in the child's status because in the eyes of the law the child would not be considered adopted though she would be registered in the Registry as such. This would also open a wide door to registering dubious adoption decrees that clearly could never be recognized whatsoever in Israel and for which one is satisfied with their registration in the Population Registry.

In our case it seems the Registrar acted reasonably and within the discretion it was granted when it refused to register, based on the foreign adoption decree, the First Petitioner as the adoptive mother of the Third Petitioner. The legal doubt as to the validity in Israel of a yet to be recognized adoption decree, the uncommon family unit that the decree creates and the seeming tension in registering two mothers to a minor are sufficient to justify the Respondent's position not to make the registration before the adoption decree is recognized and in such cases the Respondent must refer the petitioners to a family court in order to recognize the adoption decree.

At bottom I will note that though the Petitioners do not wish for the adoption to be recognized by the different Israeli authorities in a manner that would mean the parental duties and rights of the Petitioner vis-à-vis the child be recognized as such. However, reviewing the Petition reveals the most of the Petitioners' arguments concern the consequences of the registration and the importance that the adoption be recognized. In effect, the Petitioners do not seek registration alone, but they seek de facto recognition of the adoption. For such purposes they should have turned to the competent court from the outset in order to be granted recognition for the adoption decree. The Respondent's argument in this context is correct that since the Registrar has only a registering function, since its registration has no force beyond the fact of the registration itself, then the substantive outcomes of non-registration cannot be relied upon in order to justify registration. If indeed under the circumstances the registration bears any outcomes, then certainly the Registrar's discretion cannot be eliminated.

Therefore, were my opinion heard, I would have rejected the Petition.

Justice

It was decided, by majority, according to the opinion of Justice Dorner.

Handed down today, 24 Iyar 5760 (May 29, 2000).

Justice Justice Justice