

## CASE NOTE

# *GTB V SPAIN: THE RIGHT TO BIRTH REGISTRATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS*

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## I INTRODUCTION

On 16 November 2023, the European Court of Human Rights ('Court') issued a landmark judgment in the case of *GTB v Spain* ('*GTB*').<sup>1</sup> The case concerned the prolonged delay by Spanish authorities in assisting the applicant, Mr GTB, with registering his birth and obtaining identity documents, despite being aware of his inability to do so. In a first for the Court, it was held that art 8 of the *Convention on the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*'),<sup>2</sup> which protects the right to private and family life, includes a right to birth registration. Accordingly, the Court found a violation against the Spanish authorities for their failure to act diligently to secure this right.<sup>3</sup>

Birth registration is vital to establish a child's legal identity, family ties and often their nationality, all of which are important for accessing fundamental rights. Children who lack birth registration can face significant difficulties in their education, healthcare and personal lives. In some cases, these children are also

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<sup>1</sup> *GTB v Spain* (European Court of Human Rights ('ECtHR'), ECLI:CE:ECHR:2023:1116JUD000304119, 16 November 2023) ('*GTB*').

<sup>2</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8 ('*ECHR*'), which reads:

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

<sup>3</sup> *GTB* (n 1) [130]–[131].

stateless or at the risk thereof.<sup>4</sup> Nevertheless, significant barriers to birth registration persist across Europe and other regions.

The *GTB* judgment has clear potential to place the issue of birth registration and access to identity documents at the heart of the Court's progressive development of art 8. The Court not only established that access to documentation is a substantive right under the *ECHR*, but also articulated this through a noteworthy emphasis on the right to have one's identity recognised in law, particularly where children are concerned.<sup>5</sup> The judgment also takes a step further in the Court's interpretation of art 8, considering as its central legal issue whether states have an obligation to go beyond standard procedures to secure an individual's ability to develop their sense of identity.<sup>6</sup> While the Court's analysis raises various questions, particularly whether the obligation exists only as a remedy for parental inaction, it nevertheless establishes several principles that advance the protections of art 8 concerning an individual's access to a legal identity.

## II FACTS

Mr GTB was born in Mexico in August 1985 to a Spanish mother, Ms X. His birth was not registered with the Civil Registry at the Spanish Consulate in Mexico.<sup>7</sup> Shortly after Mr GTB's birth, an earthquake caused significant damage in Mexico. This event prompted Ms X to request repatriation to Spain for herself and her two children, Mr GTB and his elder brother. Upon their arrival in Spain, neither child had their birth registered.<sup>8</sup> Since then, the children continued to reside in Spain but faced difficulties accessing primary education due to a lack of identification documents.<sup>9</sup> The children lived in a foster centre between December 1989 and January 1991, later returning to the care of Ms X.<sup>10</sup>

12 years after Mr GTB's birth in 1997, Ms X requested that Spanish authorities initiate a late birth registration procedure for both of her children.<sup>11</sup> Upon approval, the Central Civil Registry asked Ms X to prove that her children had been born in Mexico, but she was unable to provide the necessary documentation and the registration process was suspended.<sup>12</sup>

In May 2002, Ms X restarted the registration process, explaining that the documents had been destroyed in the earthquake in Mexico.<sup>13</sup> Despite repeated requests from Spanish authorities for documents that she could not provide, a judge recognised the children as hers in May 2005 after examination by a forensic

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<sup>4</sup> For analysis on the significance of birth registration in preventing statelessness across different European states, see European Network on Statelessness ('ENS'), *Birth Registration and the Prevention of Statelessness in Europe: Identifying Good Practices and Remaining Barriers* (ENS Briefing, 5 May 2020) <<https://www.statelessness.eu/updates/publication/birth-registration-and-prevention-statelessness-europe-identifying-good>>, archived at <[perma.cc/QR9E-CY6C](https://perma.cc/QR9E-CY6C)> ('Birth Registration and the Prevention of Statelessness in Europe').

<sup>5</sup> *GTB* (n 1) [118].

<sup>6</sup> *ibid* [122].

<sup>7</sup> *ibid* [5].

<sup>8</sup> *ibid* [6]–[7].

<sup>9</sup> *ibid* [14].

<sup>10</sup> *ibid* [8].

<sup>11</sup> *ibid* [31].

<sup>12</sup> *ibid* [35].

<sup>13</sup> *ibid* [40].

doctor.<sup>14</sup> In April 2006, their births were finally registered and Mr GTB, who was then 21 years old, received his ID card the following month.<sup>15</sup>

In 2015, Mr GTB filed a state liability complaint, requesting monetary compensation for the undue delay in issuing his ID card and the corresponding impact on his health as well as various aspects of his private life.<sup>16</sup> Mr GTB argued that the lack of documentation during the nine year interim exacerbated his mental health conditions, including chronic post-traumatic stress disorder and paranoid schizophrenia, which hindered his ability to pursue education and find employment.<sup>17</sup> After his claim for state liability was rejected by judicial proceedings in Spain, he filed a complaint under the *ECHR* alleging violations of arts 3 and 8, as well as art 2 of *Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>18</sup> Ultimately, the Court classified Mr GTB's complaint solely under art 8, noting that the protections of private life are sufficiently broad to encompass his physical and psychological integrity as well as his education.<sup>19</sup>

### III ISSUES AND HOLDINGS

#### A *Main Arguments by the Parties*

In the context of art 8, Mr GTB made two arguments before the Court. First, he contended that public authorities should have initiated a late registration procedure while he was under their guardianship.<sup>20</sup> This relates to the periods in which Mr GTB was in foster care, during which no efforts were made to register his birth.<sup>21</sup>

Second, Mr GTB argued that public authorities became aware of Ms X's difficulties concerning documentation in March 1999 but allowed the procedure to delay for a further seven years. Mr GTB stressed that the failure of public authorities to take initiative in the proceedings overlooked his best interests as a child, noting that he remained undocumented for highly sensitive periods of his childhood and adolescence.<sup>22</sup> He argued that this failure interfered with his right under art 8 of the *ECHR* and was 'a measure which had not been necessary in a democratic society' as required by art 8 § 2.<sup>23</sup>

The Government denied that public authorities had ever been in a position of legal guardianship over Mr GTB, asserting that under Spanish law, Ms X was the only person responsible for her son's birth registration. The Government also submitted that the delays in the registration procedure had been justified, as Ms

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<sup>14</sup> *ibid* [50].

<sup>15</sup> *ibid* [54]–[55].

<sup>16</sup> Council of State, Opinion No 529/2016, 7 July 2016, cited in *GTB* (n 1) [62].

<sup>17</sup> *GTB* (n 1) [98].

<sup>18</sup> Article 3 prohibits torture and inhumane or degrading treatment and art 8 protects the right to respect for private and family life: *ECHR* (n 2). Article 2 of *Protocol No 1* protects the right to education: *Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, ETS 9 (entered into force 18 May 1954) ('*Protocol No 1*').

<sup>19</sup> *GTB* (n 1) [83]–[85]. The Court noted that the applicant had not provided sufficient evidence to reach the threshold of severity required for a complaint under *ECHR* (n 2) art 3, and that the claim would therefore be analysed under art 8: *GTB* (n 1) [83].

<sup>20</sup> *GTB* (n 1) [94].

<sup>21</sup> *ibid* [95].

<sup>22</sup> *ibid* [96]–[99].

<sup>23</sup> *ibid* [100]. See *ECHR* (n 2) art 8.

X's inability to produce the required documents, as well as her 'attitude' towards the proceedings, could not be attributed to the authorities.<sup>24</sup> The Government thereby argued that Mr GTB did not qualify for victim status.<sup>25</sup> Interestingly, the Government also stressed that Mr GTB's Spanish nationality was never called into question or denied.<sup>26</sup>

### B *The Right to Birth Registration*

In its findings, the Court identified two central concerns under art 8 relating to the lack of birth registration. The first concern was the intrinsic connection between birth registration and an individual's right to identity. Early in the findings, the Court recalled that respect for private life requires that individuals be able to establish details of their personal identity, noting that the inability to do so interferes with personal autonomy and is 'directly related to the right to respect for private life'.<sup>27</sup> Assessing the application of these principles in light of Mr GTB's situation, the Court held that obstacles in obtaining birth registration and access to identity documents can have 'important repercussions ... for any person' which severely impacts their sense of individual identity.<sup>28</sup>

The second concern was the significant practical problems caused by the lack of birth registration and identity documents on an individual's daily life.<sup>29</sup> The Court took into consideration the adverse effects on education, employment and mental health, noting the existence of these issues within Mr GTB's complaint. Here, the Court also referenced material from international bodies that referred to the lack of birth registration as a form of neglect.<sup>30</sup> The conjunction of these points led the Court to hold, for the first time, that the right to respect for private life 'should be seen as including, in principle, an individual right to have one's birth registered' and to have access to other identity documents.<sup>31</sup>

### C *States' Positive Obligations to Assist in Birth Registration*

The Court also determined that safeguarding the consistency and reliability of civil registries is an important interest of states. Yet, while states accordingly have a wide purview in how they secure the right to birth registration, the Court acknowledged that the fundamental issue in this case was whether authorities were required to go beyond the standard procedure to register Mr GTB's birth. Specifically, the Court questioned if Spanish authorities had a positive obligation

<sup>24</sup> *GTB* (n 1) [105]–[110].

<sup>25</sup> *ibid* [89]–[90]. The Government suggested that Ms X's (in)actions disqualified Mr GTB from claiming victim status, which, if accepted, would have rendered the case inadmissible: at [89]. However, the Court held that this was a submission on the merits of the case and was to be examined as part of the Court's analysis: at [93].

<sup>26</sup> *ibid* [101], [103]. The Government submitted that the applicant's nationality had not been questioned as he had not been given an alternative identity card that was issued to non-Spanish citizens.

<sup>27</sup> *ibid* [118].

<sup>28</sup> *ibid* [123].

<sup>29</sup> *ibid* [118].

<sup>30</sup> *ibid*. See also United Nations Committee on the Rights of the Child, *General Comment No 13 (2011): The Right of the Child to Freedom from All Forms of Violence*, UN Doc CRC/C/GC/13 (18 April 2011) [13], cited in *GTB* (n 1) [80].

<sup>31</sup> *ibid* [118].

to ‘ensure that the applicant’s right to have a recognised identity under art 8 was not being violated’.<sup>32</sup>

Here, the Court reiterated how the lack of birth registration has significant repercussions for an individual, finding that there was ‘at least to some extent’ a causal link between Mr GTB’s lack of identity documents and his difficulties concerning education and health.<sup>33</sup> Subsequently, the Court held, while relying upon the best interests of the child principle, that Spanish authorities were required under art 8 to ‘act with due diligence’ and assist Mr GTB in obtaining his birth certificate and identity documents.<sup>34</sup> The Court added that ‘some adaptability’ in the process to provide identity documents may generally be required to safeguard art 8 interests where there are obstacles.<sup>35</sup>

The Court then assessed when Spanish authorities were under such an obligation, concluding that it arose in May 2002 after it became clear that the mother would not be able to produce the required documents. The Court found no justification for the inaction that caused a four year delay in the procedure from 2002 and 2006, which was determined to constitute a violation of art 8 of the *ECHR*.<sup>36</sup>

#### IV ANALYSIS

*GTB* marks a highly significant moment in the Court’s evolving concept of private life. It is the first time the Court has recognised a right to birth registration under art 8, and the implications of this should not be understated. The Court has previously acknowledged a causal link between lacking identity documents and interferences with personal autonomy and development, but it has not viewed documentation as a standalone right *within* the right to private life until now.<sup>37</sup> The Court’s development is highly welcomed and opens substantial avenues for future litigation concerning both children and otherwise undocumented individuals.

Even more noteworthy perhaps is the Court’s use of the ‘right to have a recognised identity’ to underpin its findings.<sup>38</sup> This construction of birth registration is introduced early in the Court’s analysis of general principles, with an implication that the right to private life demands that individuals not only be able to establish details of their identity but also have this identity *recognised in law*. This construction foregrounds intersubjectivity at the heart of the Court’s findings, explaining that identity is co-constructed through mutual recognition by individuals and society.<sup>39</sup> As such, Mr GTB not only had a need to be registered for the fulfilment of his private and daily life (for education, employment, etc) but

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<sup>32</sup> *ibid* [122].

<sup>33</sup> *ibid* [123].

<sup>34</sup> *ibid* [124]. The Court noted that assisting Mr GTB was not incompatible with the legitimate goal of maintaining accurate civil registries.

<sup>35</sup> *ibid* [122].

<sup>36</sup> *ibid* [127]–[131].

<sup>37</sup> For comparison, see *Christine Goodwin v United Kingdom* (ECtHR, Grand Chamber, App No 28957/95, 11 July 2002) [90]. For further recognition of the impact of lacking identity documents upon the right to private life, see *Kurić v Slovenia* (ECtHR, Grand Chamber, App No 26828/06, 12 March 2014) [356]; *Ahmadov v Azerbaijan* (ECtHR, ECCL:CE:ECHR:2020:0130JUD003253810, 30 January 2020) [46].

<sup>38</sup> *GTB* (n 1) [122].

<sup>39</sup> See Jill Marshall, *Personal Identity and the European Court of Human Rights* (Routledge 2022) 19.

also a right to be registered and recognised — which according to the Court is a right inherent to art 8’s protection of identity and the best interest of children.<sup>40</sup> While this construction of legal identity is not entirely novel to art 8 case law, having been hinted at in other cases pertaining to parental relationships and surrogacy,<sup>41</sup> *GTB* marks the first time it serves as the main justification for a legal obligation.

However, the nature of this obligation will need significant clarification. The facts of this case are highly nuanced, with the findings paying significant attention to the individual role of Ms X. For instance, in its explanation of the positive obligation, the Court stated that Spanish authorities were required to ‘compensate for the mother’s failings’ in registering Mr GTB’s birth.<sup>42</sup> This narrative of blame and compensation is quite unhelpful, serving not only to blunt the Court’s prior findings on the right to birth registration — a right sufficiently justified by the need to secure a child’s identity and best interests, regardless of who their parents are — but also to raise questions about the required threshold to activate states’ obligations.

An alternative proposal, which has significant merit, is that the Court’s finding of due diligence obligations ‘to assist the applicant’ would be better served as an obligation to also assist parents in registering births,<sup>43</sup> a framing that is more in line with other international bodies.<sup>44</sup> Nevertheless, the Court’s due emphasis on the need for ‘adaptability’ in birth registration procedures lays the groundwork for this development in future cases. For truly universal and safeguarded access to birth registration, this adaptability ought to exist in law.<sup>45</sup>

Finally, although statelessness was not at issue in this case, it is somewhat surprising that the Court did not discuss nationality in its findings. Undocumented people are not always stateless — an important distinction — and Mr GTB did not raise his nationality in his complaint. Nevertheless, the Government’s claim that Mr GTB’s inability to obtain a birth certificate or ID was entirely unrelated to his nationality, stating that ‘the two aspects should not be mixed up’, went unchallenged by the Court.<sup>46</sup> The omission is noticeable given that the Court has acknowledged in *Hashemi v Azerbaijan* that proof of nationality through identity documents is essential to exercise its associated rights.<sup>47</sup> In this case, the denial of access to ID cards was made analogous to denial of nationality, which reflects a view from the Court that nationality and documentation are rather highly interrelated.<sup>48</sup>

An emphasis on nationality would have added more nuance to the Court’s findings on the need to register births. Simply because the authorities did not

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<sup>40</sup> See also Sarah Trotter, ‘The Construction of a Right to Birth Registration in European Human Rights Law: The Case of *GTB v Spain*’, *Strasbourg Observers* (Blog Post, 23 February 2024) <<https://strasbourgothers.com/2024/02/23/the-construction-of-a-right-to-birth-registration-in-european-human-rights-law-the-case-of-g-t-b-v-spain>>, archived at <[perma.cc/2JM7-4UGA](https://perma.cc/2JM7-4UGA)>.

<sup>41</sup> *Mennesson v France* (ECtHR, Fifth Section, App No 65192/11, 26 June 2014) [96].

<sup>42</sup> *GTB* (n 1) [124].

<sup>43</sup> Trotter (n 40).

<sup>44</sup> See Committee on the Rights of the Child, *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7.Rev.1 (20 September 2006) [25].

<sup>45</sup> See ENS, ‘Birth Registration and the Prevention of Statelessness in Europe’ (n 4).

<sup>46</sup> *GTB* (n 1) [101].

<sup>47</sup> *Hashemi v Azerbaijan* (ECtHR, ECLI:CE:ECHR:2022:0113JUD000148016, 13 January 2022) [49].

<sup>48</sup> *ibid* [46].

actively or explicitly deny Mr GTB's nationality does not mean that nationality is irrelevant to this case. Nor does it mean that Mr GTB's problems in accessing education or employment did not stem from his inability to access the rights associated with his nationality. This is especially pertinent given that many children experience statelessness or the risk thereof due to similar circumstances to Mr GTB and the unavailability of birth registration.<sup>49</sup> The failure to sufficiently capture this relationship when constructing the right to birth registration could be construed as an oversight from the Court.

## V CONCLUSION

The Court's judgment in *GTB* is undoubtedly a significant progression in the interpretation of art 8. By establishing a substantive right to birth registration and ID, along with states' due diligence obligations to assist, the judgment provides a foundation for addressing the various obstacles individuals face in accessing these procedures across Europe. The Court's focus on personal identity is noteworthy in this context. In emphasising the interplay between narratives of self and legal recognition, its findings contribute to a line of jurisprudence that prioritises the unimpeded ability to develop one's personal identity at the heart of the right to private life. In doing so, the Court also solidified its commitment to following the United Nations Committee on the Rights of the Child on these issues.

Yet, for the Court to fully realise the right to birth registration, it must also address several questions arising from the *GTB* case. Most notably, if the Court is to prioritise children's best interests in birth registration cases, it should avoid referencing parental fault when determining the nature of positive obligations. This is especially crucial since children born to undocumented parents often face significant barriers in accessing birth registration, a situation where assigning any blame to parents is wholly inappropriate.<sup>50</sup> This development nevertheless seems within reach, as does the Court taking the steps to connect the right to birth registration with its prior findings on nationality. The principles established in *GTB* must therefore be leveraged in further jurisprudence to ensure that all children and otherwise undocumented persons have access to their *right* to a recognised identity.

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<sup>49</sup> See ENS, 'Birth Registration and the Prevention of Statelessness in Europe' (n 4).

<sup>50</sup> See *Ramadani v Serbia* (ECtHR, App No 32903/22, 16 May 2024). The ENS and the Advice on Individual Rights in Europe ('AIRE') Centre jointly submitted a third-party intervention in this case, which concerned the refusal of Serbian authorities to register the applicant's birth because her mother of Romani origin had no identity documents. The submission analysed contracting states' obligations under *ECHR* (n 2) arts 8 (right to respect for private and family life) and 14 (prohibition of discrimination), along with other international instruments, to ensure that all children have their births registered and obtain access to a nationality: AIRE Centre and ENS, *Written Submission on Behalf of the Intervenors* (Submission to the European Court of Human Rights in *Ramadani v Serbia*, 16 May 2024).