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# The Development of Case Law on Parental Rights and Surrogacy at the European Court of Human Rights

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*The emergence of assisted reproductive techniques (ART) has sparked ethical and moral dilemmas concerning family, parenthood, and child rearing. Consequently, the most controversial technique, surrogacy, and the legal and human rights implications of cross-border surrogacy cases were brought before the European Court of Human Rights (Court). The right to become a parent is an inappropriate focal point in surrogacy debates, as it prioritises adult-centred reproductive claims over the best interests of the child. The Court's case law incorporated a "process-based approach" in the initial leading cases, although recent case law suggests a development of value-based assessment, which might not lie in line with the sovereignty of the member states to regulate sensitive aspects of family law and ART. The fact that obtaining parental rights motivates parents to engage in surrogacy, and the willingness of the Court to facilitate this in cases of surrogacy involving cross-border recognition of parental rights may spark tension between national laws on surrogacy based on national values.*

**Keywords:** surrogacy, right to respect for private and family life, European Court of Human Rights, assisted reproductive techniques, the right to become a parent

## Introduction

Demographic trends, shifts in the perception of what constitutes a fulfilled life, and the ongoing fight against infertility represent some of the defining challenges of the 21st century. In vitro fertilisation (IVF) and other advancements in reproductive medicine, first revolutionised in the 1970s, have since been refined and perfected to such an extent that assisted reproductive technologies (ART) are now widely accessible. However, these advancements have sparked ongoing ethical debates, particularly concerning the dismantling of traditional family structures, the potential exploitation and commodification of women and children, the

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fragmentation of motherhood, and the contractual nature of such arrangements. These unresolved issues continue to influence societal views on one of the most controversial forms of ART: surrogacy. Despite the ethical concerns, the demand for surrogacy has persisted and been met with corresponding supply. The use of economic terminology here is deliberate, as commercial surrogacy has become a prime example of how the right to parenthood can intersect with market dynamics.

This is precisely why surrogacy arrangements raise numerous human rights concerns, as value-based legislation determines which forms of ART are supported by law and under what circumstances, while others are discouraged due to public policy considerations. The interpretation of Article 8 of the European Convention on Human Rights (hereinafter: Convention), namely the right to respect for private and family life, in connection with reproductive issues, and whether the right to become a parent exists based on that, is an intriguing point to be raised. Practically, the diversity of legislation combined with the opportunity to travel abroad for medical services, opened a way for surrogacy tourism for parents living in a country where these arrangements are not addressed or prohibited by law. These possibilities altogether reconceptualised how society perceives family with a child, parenthood and infertility. Historically, infertile couple's only chance to become parents was adoption, which in comparison with surrogacy arrangements are a rather time-consuming, highly regulated, and rigid procedure. By contrast, surrogacy appears to be more flexible, accessible, expedient, shorter and a less supervised method, with the added biggest advantage: enabling the intended parents to have a genetically related child by the end of the arrangement. In essence, surrogacy has made the seemingly impossible possible. However, this innovation has also shifted the motivations for parenthood. What was once seen as a deeply personal longing or need has increasingly been framed as a right – or, more provocatively, as a subjective demand.

Given the intended parents' resort to cross-border surrogacy arrangements for family formation, the most relevant regional judicial authority to assess human rights related issues falls into the jurisdiction of the European Court of Human Rights (hereinafter: Court). In order to address human rights concerns, the work of the Court's jurisprudence on a specific area of surrogacy has become more sophisticated, although its development has somehow "stopped" in some respects. The Court has already established certain key factors which inherently influence the assessment of the case, thus one might say a decision-making tendency could be identified. The Court's navigation in the interpretation of human rights is of high importance, particularly in responding to evolving family structures and determining whether the right to become a parent, and the methods of doing so, fall under the scope of Article 8. A structured analysis on the relevant case law, and the Council of Europe's (CoE) thematic reports and recommendations provide valuable guidance on the ethical and legal dimensions of these issues.

## Is there a right to become a parent? – Reproductive rights and the Convention

The individual freedom to make decisions about one's most private aspects of life, including autonomy in making free choices of a private and familial nature, and the capability to determine oneself, prevail in decisions concerning child rearing and becoming a parent. We might say that becoming a parent is (mostly) an individual choice, and no one should force or discourage someone from doing so. This freedom is, however, not necessarily limitless, as it shall be weighted to the rights and freedoms of others, public morality, public values, that is why reproductive rights, especially in modern ART treatments are subject to many bioethical and moral debates. Generally, even when ART are not involved, the right to become a parent is typically framed within the context of reproductive rights. However, before exploring this further in relation to the Convention, let us first examine some philosophical arguments regarding this so-called "right".

Some individuals may experience genuine fulfilment through child rearing and becoming a parent, which is closely linked to the quality of the parent-child relationship. However, what makes this relationship objectively fulfilling may depend on the interaction between the child's and the parent's interests. Political theorists and ethicist have been examining the moral ground of family structures, where eventually the dynamics between the interests of the parent and of the child, and the self-assertion of each of them determines the nature of the structural relationship. One of the leading concepts is formed around the dual interest theory developed in a liberal egalitarian framework.[2] This approach emphasises the unique significance of parenting and asserts that adults have a fundamental moral right to become parents. It argues that the high level of intimacy and authority inherent in the parent-child relationship fosters the self-realisation of adults. The experience of raising a child provides a distinct and irreplaceable dimension of personal fulfilment that is not directly comparable to other forms of relationships, even those that may hold significant value for both parties.[3] The decision to become a parent reflects a fundamental value embedded in the concepts of family and child rearing. Once chosen, it is primarily driven by the individual's desire to align with this value, regardless of their competencies in raising a child. Although, if we would determine the answer through child-centred lenses, the parent's interest for personal fulfilment to parenthood and child rearing would not be respected.[4]

A critical approach to this theory argues that the parents' personal fulfilment to justify power over children, rather than focusing exclusively on the child's well-being, feeds the historical bias concentrated around the authoritative side of the relationship, and that children lack moral agent and are pawn of their own parents.[5] Arguably, if we

[2] See Macleod 2010; Brighouse–Swift 2014.
[3] Brighouse–Swift 2014: 88.
[4] Brighouse–Swift 2014: 5, 86.
[5] Gheaus 2015: 202.

focus solely on the competence of the most capable parents to raise a child, which would be in their interest, that could even mean redistributing them from adequate biological parents to more competent caregivers. However, children have a fundamental biological and gestational connection to their parents, which cannot be overseen.[6] The mere desire to have a child for self-fulfilment in the parental role cannot justify any means of becoming a parent, as it risks overlooking the child's best interests.

This desire and longing for having a child have evolved into a fundamental need, contributing to the expansion of the international surrogacy market, which reflects a growing emphasis on an adult-centred approach to child rearing. However, the right to become a parent can hardly be considered a fundamental right, as not all individuals are capable of child rearing due to health limitations, psychological readiness, or socio-economic constraints. Although adult-centrism is present at various stages of surrogacy arrangements, it is most prevalent during the initiation phase, where the focus is primarily on the intended parents' desires and rights. However, as these arrangements progress, the normative framework tends to shift towards prioritising biological ties and custody rights, ultimately aligning with the best interests of the child, if the case ends up before the Court (discussed in later chapters.) Thus, while surrogacy begins with an adult-centred approach, once the child is conceived, child-centrism gradually takes precedence.

The right to become a parent in the context of surrogacy arrangements is primarily framed through the principles of reproductive autonomy, self-determination, and human dignity. However, in concrete surrogacy cases, the focus often shifts to legal parental filiation, particularly concerning the recognition of the intended parents and the status of the child born through cross-border surrogacy arrangements. This is because the member states of the Council of Europe (CoE) would hardly accept an authoritative or decisive value-based assessment by the Court, as in challenging moral and ethical issues, the sovereignty of national legislation is prioritised.[7]

Based on the above-mentioned grounds, we may ask whether the Convention affirms reproductive rights. To address this question, it is important to first examine how the right to health and reproductive rights are defined and characterised. The Convention does not explicitly guarantee a right to healthcare or the right to be healthy. These rights are generally considered part of the fourth generation of human rights, which are closely associated with social rights. Such rights are more explicitly detailed in instruments like the European Social Charter, the European Code of Social Security, and the International Covenant on Economic, Social and Cultural Rights. Nevertheless, health-related rights fall within the broader scope of the rights protected by the Convention and are frequently

[6] See Gheaus 2012; 2015.

[7] It is important to highlight that there are different implications for children who are about to be conceived through surrogacy arrangements and those who are already born. The Court naturally focuses on the practical implications for children born through surrogacy, rather than engaging in ethical and moral debates about the legitimacy of surrogacy itself. Instead of assessing the morality of surrogacy arrangements, the Court's approach is centred on ensuring the protection of the rights and best interests of the child, particularly in matters of legal parentage, nationality, and identity. See Mulligan 2018: 451–453.

invoked before the Court. The Court has played a key role in interpreting "the right to health" through its case law. It has extended the concept of private life to encompass the right to safeguard one's physical, moral, and psychological integrity, as well as the right to personal autonomy and choice – both of which are particularly significant in the context of health-related and reproductive issues.

Reproductive rights are deeply personal and fundamental to human experience, closely tied to bodily autonomy and integrity. These rights reflect the values associated with an individual's or couple's decision to have children or not, whether immediately or in the future, and the circumstances under which they choose to do so. The right not to procreate includes issues such as access to contraception and abortion, while the right to procreate may involve topics like assisted reproduction, surrogacy, uterus transplantation, and sterilisation. Furthermore, the conditions surrounding procreation and childbirth encompass considerations like prenatal diagnosis and the option to authorise home births.

## The development of case law of the Court on surrogacy

Reproductive cases brought before the Court typically fall under Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination). In the context of assisted reproduction, this primarily concerns the right to conceive a child through medically assisted procreation, particularly in relation to surrogacy arrangements and the legal parenthood of children born via surrogacy. While a considerable number of cases have addressed surrogacy-related issues, focusing predominantly on the legal parenthood and filiation between intended parents and surrogate-born children, the Court has yet to address the core question of whether national bans on surrogacy align with the Convention.[8]

Given the Court's cautious approach to reproductive rights, the explicit control of family law by state authorities, the ethical and moral complexities of the issue, and the rapid pace of scientific advancements, the Court has often deferred decisions on reproductive matters to national jurisdictions. This approach suggests that the Court is unlikely to establish a comprehensive European legal standard on surrogacy arrangements.[9] By allowing a broad margin of appreciation in sensitive matters requiring a nuanced balance between individual rights and public interests, the Court avoids creating a uniform interpretative framework for cross-border surrogacy cases.

Instead, the Court emphasises case-specific rulings, focusing on proportionality and subsidiarity tests to determine whether there has been a violation.[10] It refrains from establishing generally applicable rules for future cases. Nonetheless, even within

[8] Garayová 2023 260.
[9] Koffeman 2015: 56.
[10] Trimmings 2019: 154.

this minimalist and procedural approach, certain decision-making patterns can be discerned from its jurisprudence. By closely analysing landmark judgments on cross-border surrogacy and their references in subsequent cases, insights into the Court's tendencies can still be drawn.

The majority of CoE member states prohibit and condemn surrogacy, particularly commercial surrogacy. Cases brought before the Court often involve conflicts arising from the refusal of national public authorities to recognise or accept foreign birth certificates that establish legal parenthood based on surrogacy arrangements contracted abroad. These disputes typically arise when intended parents return to their home country with a child born through surrogacy.

As previously noted, the absence of European consensus on surrogacy arrangements grants member states a wide margin of appreciation in this area. However, the Court has frequently emphasised the principle of the best interests of the child as a key consideration in surrogacy cases. This principle often serves as a decisive factor in the Court's rulings, alongside the presence or absence of a biological link between the child and the intended parents. These elements have become pivotal in shaping the outcomes of surrogacy-related judgments.

Landmark cases on cross-border surrogacy have established key aspects that the Court examines and uses as the basis for its decisions. These cases highlight specific values, interests, and objective circumstances within the facts of each case that significantly influence the outcomes of the judgments. Notably, the Court has often adopted a child-centred approach, with the principle of the best interests of the child taking precedence.

While this focus has been a recurring theme in the Court's reasoning, it has also drawn criticism from contracting states, particularly those that prohibit surrogacy arrangements within their jurisdictions. These states argue that prioritising the best interests of the child in such cases could inadvertently undermine their national policies and ethical stances against surrogacy.

To be more specific, the approach of the Court to the recognition of the parent-child relationship in cross-border surrogacy cases, has been markedly established on many occasions, especially in the following key cases: *Mennesson v. France*[11] and *Labassee v. France* cases, [12] *D v. Belgium,*[13] *Paradiso and Campanelli v. Italy,*[14] and the *Advisory Opinion on Recognition of the Intended Mother,* while not binding, these decisions have established significant principles that the Court considers in surrogacy cases. In the following sections, we will outline the most groundbreaking judgments that have shaped the reasoning applied in subsequent cases of a similar nature, along with an overview of more recent rulings on the subject.

11 Mennesson v. France, App. no. 65192/11 (26 June 2014).
12 Labassee v. France, App. no. 65941/11 (26 June 2014).
13 D v. Belgium, App. no. 29176/13 (11 September 2014).
14 Paradiso and Campanelli v. Italy, App. no. 25358/12 (Grand Chamber 24 January 2017).

The Court has been confronted with the human rights issues stemming from surrogacy arrangements in several cases, however the early case law has established key factors the Court looks at during its assessment.

### *Mennesson v. France and Labassee v. France*

The first cases, which concerned surrogacy, especially the question of the recognition of the cross-border parental filiation between intended parents and the child, were the Mennesson v. France and the Labassee v. France. In both cases the French authorities refused the parental filiation to the child born through commercial surrogacy arrangement established abroad. These cases were tried by the Court together, because of the joint Application. The arguments expressed in these cases (foremost the Mennesson case, as that will be referenced mostly) has become sort of a "template" for further decision-making, if the factual circumstances of the case matches with those of the Mennesson.[15] Furthermore, the case demonstrates how, one of the most decisive factors, the best interests of the child principle and the child's right to identity, becomes the pivotal interests of assessment in the Court's decision making in cross-border surrogacy cases.

The factual background of the cases involved that two French couples concluded an international surrogacy agreement in California and Minnesota, respectively. In both cases, due to the intended mothers' age, donor eggs were fertilised by the husbands' sperm in the IVF. According to the U.S. laws, the intended parents were listed as legal parents on the birth certificate. The children born had a genetic connection to one of the intended parents. However, the French authorities, citing public policy, refused to issue French birth certificates. As a result, the children were unable to acquire French nationality, and their inheritance rights were significantly affected, effectively barring them from filial inheritance. The applicants argued that the non-recognition of the legal relationship between them and the children violated their right to respect for private and family life.

The French authorities argued that the refusal to recognise the surrogate parent did not prevent the child from maintaining a relationship with the parents. However, under French law, only the woman who gave birth to the child could be registered as the mother. Furthermore, France has a prohibitive approach to surrogacy both according to civil and criminal law.[16] The French Court of Cassation held that such registry based on the foreign birth certificate would be contrary to the principle of inalienability of

[15] Bracken 2024: 142.

[16] Surrogate motherhood is conservatively regulated in France in both civil and criminal law. The prohibition of surrogacy has been ruled by the judgement of the Cour de cassation in 1991, later on confirmed by the Bioethics Act of 1994 as well as being elaborated on in the Civil Code under Chapter II of the Respect of the Human Body, especially Article 16-7. Under criminal law the French Criminal Code stipulates criminally punishable behaviours, which occur during surrogacy arrangements, e.g. incitement to the abandonment or to the adoption, the infringements of the child's civil status as well as offense of obtaining gametes for payment, artisanal insemination,

civil status.[17] Additionally, the French Court of Cassation held that on the grounds of public policy, the entry of the U.S. birth certificates to the French register of births, marriages and deaths, would not be in line with French civil law, which renders surrogacy arrangements null and void.

The Court in its reasoning rejected the complaint formed on the ground of "family life", as the four applicants could without interference enjoy a de facto "family life" together, as there was no immediate risk present those authorities could resort to separate them. In fact, the contested refusal in question amounted to an interference, nevertheless the Court found this interference was justified and proportionate, as they have not faced any practical challenges in everyday life.[18]

The Court in its ruling and reasoning focused on the link between legal parentage and genetics and the difference between altruistic and commercial surrogacy. In this case, significant emphasis was put on the perseverance of the child's right to identity through the recognition of parenthood with the genetic parent.[19]

In other words, a persons' identity encompasses the establishment of legal parent-child relationship and when this fails, an essential aspect of a persons' identity is at stake.[20] Furthermore, the Court emphasised how the best interests of the child principle was not taken into account by the French authorities, however it should have been a navigating underlying basis in public decision-making concerning a child. The French authorities violated the child's right to respect for private life, because their right to identity in French society was not ensured because of the refusal of their French nationality. By relying on the children's rights-based approach the Court gave precedent to the biological connection in surrogacy cases, as well as suggesting that the best interests of the child should precede public policy concerns over surrogacy.[21]

In the *Mennesson v. France* case, the Court upheld the complaint concerning the violation of the child's right to private life, which includes the right to identity – specifically the right to know their genetic origin. The Court ruled that respecting this right for children born through gestational surrogacy requires states to recognise the parent-child relationship between such children and their biological intended father. However, the judgment clarified that intended parents themselves cannot invoke the Convention to claim recognition of this relationship, even if they are genetically related to the children. Only the children have the right to assert this claim, particularly when their best interests are at stake. This raises a critical question about whether the Convention mandates the legal recognition of a familial bond with an intended parent who lacks a genetic connection to the children, especially in the context of the family's home

disclosure of information allowing the identification of the recipient couple or the donor, or procuring human embryos against payment. See Baillon-Wirtz 2019: 103.

17 Mennesson v. France, App. no. 65192/11 (26 June 2014), para. 27.

18 Mennesson v. France, App. no. 65192/11 (26 June 2014), paras. 92–94.

19 Trimmings 2019: 198.

20 Mennesson v. France, App. no. 65192/11 (26 June 2014), para. 96.

21 Trimmings 2019: 199, 200.

country.[22] This issue has been elaborated on in the latter case law of the court, namely Paradiso and Campanelli v. Italy decision from 2017 and the Advisory Opinion on the Recognition of the Intended Mother from 2019.

### *Advisory Opinion on the Recognition of the Intended Mother*

This question was addressed in the first-ever Advisory Opinion,[23] issued in 2019 as a follow-up to the Mennesson case. The most notable contribution of this opinion is that the Court effectively gave a "green light" to recognising the effects of surrogate motherhood in a cross-border context, building on the Mennesson precedent. Specifically, the Advisory Opinion dealt with a situation where a child was born abroad through a gestational surrogacy arrangement, conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father had already been recognised under domestic law:

1. the child's right to respect for private life within the meaning of Article 8 of the Convention requires that *domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother,* designated in the birth certificate legally established abroad as the "legal mother"

2. the child's right to respect for private life does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; *another means,* such as *adoption* of the child by the intended mother, may be used"[24]

Moreover, which is a pressing issue in cases of transnational surrogacy involving donor conception, the Advisory Opinion noted:

> "[A]n effective mechanism should exist enabling that relationship to be recognized. Adoption may satisfy this requirement provided that the conditions which govern it are appropriate and the procedure enables a decision to be taken rapidly, so that the child is not kept for a lengthy period in a position of legal uncertainty as regards the relationship. It is self-evident that these conditions must include an assessment by the courts of the child's best interests in the light of the circumstances of the case."[25]

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22 Trimmings 2019: 155.

23 Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship Between a Child Born through a Gestational Surrogacy Arrangement Abroad and the Intended Mother, Request no. P16-2018-001 by the French Court of Cassation (ECtHR, 10 April 2019). The Opinion was confirmed in C and E v. France App. no. 1462/18 and 17348/18 (ECtHR, 12 December 2019) and K.K. and others v. Denmark App. no. 25212/21 (ECtHR, 6 December 2022).

24 Korać Graovac 2021: 44.

25 Advisory Opinion of the Grand Chamber to the Cour de Cassation, P16-2018-001 (10 April 2019), para. 54.

Although, the Advisory Opinion is not a generally binding instrument of the Court, it provided essential aspects of the reasons of the reduction of the margin of appreciation of the member states, when the best interests of the child are of concern in international commercial surrogacy arrangements. Furthermore, we shall highlight that in the Court's interpretation the best interests of the child principle tends to be interpreted fairly strictly, as it usually supports this principle's paramountcy.[26]

The Court essentially concluded that Article 8 of the Convention requires domestic law to recognise the parent-child relationship established abroad between a child and a non-genetically related intended parent. This obligation is even stronger when the child was conceived using the ovum of the intended mother. However, the Court stressed that states have discretion in determining how such recognition is implemented, permitting alternatives such as adoption rather than mandating the automatic registration of a foreign birth certificate. The primary obligation of states is to ensure an effective procedural mechanism for recognising the legal relationship, respecting national variations while upholding the Convention as a "living instrument".[27]

### *Paradiso and Campanelli v. Italy*

The Italian case[28] was groundbreaking as it required the Court to address a previously unexplored question in surrogacy cases: the human rights implications when a child born via surrogacy has no biological connection to either of the intended parents. Notably, the Grand Chamber reached a different conclusion than the earlier decision.

In the first instance,[29] the Court found a violation of Article 8 of the Convention, citing the actions of the Italian authorities, who removed the child from the intended parents' care and eventually placed the child for adoption upon discovering the lack of a genetic link between them. The Court determined that these measures did not adequately respect the paramount consideration of the child's best interests. While the actions of the authorities were not deemed unreasonable, they were considered a drastic measure that should only be employed as an absolute last resort.[30] The Court also emphasised the impact of the child's removal, drawing attention to the sensitive situation the child faced regarding their identity, birth registration, and nationality.[31]

However, the Grand Chamber decision found that there was no violation of Article 8 of the Convention, highlighting the wide margin of appreciation and the justifiable public policy concerns.

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26 Mennesson v. France, App. no. 65192/11 (26 June 2014), para. 81.
27 Erdősová 2020: 7.
28 Paradiso and Campanelli v. Italy, App. no. 25358/12 (Grand Chamber 24 January 2017).
29 Paradiso and Campanelli v. Italy, App. no. 25358/12 (27 January 2015).
30 Paradiso and Campanelli v. Italy, App. no. 25358/12 (27 January 2015), para. 80.
31 Paradiso and Campanelli v. Italy, App. no. 25358/12 (27 January 2015), para. 85.

The case involves a child born via gestational surrogacy in Russia, where it was later discovered that neither of the intended parents, Mrs. Paradiso and Mr. Campanelli, was biologically related to the child due to an error by the clinic. After bringing the child to Italy and seeking legal recognition as the child's parents, the Italian authorities intervened, removing the child and placing him for adoption, citing the illegality of the surrogacy arrangement under Italian law.

Mrs. Paradiso and Mr. Campanelli subsequently filed an application with the Court, alleging that the removal of the child and his placement for adoption violated their right to respect for private and family life under Article 8 of the Convention. Notably, the child was not a party to the case, as the intended parents lacked legal standing to represent the child's interests due to the absence of biological ties and authorisation from a lawful representative.

In the initial decision, the Court recognised that a "de facto family life" existed between the applicants and the child, despite the brief time they had custody of the child.[32] However, the Grand Chamber later overturned this reasoning, emphasising the lack of a biological link between the intended parents and the child, the short duration of their relationship, and the legal uncertainties surrounding their ties.

On the other hand, the Grand Chamber acknowledged the relevance of the applicants' "private life," particularly concerning their reproductive rights, which include the right to decide to become parents and the means of doing so, such as through assisted reproduction.[33] The Court found that while the Italian authorities' actions interfered with the applicants' private life, this interference was lawful, as the Italian regulations on parentage and conflict-of-law rules clearly stipulated that the child would be treated as a foreign minor. The interference pursued a legitimate aim, as Italy's prohibition of heterologous artificial reproduction techniques was intended to prevent disorder in the recognition of parent-child relationships and protect children.[34] Moreover, the interference was deemed necessary in a democratic society. Given the wide margin of appreciation afforded to states in this area, the Court concluded that the separation of the child served the public interest by protecting women and children from potentially harmful and unlawful practices.[35]

The above-mentioned case highlighted the decisive importance of a genetic link between one of the intended parents and the child in the Court's evaluation. The absence of such a genetic relationship undermined the applicants' standing to represent the child's rights, resulting in the right to respect for family life and the child's best interest's principle not being fully assessed. The Court's central legal question focused on the applicants' right to become parents through medically assisted reproduction[36] weighed

32 Paradiso and Campanelli v. Italy, App. no. 25358/12 (27 January 2015), para. 69.
33 Paradiso and Campanelli v. Italy, App. no. 25358/12 (Grand Chamber 24 January 2017), para. 163.
34 Paradiso and Campanelli v. Italy, App. no. 25358/12 (Grand Chamber 24 January 2017), para. 177.
35 Paradiso and Campanelli v. Italy, App. no. 25358/12 (Grand Chamber 24 January 2017), paras. 195 and 203.
36 Paradiso and Campanelli v. Italy, App. no. 25358/12 (Grand Chamber 24 January 2017), para. 163.

against the Italian state's public interest in prohibiting surrogacy arrangements to protect the rights of women and children.[37] This decision affirmed the Court's intention to grant states broad discretion in regulating surrogacy, a controversial form of assisted reproductive technology, and to allow them the freedom to discourage citizens from engaging in such arrangements abroad.

Through this judgment, the Court adopted a minimalist approach, refraining from intervening in matters traditionally considered explicit national competencies, such as family law. It emphasised the sovereignty of member states in legislating on these sensitive issues, preserving their authority to regulate family-related matters according to their own legal and ethical frameworks.

### *Valdís Fjölnisdóttir and Others v. Iceland*

In the more recent case[38] from Iceland underscored the role of genetics in the creation of alternative families. This guidance of the Court was further affirmed in this instance, where the steps taken by the public authorities of states where surrogacy is against the law, of formal non-recognition of the family relations between the child and the non-genetic intended parents, constituted a lawful and necessary interference with the applicants right to respect for private and family life.

The case involved a same-sex married couple from Iceland who entered into a gestational surrogacy arrangement in the United States and returned to Iceland with a surrogate-born child who had no biological connection to either parent. Since surrogacy is prohibited in Iceland and the birth mother is recognised as the legal mother, the authorities refused to acknowledge the parent-child relationship established in the U.S. between the child and the intended parents (both mothers). Consequently, the child was placed in foster care with the intended parents but was treated as an unaccompanied minor in Iceland. While the couple was allowed to care for the child as foster parents, they were denied parental responsibility and legal parentage.

During their joint application for adoption, the couple separated, disqualifying them from jointly adopting the child under Icelandic law. The applicants brought their case to the European Court of Human Rights, alleging violations of Article 8 (right to respect for family life) and Article 14 (prohibition of discrimination).

The Court found that, although there was an interference with their family life due to the refusal to recognise legal parentage, the interference was justified. Icelandic law, which bans surrogacy and designates the birth mother as the legal mother, provided a legitimate basis for this decision. The law aims to protect women from potential

[37] Paradiso and Campanelli v. Italy, App. no. 25358/12 (Grand Chamber 24 January 2017), para. 203.
[38] Valdís Fjölnisdóttir and Others v. Iceland, App. no. 71552/17 (18 May 2021).

exploitation in surrogacy arrangements and safeguard children's rights to know their biological parents.[39]

The Court concluded that the actions of the Icelandic authorities and the existing legislation did not violate Article 8, as the law offered an adequate mechanism for the applicants to establish legal parenthood. A significant factor in the proportionality assessment was that the child was granted Icelandic nationality and the intended parents were given fostering rights with equal access. This arrangement was deemed fair compensation for their inability to jointly adopt the child following their separation.

Notably, in this case, the Court commended the thorough and cautious steps taken by the public authorities to prioritise the child's best interests while upholding their public policy concerns regarding commercial surrogacy arrangements. A fair balance was achieved between the competing interests: the child's right to family life was preserved through the establishment of a permanent foster care arrangement with both Ms. Fjölnisdóttir and Ms. Agnarsdóttir, and the child was granted Icelandic nationality. The Court also emphasised that the child would have the opportunity in the future to establish a legal parental relationship with at least one of the intended parents through adoption. While the Court placed significant weight on the presence of a genetic or biological link in determining parenthood, it also acknowledged adoption as a valid pathway for the genetically unrelated intended parent to establish a legal relationship with the child.

However, the Court left certain critical and pressing questions unresolved, highlighting the ongoing complexities in addressing the intersection of surrogacy, public policy, and the rights of children and intended parents.[40]

### *K.K. and others v. Denmark*

One of the more recent decisions[41] concerning cross-border surrogacy, reflects the established best interests of the child approach but has drawn criticism for its assessment of national authorities' procedural steps in such cases.

The case involves K.K., a Danish citizen, and her two children, C1 and C2, born through a surrogacy arrangement in Ukraine in 2013. Under Ukrainian law, K.K. and her husband were automatically recognised as the children's parents. However, upon returning to Denmark, K.K. faced difficulties in formalising her maternal status. Despite being granted joint custody, her application for adoption was denied. In 2020, the Danish Supreme Court upheld this decision, emphasising the risks associated with commercial surrogacy and prioritising the children's best interests.

39 Valdís Fjölnisdóttir and Others v. Iceland, App. no. 71552/17 (18 May 2021), para. 65.
40 März 2021: 285.
41 K.K. and others v. Denmark, App. no. 25212/21 (6 December 2022).

K.K. argued that the refusal to formalise her legal relationship with the children violated her right to family life under Article 8 of the Convention. The Court, by a narrow majority, found that Danish authorities

> "failed to strike a fair balance between, on the one hand, the specific children's interest in obtaining a legal parent-child relationship with the intended mother, and, on the other, the rights of others, namely those who, in general and the abstract, risked being negatively affected by commercial surrogacy arrangement".[42]

The judgment faced significant criticism, which is expressed particularly from the joint dissenting opinion of Judges Kjølbro, Koskelo, and Yüksel. They highlighted several issues, which rendered the majority's decision inconsistent with the previously established thought process in earlier surrogacy cases, such as Mennesson and more significantly the Advisory Opinion from 2019. The dissenting opinion noted that the Court diverged from earlier determinations by the misinterpretation of the best interests of the child principle,[43] narrowing the margin of appreciation,[44] which amounted to incoherent legal reasoning. The dissent argued that the majority's application of the principle deviated from international standards, such as the UN Convention on the Rights of the Child (CRC) and the EU Charter of Fundamental Rights.[45] The stricter application in this case was seen as inconsistent and not well-founded. Moreover, the applied narrow margin of appreciation unnecessarily restricted Denmark's discretion, which led to a misalignment with international documents like the Hague Convention on Adoption and the Optional Protocol to the CRC on the sale of children.[46] Thus, the incoherence in the legal reasoning showcased risks enabling practices that undermine children's rights while overlooking the specific children's need for legal security and stability.

## Lessons learnt – or not?

The above-mentioned case law reflects the Court's seemingly firm stance on cross-border surrogacy, as demonstrated in the *Mennesson* case and the Advisory Opinion. These precedents suggest a willingness by the Court to treat cross-border surrogacy cases differently from typical cases involving assisted reproductive techniques (ART). Unlike other ART-related cases, where the Court typically grants states a wide margin of appreciation due to the ethically and value-driven nature of these issues, cross-border surrogacy is approached with distinct considerations. For cases primarily focused on access to specific types of ART, the Court generally maintains a minimalist approach.

42 K.K. and others v. Denmark, App. no. 25212/21 (6 December 2022), para. 76.
43 K.K. and others v. Denmark, App. no. 25212/21 (6 December 2022), paras. 96–97.
44 K.K. and others v. Denmark, App. no. 25212/21 (6 December 2022), para. 88.
45 K.K. and others v. Denmark, App. no. 25212/21 (6 December 2022), para. 94.
46 Trimmings 2023: 1.

It emphasises the principles of subsidiarity and proportionality, asserting that member states are best positioned to decide which forms of ART to permit or prohibit. This deference to national authority stems from the recognition that ART policies are deeply intertwined with values, ethical frameworks, and traditional legal principles that form part of a state's national identity, mostly in matters of family law.

The issue of cross-border surrogacy entails elaboration on reproductive autonomy, the right to health and – if it could be considered a right at all – the right to become a parent. The question of reproductive autonomy in surrogacy cases is *not* necessarily assessed, but only in cases where the genetic link between the child and at least one of the intended parents is *missing.* An example of this is the Paradiso and Campanelli case, where the initial question surrounded the removal of the child and his placement for adoption, which allegedly violated their right to respect for private and family life under Article 8 of the Convention. However, after confirming that the child and the intended parents were not genetically related, although the Chamber's decision accepted that there was a "de facto family life" between the child and the intended parents,[47] the Grand Chamber overruled this assessment, as based on the quality of the relationship it was concluded that there was no family life in the present case.[48] As a result, the child did not become a party to the proceedings because the intended parents lacked legal standing to represent the child's private and family life.

This was a crucial point in the Court's decision-making, as the circumstances in the Mennesson case (such as the genetic connection) were not met, which led to the withholding of the child's private rights concerns by performing the evaluation of whether the non-recognition of the parental filiation was not in line with the child's best interests and the child's right to identity.

The child's private life concerns were lacking in Paradiso and Campanelli, thus reshaping the case purely about ART, the indented parent's private life concerns about their reproductive autonomy, which constitutes a wide margin of appreciation,[49] unlike cross-border surrogacy cases, where the private life implications of the child, the best interests, and identity rights narrows the discretion of the states.

The utmost relevance of the genetic link is further elaborated on in the Advisory Opinion, as

47 Paradiso and Campanelli v. Italy, App. no. 25358/12 (27 January 2015), para. 69.

48 Paradiso and Campanelli v. Italy, App. no. 25358/12 (Grand Chamber 24 January 2017), para. 157.

49 "As regards the Court's recognition that the States must in principle be afforded a wide margin of appreciation regarding matters which raise delicate moral and ethical questions on which there is no consensus at European level, the Court refers, in particular, to the nuanced approach adopted on the issue of heterologous assisted fertilisation in S.H. and Others v. Austria (cited above, paras. 95–118) and to the analysis of the margin of appreciation in the context of surrogacy arrangements and the legal recognition of the parent-child relationship between intended parents and the children thus legally conceived abroad in Mennesson (cited above, paras. 78–79)."
See Paradiso and Campanelli v. Italy, App. no. 25358/12 (Grand Chamber 24 January 2017), para. 184.

> "the Court considers that the general and absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is incompatible with the child's best interests, which require at a minimum that each situation be examined in the light of the particular circumstances of the case".[50]

The Advisory Opinion together with the Mennesson principles suggest that the Court's role in surrogacy cases should be a "process-based review". This involves examining how the national authorities assessed the best interests of the child, whether they demonstrated a willingness to consider the specific circumstances of the case, and whether they provided a thorough justification for the refusal or acceptance of the foreign birth certificate.[51]

By these precedents the national authorities shall expect that shallow refusal based on public policy, without the best interests assessment, is insufficient, as the margin of appreciation is constantly narrowed when the child's best interests and identity rights are affected.[52] Moreover, if a state offers some kind of measures, such as adoption to promptly and effectively recognise the filiation with the other intended parent in the child's best interest, the violation of the Convention could be avoided.[53] A noteworthy example of that is the Valdís Fjölnisdóttir and Others v. Iceland case, where the Court welcomed the state authorities steps towards on the one hand supporting the de facto family life between the intended parents and the child, on the other hand continuing to be cautious on the national ban on surrogacy. The foster care agreement, the custody rights as well as the likely acceptance of the joint adoption offered by the authorities in the Courts' eyes satisfied the criterium of the member state to facilitate "another means" of the Advisory Opinion to recognise parenthood in the child's best interest.[54] Moreover, as Icelandic citizenship was given to the child, the risk of statelessness just like other practical hindrances were further minimised, thus with the interference the Applicants could de facto still enjoy their family life.[55] Although, the concurring opinion of Judge Lemmens pointed out that the reluctancy to address the private life dimensions and the identity rights of the child, which is usually inevitable, where at least one intended parent is biologically related to the child, this did not arise in this case

[50] Advisory Opinion of the Grand Chamber to the Cour de Cassation, P16-2018-001 (10 April 2019), para. 42.

[51] "Process-based review is not limited to procedural issues in the traditional sense, as distinguished from issues of legal substance. In other words, it does not in any way limit the Strasbourg Court from continuing to fulfil its fundamental role of analysing substantive outcomes at the domestic level. However, the significance of process-based review lies in its shift of the Court's primary methodological focus from its own independent assessment of the 'Conventionality' of the domestic measure towards an examination of whether the issue has been properly analysed by the domestic decision-maker in conformity with already embedded issues." See Spano 2018: 480.

[52] Mennesson v. France, App. no. 65192/11 (26 June 2014), para. 77.

[53] Advisory Opinion of the Grand Chamber to the Cour de Cassation, P16-2018-001 (10 April 2019), 2.

[54] Valdís Fjölnisdóttir and Others v. Iceland, App. no. 71552/17 (18 May 2021), para. 71.

[55] Valdís Fjölnisdóttir and Others v. Iceland, App. no. 71552/17 (18 May 2021), paras. 72 and 75.

because the arguments of it focused more on the arguments on the interference of the family life. Regardless, one shall not forget that the consequences to private life of the child is the same, whether there is a biological link or not, and affects all children born from a cross-border surrogacy arrangement. That is why a broader assessment should be issued around the child's right to a legal relationship with the intended parents in the future.[56]

Perhaps the overall emphasis on the genetic link and the questions risen when non-traditional families enter into a cross-border surrogacy arrangement creates a different approach in the Court's assessment.[57] Although, focusing more on the approach of the Court presented in the selected judgement above, the K.K. and others v. Denmark is conspicuous in a sense that the "process-based approach" was somehow rather overturned, although the national authorities carried out a best interest assessment, and did not provide an automatic and superficial refusal to the parental recognition. Here, the relationship with the genetic intended father was established, and the factual enjoyment of the right to family life was not interrupted, as both intended parents were given joint custody of the children. Now the infamous private right concerns arose where the Court established the narrowing margin if identity rights are at stake in the context of recognition of parenthood.[58] However, the Danish authorities provided seemingly enough legal tools to the intended mother to establish family life with the children, the children were given Danish nationality, those did not satisfy the Court. It established a *higher standard* for the best interests of the children and their private life which is not compatible with the Danish legislation and public policy, which necessitated the refusal of the adoption order of the intended mother.[59] Here the circumstances are similar to the Mennesson case but the Danish authorities did not overall refuse to facilitate somehow the legal parenthood, it would have been in the best interest of the children to acknowledge legal parenthood on the same level with both of the intended parents, although in the Valdís case the custody rights and the foster agreement was satisfactory.

This rather nitpicking approach of the Court on the evaluation of the "another means" for parenthood recognition, as well as stepping out of the "process-based review" opens up an inconvenient pathway to those member states who would like to uphold their public policy surrounding cross-border surrogacy, to expect that their sovereign legislation on banning or not supporting surrogacy arrangements would be scrutinised by the Court.[60]

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56 Valdís Fjölnisdóttir and Others v. Iceland, App. no. 71552/17 (18 May 2021), Concurring Opinion of Judge Lemmens, 4–5.

57 See the criticism about the selective approach of the Court in relation to non-traditional families in Bracken 2024.

58 K.K. and others v. Denmark, App. no. 25212/21 (6 December 2022), para. 80.

59 K.K. and others v. Denmark, App. no. 25212/21 (6 December 2022), para. 57 and 75.

60 Čulo Margaletić – Preložnjak – Šimović 2019: 799.

## Conclusion

The analysis of surrogacy in the context of the Convention reveals significant tensions between adult-centred reproductive claims and the best interests of the child. The notion of a right to become a parent is a problematic focal point in the debate on surrogacy, as it risks prioritising the desires of intended parents over the well-being and rights of children. This approach may inadvertently reduce children to mere objects of fulfilment for adults, rather than recognising their inherent individual rights and needs.

A key issue in surrogacy-related litigation is the value-based assessment conducted by the Court. While the Court has emphasised the best interests of the child, its evolving jurisprudence also challenges national sovereignty in countries where surrogacy is restricted or outright banned. The majority of CoE member states prohibit surrogacy, particularly commercial surrogacy based on ethical concerns surrounding the commodification of women and children. National bans are generally intended to uphold children's rights by preventing exploitative practices. However, the Court's intervention in surrogacy cases has created legal uncertainty, raising concerns that national policies against surrogacy may be undermined by rulings favouring the recognition of parental ties created through cross-border surrogacy arrangements.

As described above, the "process-based" approach has at times been overlooked, even when a member state has conducted a thorough best interest assessment and ultimately denied the recognition of the parental relationship. Perhaps, even if recognising legal filiation with both intended parents would be in the best interests of the child, such recognition could undermine national bans on surrogacy and fail to deter intended parents from engaging in future surrogacy arrangements. This is because, in practice, the Court's tendency to grant legal recognition may send a signal that, despite legal prohibitions, intended parents will ultimately have their parental status recognised. This raises concerns that the Court's rulings could indirectly encourage surrogacy practices, even in jurisdictions where they are legally restricted or prohibited.

Ultimately, the Court faces a delicate balancing act in surrogacy cases. On the one hand, it must ensure that children's rights are not compromised by restrictive national policies. On the other hand, excessive judicial intervention risks eroding national legislative authority over family law and indirectly legitimising surrogacy practices that many states seek to prohibit. Moving forward, a coherent and consistent approach is needed – one that prioritises children's best interests over adult-centred reproductive claims, while respecting the principle of subsidiarity and the diverse legal frameworks of CoE member states.

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