

# The right to respect for private and family life of children born through international surrogacy in the case law of the European court of human rights

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## ORIGINAL RESEARCH PAPER

Received: September 13, 2022 • Accepted: June 6, 2023

Published online: October 6, 2023

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## ABSTRACT

The ECHR is a general human rights convention, but it contains some provisions that have gained particular importance in the case law of the ECtHR regarding the human rights of children. Such a provision is, among others, Article 8 on the right to respect for private and family life, the interpretation of which has raised many questions in cases related to children born through international surrogacy. These questions have arisen in relation to the intended parents' standing to bring an application before the Court on behalf of the child, the criteria for ascertaining the interference of the respondent state with the child's right to respect for his private and family life, as well as the specific content of the requirements that must be met for the interference to be justified. By analysing these questions and the answers the Court gave to them, this article attempts to give an overview of the state's obligations to ensure the right of a child born through international surrogacy to respect for his private and family life in connection with the recognition of the parent-child relationship between the intended parents and the child.

## KEYWORDS

child's best interests, international surrogacy, recognition of parenthood, respect for private and family life

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## 1. INTRODUCTION

The European Convention on Human Rights ('ECHR' or 'Convention') provides that the rights and freedoms defined in it shall be secured to everyone within the jurisdiction of the contracting states.<sup>1</sup> Evidently, the term 'everyone' also includes children, but in addition, the ECHR specifically emphasizes that the enjoyment of the rights and freedoms set forth in it shall be secured without discrimination on any ground<sup>2</sup> such as - according to the case law of the European Court of Human Rights ('ECtHR' or 'Court') - age.<sup>3</sup> Consequently, children are also protected by the Convention and they are entitled to the general human rights set out in the ECHR in the same way as any other individual.<sup>4</sup> The Convention, however, does not provide for children's rights,<sup>5</sup> i.e. the special human rights<sup>6</sup> that recognize children's needs for special safeguard and care.<sup>7</sup> Nevertheless, the case law of the ECtHR demonstrates that some provisions of the Convention are of outstanding significance for children, and Article 8 is such a provision in particular.<sup>8</sup>

Article 8 paragraph 1 of the ECHR declares, among others, that everyone has the right to respect for his private and family life. Pursuant to Article 8 paragraph 2, an interference of a public authority with the exercise of this right is in breach of the Convention unless it is in accordance with the law, pursues a legitimate aim set out in this paragraph (i.e., national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others), and is necessary in a democratic society to achieve this legitimate aim.

In the Court's case law relating to Article 8 of the ECHR, numerous significant questions have arisen over the past decade regarding the right to respect for private and family life of children born through international surrogacy.<sup>9</sup> The term surrogacy refers to a reproductive

<sup>1</sup>Article 1 of the ECHR.

<sup>2</sup>Article 14 of the ECHR.

<sup>3</sup>E.g., *Schwizgebel v Switzerland* App no 25762/07 (ECtHR 10 June 2010) § 85; *British Ghurka Welfare Society and Others v the United Kingdom* App no 44818/1 (ECtHR 15 September 2016) § 88; *Carvalho Pinto da Sousa Morais v Portugal* App no 17484/15 (ECtHR 25 July 2017) § 45.

<sup>4</sup>Balázs (2016) 38, Monteiro (2020) 374.

<sup>5</sup>The ECHR only mentions the detention of minors in Article 5 paragraph 1 (d) among the exceptions to the right to liberty and security, and the interests of juveniles in the context of the right to a fair trial in Article 6 paragraph 1 among the exceptions to the rule of publicity. Besides this, Article 5 of the Protocol No. 7 to the ECHR declares that spouses shall enjoy equality of rights and responsibilities in their relations with their children and sets forth that this Article shall not prevent states from taking such measures as are necessary in the interests of the children.

<sup>6</sup>Vandenhoe (2017) 21.

<sup>7</sup>Preamble of the Declaration of the Rights of the Child adopted by the United Nations General Assembly Resolution 1386 (XIV) of 10 December 1959.

<sup>8</sup>Kilkelly (2001) 312, Fortin (2006) 301–4, Besson (2007) 142–6, Kilkelly (2010) 248, Florescu, Liefwaard and Bruning (2015) 451, Jardi (2015) 103–19.

<sup>9</sup>*Mennesson v France* App no 65192/11 (ECtHR 26 June 2014), *Labassee v France* App no 65941/11 (ECtHR 26 June 2014), *Foulon and Bouvet v France* App no 9063/14 and 10410/14 (ECtHR 21 July 2016), *Laborie v France* App no 44024/13 (ECtHR 19 January 2017), *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR 24 January 2017), *C. and E. v France* App no 1462/18 and 17348/18 (ECtHR 12 December 2019), *D. v France* App no 11288/18 (ECtHR 16 July 2020), *Valdis Fjölfnisdóttir and Others v Iceland* App no 71552/17 (ECtHR 18 May 2021). Only the rights of the intended parents were the subject of the following proceedings: *D. and Others v Belgium* App no 29176/13 (ECtHR 8 July 2014), *A.M. v Norway* App no 30254/18 (ECtHR 24 March 2022), *A.L. v France* App no 13344/20 (ECtHR 7 April 2022).



procedure whereby a woman (the surrogate mother) and another person or a couple (the intended parents) enter into an agreement (the surrogacy arrangement) based on which the surrogate mother carries a pregnancy and, after the birth, hands over the child to the intended parents so that they raise him as their own.<sup>10</sup> Forms of surrogacy can be distinguished in several ways but from a legal point of view, the following distinctions are of the greatest importance.

Depending on whether the surrogate mother undertakes to participate in the reproductive procedure for free or is remunerated by the intended parents, we can make a distinction between altruistic (or non-commercial) and commercial surrogacy.<sup>11</sup> It is worth noting that it does not change the altruistic nature of surrogacy if the intended parents only reimburse the surrogate mother for her medical and other necessary expenses related to the pregnancy and the birth of the child.<sup>12</sup>

Another distinction can be made according to whether the surrogate mother's ovum is used for the purpose of the reproductive procedure, in which sense we can talk about traditional (or partial) and gestational (or full) surrogacy.<sup>13</sup> Traditional surrogacy means that the ovum of the surrogate mother is fertilized with the intended father's or an anonymous donor's semen, thus the surrogate mother is always the child's genetic mother.<sup>14</sup> In contrast, the essence of gestational surrogacy is that the ovum of the intended mother or an anonymous donor is fertilized *in vitro* with the sperm of the intended father or an anonymous donor, and is implanted in the uterus of the surrogate mother.<sup>15</sup> In this case, the surrogate mother never has a genetic relationship with the child,<sup>16</sup> but it is also possible that none of the intended parents are genetically related to him either.<sup>17</sup>

According to general opinion, it is primarily the commercial form of surrogacy that carries the risk of commodification of children and exploitation of women,<sup>18</sup> while it is true for all forms of surrogacy that they challenge the traditional legal concept of motherhood which is based on the principle of '*mater semper certa est*' designating the woman giving birth to the child

<sup>10</sup>Arenstein (1988) 831, Ramsey (2000) 49, Horsey (2010) 452, Stark (2012) 369, Bromfield and Smith Rotabi (2014) 124, Sucker (2015) 257, Kriari and Valongo (2016) 332, Bracken (2017) 369, Iliadou (2017) 129, Hevia (2018) 375, Ní Shúilleabháin (2019) 105, Weiss (2019) 343, Garayová (2022) 66.

<sup>11</sup>Ramsey (2000) 49, Gruenbaum (2012) 479, Stark (2012) 369, Bracken (2017) 369, Hevia (2018) 375–76, Sándor (2018) 37–42.

<sup>12</sup>Arenstein (1988) 833, Gabry (2012) 447–48, Bracken (2017) 369, Cascão (2016) 152.

<sup>13</sup>Gabry (2012) 418–19, Gruenbaum (2012) 479–80, Stark (2012) 369–70, Bromfield and Smith Rotabi (2014) 124, Bernat (2016) 4, Kriari and Valongo (2016) 332, Bracken (2017) 369, Navratyil (2017) 101, Sándor (2018) 36.

<sup>14</sup>Navratyil (2010) 193–94, Hisano (2011) 520, 526–27, Gabry (2012) 419, Stark (2012) 369–70, Bromfield and Smith Rotabi (2014) 124, Bernat (2016) 4, Cascão (2016) 152, Kriari and Valongo (2016) 332, Iliadou (2017) 129–31, Hevia (2018) 375, Pol (2018) 1311–12, Sándor (2018) 36, Ní Shúilleabháin (2019) 105, Garayová (2022) 66.

<sup>15</sup>Navratyil (2010) 193–94, Hisano (2011) 520, 527–28, Gabry (2012) 419, Stark (2012) 369–70, Bromfield and Smith Rotabi (2014) 124, Bernat (2016) 4, Cascão (2016) 152, Kriari and Valongo (2016) 332, Iliadou (2017) 129–31, Hevia (2018) 375, Pol (2018) 1311–12, Sándor (2018) 36, Ní Shúilleabháin (2019) 105, Garayová (2022) 66.

<sup>16</sup>Hisano (2011) 527, Bracken (2017) 369, Iliadou (2017) 137, Ní Shúilleabháin (2019) 105.

<sup>17</sup>Hisano (2011) 528, Navratyil (2010) 194, Gabry (2012) 419.

<sup>18</sup>Arenstein (1988) 831–33, Ramsey (2000) 49, Alghrani (2012) 633, Gabry (2012) 439–41, Stark (2012) 374, Bromfield and Smith Rotabi (2014) 124, 128, Orfali and Chiappori (2014) 33–34, Bernat (2016) 23–26, Cascão (2016) 154–56, Fenton-Glynn (2016) 66–69, 71–72, Snyder (2016) 278, Ní Shúilleabháin (2019) 105.



as the legal mother.<sup>19</sup> In addition, surrogacy raises many human rights issues, primarily on the part of the child (e.g., the right to an identity, the right to access to origins, the right not to be sold) and the surrogate mother (e.g., gender inequality, the right to bodily integrity).<sup>20</sup> These are the main reasons why surrogacy is a morally and legally complex issue, and its prohibition or legalization is surrounded by controversy in many countries.<sup>21</sup>

In this discussion, national legislations have taken different positions, ranging from strict prohibition to full legalization, while there are legal systems where surrogacy is still not regulated.<sup>22</sup> Residents of countries where surrogacy is banned or unregulated often enter into surrogacy arrangements with surrogate mothers living in countries that allow surrogacy and recognize the intended parents' legal parental status.<sup>23</sup> This brings us to the third way of distinguishing the forms of surrogacy which differentiates according to whether the intended parents enter into a surrogacy arrangement with a surrogate mother from their country of residence or from another country. In the former case, we are talking about domestic surrogacy, while the latter is called international (cross-border, transnational or global) surrogacy.<sup>24</sup>

Human rights related problems may arise primarily in the case of international surrogacy if the intended parents aim to bring up the child in their country of residence where this reproductive procedure is illegal or not regulated, and therefore the authorities refuse to recognize them as the child's legal parents.<sup>25</sup> In this case, according to the principle of '*mater semper certa est*', the surrogate mother is considered the legal mother,<sup>26</sup> while the intended mother can only become the legal mother by adopting the child.<sup>27</sup> Establishing maternity based on this principle also directly affects the legal status of the father. Since the spouse of the woman giving birth to the child is presumed to be the child's father (the principle of '*pater vero is est quem nuptiae demonstrant*'),<sup>28</sup> the intended father must first contest the paternity of the surrogate mother's husband in order to have the opportunity to legally establish his own fatherhood.<sup>29</sup> If the surrogate mother is unmarried, or the intended father has successfully contested the paternity of the surrogate mother's husband, the intended father can establish his fatherhood by making

<sup>19</sup>Steinbock (2005) 287, Hisano (2011) 529–31, Horsey (2010) 456, Monéger (2010) 239, Gruenbaum (2012) 475–78, Stark (2012) 374, Margaria (2020) 415, 422, Tesfaye (2022) 4.

<sup>20</sup>Gostin (2001) 432–37, Tobin (2014) 320, 326–48, Mulligan (2018) 468–72, Pons (2018) 121.

<sup>21</sup>Allen (1990) 139–48, Garrison (2000) 840, Ramsey (2000) 48–52, Hisano (2011) 520, Sucker (2015) 257–58, Fenton-Glynn (2016) 64–75, Neményi (2005) 10–14, Margaria (2020) 420.

<sup>22</sup>Navratyil (2010) 198–211, Gabry (2012) 421–31, Stark (2012) 370, Sucker (2015) 260, Kriari and Valongo (2016) 332–42, Snyder (2016) 281–82, Fenton-Glynn (2017) 546, Storror (2018) 43–65, Garayová (2022) 70–80.

<sup>23</sup>Bernat (2016) 6–8, Cascão (2016) 153, Bracken (2017) 369–70, Iliadou (2017) 128, Fenton-Glynn (2017) 546–47, Pons (2018) 121, Sándor (2018) 42–46, Storror (2018) 40, Ni Shuilleabháin (2019) 105, Margaria (2020) 415, Levy (2022) 125–26.

<sup>24</sup>Stark (2012) 370–71, Bromfield and Smith Rotabi (2014) 124, Sándor (2018) 46.

<sup>25</sup>According to Forder, '[l]egal parentage is established when the law prescribes that a legal filiation link has arisen.' See Forder (1997) 126.

<sup>26</sup>Stark (2012) 374, Sucker (2015) 262, Bernat (2016) 6, Margaletić, Preložnjak and Šimović (2019) 779–81, Margaria (2020) 422.

<sup>27</sup>Sucker (2015) 262.

<sup>28</sup>Cascão (2016) 153–54.

<sup>29</sup>Garrison (2000) 883–85, Navratyil (2010) 195, 210, Sucker (2015) 261–62.



an acknowledgement of paternity, or if he is proven to be also the genetic father, his fatherhood can be established by the court.<sup>30</sup> In all cases, adoption is a further option for the intended father to become the legal father.<sup>31</sup>

International surrogacy-related cases decided by the ECtHR demonstrate that in the absence of legal recognition of the intended parents' parental status, there will be an enduring discrepancy between the social and legal child-parent relationship, the adverse consequences of which affect both the intended parents and the child.<sup>32</sup> As Judge O'Leary aptly noted in her concurring opinion to the judgment delivered by the ECtHR in the case of *A.M. v Norway*, 'as the child-parent relationship is a two-way street, refusal of recognition of the intended parent clearly has consequences for the rights, interests and social reality of the child.'<sup>33</sup> Hughes also argues that

[t]he child's right to privacy is not wholly distinct from the adult's right to privacy. (...) Thus many of the issues and questions that are relevant to the adult's right to privacy will also apply to the child's right to privacy. However, (...) the child's right to privacy raises a number of special issues that justify examining it separately from that of the adult.<sup>34</sup>

With this in mind, focusing exclusively on children's right to respect for their private and family life, in the following we are going to examine what challenging questions the ECtHR had to face when interpreting Article 8 of the ECHR in cases related to international surrogacy, what answers the Court gave to these questions, and based on these answers, what obligations of the state can be established in relation to ensuring this right. In this way, we are attempting to justify our hypothesis that some principles have already been crystallized in the case law of the ECtHR in relation to the right to respect for the private and family life of children born through international surrogacy, which define the state's obligations regarding the recognition of the parent-child relationship between the intended parents and the child.

## 2. THE *LOCUS STANDI* OF THE INTENDED PARENTS

The first challenging question is of a preliminary nature as it concerns the compatibility *ratione personae* of the application with the Convention.<sup>35</sup> This question is whether the intended parents have standing to bring an application (*locus standi*) before the ECtHR on behalf of the child.<sup>36</sup> In this regard, the problem arises from the fact that the lack of recognition of the intended parent's legal parenthood in the respondent state also means that under national law,

<sup>30</sup>Sucker (2015) 261, Bernat (2016) 6.

<sup>31</sup>Sucker (2015) 262–65.

<sup>32</sup>Margaria (2020) 417.

<sup>33</sup>Concurring opinion of Judge O'Leary to the ECtHR's judgment delivered in the case of *A.M. v Norway* § 15.

<sup>34</sup>Hughes (2012) 456.

<sup>35</sup>Incompatibility *ratione personae* means that the ground of the incompatibility of the application with the Convention lies in the person of the applicant. See Peters and Altwick (2018) 9.

<sup>36</sup>The lack of *locus standi* results in the application being incompatible *ratione personae* with the Convention in the meaning of Article 35 paragraph 3 (a). See e.g., *Lambert and Others v France* App no 46043/14 (ECtHR 5 June 2015) § 96–106.



the intended parents do not have the standing to act on behalf of the child, who, however, is lacking legal capacity to conduct proceedings due to his age.<sup>37</sup>

Outside the scope of international surrogacy matters, in the case of *Scozzari and Giunta v Italy* the ECtHR made general findings regarding the *locus standi* requirements which are also instructive from the point of view of our topic. The Court pointed out that ‘the conditions governing individual applications are not necessarily the same as national criteria relating to *locus standi*.’<sup>38</sup> The ECtHR expounded that ‘in principle a person who is not entitled under domestic law to represent another may nevertheless, in certain circumstances, act before the Court in the name of the other person.’<sup>39</sup> The ECtHR cited as an example that even a mother deprived of her parental rights can act on behalf of her children because ‘her standing as the natural mother suffices to afford her the necessary power to apply to the Court on the children’s behalf, too.’<sup>40</sup> The ECtHR explained this position by saying that if a conflict occurs over a child’s interests between the natural parent and the child’s guardian appointed by the national authorities, ‘there is a danger that some of those interests will never be brought to the Court’s attention and that the minor will be deprived of effective protection of his rights under the Convention.’<sup>41</sup>

Reviewing the international surrogacy-related case law of the ECtHR in the light of the above, it can be concluded that the Court applied the principles established in the case of *Scozzari and Giunta v Italy*. Accordingly, when the intended father was also the genetic father, both the intended parents and the child were in the position of the applicant, and the complaint raised by the intended parents on behalf of the child was examined on its merits even though there was no legally recognized relationship in the respondent state between the intended parents and the child.<sup>42</sup> However, in the case in which the child was not genetically related to either of the intended parents, the Court considered the application compatible *ratione personae* with the ECHR only if it was submitted on the authority of the child’s legal guardian.<sup>43</sup>

In accordance with this, in the case of *Paradiso and Campanelli v. Italy*, the Court took the position that the intended parents did not have the standing to act on behalf of the child and dismissed the complaints raised on his behalf as incompatible *ratione personae* on the grounds that there was no biological tie between the intended parents and the child who was placed under guardianship and was represented by his guardian in the domestic proceedings, while the intended parents were not authorised to represent him.<sup>44</sup> Nevertheless, it is worth noting that despite the fact that in the latter case the ECtHR found that the intended parents did not have *locus standi* to pursue an application on behalf of the child, it examined the child’s best interests

<sup>37</sup>This problem does not arise when the intended parents only claim a violation of their own human rights, as in the following cases: *C. and E. v France* § 37; *A.M. v Norway* § 101, 136; *A.L. v France* § 34.

<sup>38</sup>*Scozzari and Giunta v Italy* App no 39221/98 and 41963/98 (ECtHR, 13 July 2000) § 139.

<sup>39</sup>*Scozzari and Giunta v Italy* § 138.

<sup>40</sup>*Scozzari and Giunta v Italy* § 138.

<sup>41</sup>*Scozzari and Giunta v Italy* § 138.

<sup>42</sup>*Mennesson v France* § 1; *Labassee v France* § 1; *D. and Others v Belgium* § 1; *Foulon and Bouvet v France* § 1; *Laborie v France* § 1, 4; *C. and E. v France* § 1; *D. v France* § 1.

<sup>43</sup>*Valdís Fjölnisdóttir and Others v Iceland* § 1, 2.

<sup>44</sup>*Paradiso and Campanelli v Italy* § 85–86, § and Chamber judgment (ECtHR, 27 January 2015) § 48–50.



on the merits of the case, but only from the point of view of a possible violation of the intended parents' human rights.<sup>45</sup> According to Florescu, Liefard and Bruning, '[t]his is illustrative of the Court's struggle to incorporate rights of children when children face major obstacles in accessing courts, including the ECtHR.'<sup>46</sup>

### 3. THE INTERFERENCE WITH THE CHILD'S RIGHT TO RESPECT FOR HIS PRIVATE AND FAMILY LIFE

If the ECtHR finds that the intended parents have *locus standi* to lodge an application on behalf of the child, the second challenging question relates to the compatibility *ratione materiae*<sup>47</sup> of the application with the Convention, namely under what conditions the non-recognition of the intended parents' parenthood can be regarded as an interference with the child's right to respect for his private or family life.

Regarding private life, according to the case law of the ECtHR, the right to identity is an integral part of the notion of 'private life' which includes not only aspects of a person's physical but also social identity.<sup>48</sup> The Court also pointed out that 'respect for private life requires that everyone should be able to establish details of their identity as [an] individual human being, which includes the legal parent-child relationship.'<sup>49</sup> Therefore 'an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned.'<sup>50</sup> Since the parent-child relationship is necessarily affected in the absence of recognition of parentage, it can be concluded that this latter fact shall be interpreted as an interference with the child's right to respect for his private life in itself. This conclusion is reflected in the ECtHR's case law as the Court consistently regards the mere fact of the lack of recognition as an interference that affects the child's private life.<sup>51</sup>

As for family life, the ECtHR determined that this right presupposes the existence of a family, which notion concerns not only marriage-based relationships but also *de facto* family ties.<sup>52</sup> As interpreted by the ECtHR, the existence of a 'family life' is 'essentially a question of fact depending upon the existence of close personal ties.'<sup>53</sup> In applying this test to determine whether there was an interference with the child's right to respect for family life, the ECtHR examines the

<sup>45</sup>*Paradiso and Campanelli v Italy* § 193, 208.

<sup>46</sup>Florescu, Liefard and Bruning (2015) 452.

<sup>47</sup>Incompatibility *ratione materiae* means that the ground of the incompatibility of the application with the Convention lies in the subject of the application. See Peters and Altwick (2018) 12. The Court examines this question at the admissibility stage unless 'there is a particular reason to join this question to the merits.' See *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018) § 93.

<sup>48</sup>*Labassee v France* § 38.

<sup>49</sup>*Mennesson v France* § 96.

<sup>50</sup>*Mennesson v France* § 96.

<sup>51</sup>*Mennesson v France* § 49; *Labassee v France* § 38; *Foulon and Bouvet v France* § 55–58; *Laborie v France* § 29–32; *C. and E. v France* § 37; *Valdís Fjölfnisdóttir and Others v Iceland* § 64, 65.; *D. v France* § 43–44.

<sup>52</sup>*Paradiso and Campanelli v Italy* § 140.

<sup>53</sup>*Valdís Fjölfnisdóttir and Others v Iceland* § 56.





concrete reality of the relationship between the interested parties.<sup>54</sup> Therefore it typically considers the facts that the intended parents took care of the child continuously and without interruption from the time of his birth, and they lived together in a manner that did not differ from ‘family life’ in its habitual sense.<sup>55</sup> It can be concluded from this that in examining the existence of family life, the Court does not require the existence of a genetic connection,<sup>56</sup> but attaches importance to the duration and quality of the personal relationship between the intended parents and the child.

Based on the above, the case law of the ECtHR shows that the relationship between the intended parents and the child is an essential aspect of the child’s social identity and thereby of his private life. In addition, if there is a durable and close personal relationship between the intended parents and the child, and they function as a family in the habitual sense of the term, it can be concluded that the child’s family life is also affected by the refusal of the legal recognition of his family ties.

#### 4. THE LAWFULNESS AND LEGITIMATE AIM OF THE INTERFERENCE

If the interference with the child’s right to respect for his private or family life can be established, in the next step the ECtHR examines on the merits of the case whether the requirements for the justification of the interference have been met. In this domain, the Court first deals with the lawfulness of the interference, and then the existence of its legitimate aim.<sup>57</sup> Accordingly, the next challenging question is under what conditions these requirements are fulfilled when the recognition of the intended parents’ parental status is refused.

According to the case law of the ECtHR, the requirement of lawfulness<sup>58</sup> means

that the measures in question should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects. In order for the law to meet the criterion of foreseeability, it must set forth with sufficient precision the conditions in which a measure may be applied, to enable the persons concerned - if need be, with appropriate advice - to regulate their conduct accordingly.<sup>59</sup>

Regarding the depth of the examination of lawfulness, the ECtHR’s case law shows a significant amount of fluctuation,<sup>60</sup> but in those cases in which the Court examined this question in detail, it considered not only the positive law but also its interpretation by the domestic courts, as well

<sup>54</sup>*Labassee v France* § 37.

<sup>55</sup>*Labassee v France* § 37; *Valdís Fjölnisdóttir and Others v Iceland* § 62.

<sup>56</sup>Fenton-Glynn (2017) 558.

<sup>57</sup>*Mennesson v France* § 51–62; *Labassee v France* § 52–54; *C. and E. v France* § 37; *Valdís Fjölnisdóttir and Others v Iceland* § 76; *D. v France* § 41.

<sup>58</sup>*P. and S. v Poland* App no 57375/08 (ECtHR 30 October 2012) § 134.

<sup>59</sup>*Mennesson v France* § 57.

<sup>60</sup>In some cases, the Court did not examine this issue in substance, but either noted that the applicants did not dispute the interference was in accordance with the law (*Labassee v France* § 52), or simply concluded that it had no doubt that the interference met the requirement of lawfulness (*C. and E. v France* § 37).





as whether the applicants were aware that there was a substantial risk that the domestic courts would not recognize their parent-child relationship.<sup>61</sup>

Regarding the legitimate aims of the interference, the ECtHR typically referred to the protection of the rights and freedoms of others (primarily the child and the surrogate mother),<sup>62</sup> but in the Court's case law we also encounter frequent references to another legitimate aim, namely the protection of health.<sup>63</sup> In light of the previously mentioned fact that surrogacy carries the risk of the commodification of children and exploitation of women, accepting the protection of the rights and freedoms of others as a legitimate aim of the interference seems convincing. At the same time, it is more difficult to see how the legal regulations underlying the refusal to recognize the parental status of the intended parents serve the protection of health, and the Court's reasonings do not provide further guidance in this regard either.

It appears from the case law of the Court that the prevention of disorder and crime can also serve as a legitimate aim of the interference. However, the reference to this can only be justified if it can be established that having recourse to surrogacy amounts to a criminal offence under domestic law.<sup>64</sup> Finally, we note that it is surprising that a reference to the protection of morals, which is also mentioned as a legitimate aim in Article 8 paragraph 2 of the Convention, does not appear in the Court's judgments,<sup>65</sup> even though they refer to the sensitive moral and ethical issues raised by surrogacy when examining the necessity of the interference.<sup>66</sup>

## 5. NECESSITY IN A DEMOCRATIC SOCIETY

The third requirement for justifying the interference is necessity in a democratic society. According to *Greer*, this 'is arguably one of the most important clauses in the entire Convention since, in principle, it gives the Strasbourg organs the widest possible discretion in condoning or condemning interferences with rights which states seek to justify.'<sup>67</sup> In this domain, the question arises as to what aspects are important in terms of assessing the necessity of the interference.<sup>68</sup>

As determined by the Court, '[t]he notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.'<sup>69</sup> Regarding the question of 'pressing social need,' although the Court refers to it as a criterion of necessity, it does not subject it to a separate investigation in international surrogacy-

<sup>61</sup>*Mennesson v France* § 58–59; *D. v France* § 43; *Valdís Fjölnisdóttir and Others v Iceland* § 64.

<sup>62</sup>*Mennesson v France* § 62; *Labassee v France* § 54; *C. and E. v France* § 37; *Valdís Fjölnisdóttir and Others v Iceland* § 65; *D. v. France* § 44.

<sup>63</sup>*Mennesson v France* § 62, *Labassee v France* § 54; *D. v. France* § 44.

<sup>64</sup>*Mennesson v France* § 61, *Labassee v France* § 53.

<sup>65</sup>This may be due to the fact pointed out by *Ryan*, i.e., '[o]ften states do not justify their actions by reference to morality, but rather by reference to health, safety and the protection of rights and freedoms of others.' See *Ryan* (2018) 487.

<sup>66</sup>*Mennesson v France* § 77; *Labassee v France* § 58; *Valdís Fjölnisdóttir and Others v Iceland* § 69;

<sup>67</sup>*Greer* (1997) 14.

<sup>68</sup>It must be noted that the Court did not carry out a detailed examination of all these requirements in every case, but in some cases simply indicated that there was no reason to conclude otherwise than in the cases of *Mennesson v France* and *Labassee v France*. See *Foulon and Bouvet v France* § 55–57; *Laborie v France* § 29–31.

<sup>69</sup>*Mennesson v France* § 50; *Labassee v France* § 51; *C. and E. v France* § 38; *Valdís Fjölnisdóttir and Others v Iceland* § 68.



related cases, but places the focus on the assessment of proportionality.<sup>70</sup> When assessing the latter, two aspects are of decisive importance: the scope of the state's 'margin of appreciation' and the 'fair balance' that must be struck between the competing interests of the state and the applicants.<sup>71</sup>

As Storrow correctly states, '[t]he margin of appreciation grants member states a zone of discretion that permits them to pursue solutions to human rights issues in different ways.'<sup>72</sup> When determining the State's margin of appreciation in international surrogacy-related cases, there are conflicting aspects, some of which argue for a wide margin of appreciation, while others speak for a reduced margin of appreciation available for the state.<sup>73</sup>

On the one hand, according to the consistent case law of the ECtHR, when a case raises sensitive moral and ethical issues, the state's margin of appreciation will be wide.<sup>74</sup> The ECtHR emphasized several times that there is no consensus between the member states of the Council of Europe on the lawfulness of surrogacy arrangements and the recognition of the legal relationship between intended parents and children born through international surrogacy.<sup>75</sup> According to the Court,

this lack of consensus reflects the fact that recourse to a surrogacy arrangement raises sensitive ethical questions. It also confirms that the states must in principle be afforded a wide margin of appreciation regarding the decision not only whether or not to authorise this method of assisted reproduction but also whether or not to recognize a legal parent-child relationship between children legally conceived as a result of a surrogacy arrangement abroad and the intended parents.<sup>76</sup>

On the other hand, the Court also established that 'an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned,' therefore the margin of appreciation afforded to the state needs to be reduced.<sup>77</sup> In addition, the ECtHR pointed out that the issues at stake in this context go beyond the question of the children's identity as 'other essential aspects of their private life come into play where the matter concerns the environment in which they live and develop and the persons responsible for meeting their needs and ensuring their welfare', which also supports the reduced margin of appreciation.<sup>78</sup>

With respect to the requirement of 'fair balance', numerous different interests must be considered.<sup>79</sup> Regarding this fact, it must also be taken into account that it is a principle

<sup>70</sup>*Mennesson v France* § 75–100; *Labassee v France* § 55–80; *C. and E. v France* § 39–45; *Valdis Fjölnisdóttir and Others v Iceland* § 66–76; *D. v. France* § 45–72.

<sup>71</sup>*Iliadou* (2017) 143, *Margaria* (2020) 417–19.

<sup>72</sup>*Storrow* (2018) 41–42.

<sup>73</sup>*Mulligan* (2018) 453–56.

<sup>74</sup>*Mennesson v France* § 77.

<sup>75</sup>*Mennesson v. France* § 77, *Labassee v France* 58.

<sup>76</sup>*Mennesson v. France* § 79.

<sup>77</sup>*Mennesson v. France* § 80; *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* App no P16-2018-001 (ECtHR 10 April 2019), § 44.

<sup>78</sup>*Advisory opinion* § 45.

<sup>79</sup>*Hisano* (2011) 544.



prevailing in the case law of the ECtHR that the obligations imposed by the ECHR on the contracting states may be interpreted in the light of the relevant international treaties applicable to the particular sphere.<sup>80</sup> Accordingly, in cases concerning the human rights of children, the Court interprets the provisions of the ECHR in the light of the United Nations Convention on the Rights of the Child ('CRC'), and requires the contracting states to aspire to the standards set out in the CRC.<sup>81</sup> In this area, the most relevant provision of the CRC stipulates that in 'all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'<sup>82</sup> Therefore, when examining whether a fair balance has been struck by the national authorities between the competing interests, it is essential to consider the child's best interests which are paramount whenever the situation of a child is at issue<sup>83</sup> (the 'paramountcy' principle<sup>84</sup>).

Regarding the child's best interests, the ECtHR explained that these must be assessed primarily *in concreto* rather than *in abstracto*.<sup>85</sup> The Court also established that the child's best interests 'also entail the legal identification of the persons responsible for raising him or her, meeting his or her needs, and ensuring his or her welfare, as well as the possibility for the children to live and develop in a stable environment.'<sup>86</sup> Besides, in the absence of the recognition of the legal parent-child relationship, the identity of the child is undermined and he is in a state of legal uncertainty under domestic law.<sup>87</sup> However, the Court also pointed out that in the context of surrogacy, the child's best interests 'include other fundamental components that do not necessarily weigh in favour of recognition of a legal parent-child relationship.'<sup>88</sup> The latter include, e.g., the 'protection against the risk of abuse which surrogacy arrangements entail (...) and the possibility of knowing one's origins.'<sup>89</sup>

When assessing the necessity of the intervention, the ECtHR took all these aspects into account in its decisions, from which the following principles can be outlined in relation to the obligations of the state regarding the recognition of the parent-child relationship between the intended parents and the child.

Firstly, the child's right to respect for his private life requires that domestic law provide a possibility of recognition of the legal relationship between the child and the intended father if he is also the biological father.<sup>90</sup>

<sup>80</sup>E.g., *Demir and Baykara v Turkey* App no 34503/97 (ECtHR 12 November 2008) § 69.

<sup>81</sup>E.g., *Sahin v Germany* App no 30943/96 (ECtHR 8 July 2003) § 39.

<sup>82</sup>Article 3 paragraph 1 of the CRC.

<sup>83</sup>*Mennesson v France* § 81; *Labassee v France* § 60; *Advisory opinion* § 38.

<sup>84</sup>Ní Shúilleabháin (2019) 106.

<sup>85</sup>*Advisory opinion* § 52.

<sup>86</sup>*Advisory opinion* § 42.

<sup>87</sup>*Mennesson v France* § 96.

<sup>88</sup>*Advisory opinion* § 41.

<sup>89</sup>*Advisory opinion* § 41.

<sup>90</sup>*Mennesson v France* § 99–101; *Labassee v France* § 78–80; *Foulon and Bouvet v France* § 55–58; *Laborie v France* § 29–32; *Advisory opinion* § 35.



Secondly, if the child's parent-child relationship with the intended and at the same time biological father has been recognised in domestic law, the child's right to respect for his private life also '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".'<sup>91</sup> This principle applies with even greater force if the child was conceived using the ovum of the intended mother.<sup>92</sup>

Thirdly, the child's right to respect for his private life does not require a specific means of recognition of the legal relationship between him and the intended mother. This right of the child does not require that recognition be made by registering the data of a birth certificate established abroad; other means, such as adoption by the intended mother may also be acceptable.<sup>93</sup> The choice of means falls within the states' margin of appreciation with the limitation that the chosen mechanism must be prompt, effective and in accordance with the child's best interests, i.e. it cannot impose an undue burden on the child concerned.<sup>94</sup> The recognition must happen at the latest when the parent-child relationship has become a practical reality, which must be assessed by the national authorities in light of the concrete circumstances of the case.<sup>95</sup> Consequently, the refusal of the request for the transcription of the foreign birth certificate does not amount to a violation of the child's right to respect for private life if the possibility of an adoption procedure that meets these requirements is available.<sup>96</sup>

Fourthly, the refusal of the recognition of the parent-child relationship does not violate the child's right to respect for his family life if no actual and practical obstacles exist in the enjoyment of family life between the child and the intended parents that have been impossible to overcome, and there is no risk that the child and the intended parents will be separated by the authorities on account of their status under domestic law.<sup>97</sup> Absence of this risk is indicated if the authorities do not prevent the child from living with the intended parents,<sup>98</sup> or the state takes steps to regularise and secure the bond between the child and the intended parents.<sup>99</sup>

## 6. SUMMARY

According to the case law of the ECtHR, the existence of a genetic relationship between the intended father and the child born through international surrogacy is of fundamental importance from the point of view of the child's right for respect of his private and family life, when

<sup>91</sup> *Advisory opinion* § 46.

<sup>92</sup> *Advisory opinion* § 47; *D. v France* § 53.

<sup>93</sup> *Advisory opinion* § 50, 53; *C. and E. v France* § 40–44; *D. v France* § 58.

<sup>94</sup> *Advisory opinion* § 51, 54–55; *C. and E. v France* § 43.

<sup>95</sup> *Advisory opinion* § 52.

<sup>96</sup> *D. v France* § 62–63, 70–71.

<sup>97</sup> *Mennesson v France* § 87–95; *Labassee v France* § 66–74; *Foulon and Bouvet v France* § 55–58; *Laborie v France* § 29–32; *Valdís Fjölnisdóttir and Others v Iceland* § 71–75.

<sup>98</sup> *Mennesson v France* § 93; *Labassee v France* § 72.

<sup>99</sup> *Valdís Fjölnisdóttir and Others v Iceland* § 75.



the legal child-parent relationship is not recognized by the respondent state.<sup>100</sup> In the absence of a genetic link, the state is not obliged to recognize the intended father as the legal father of the child, and if there is no legal relationship between the intended father and the child, the state has no obligation to recognize the legal motherhood of the intended mother either.

This shows that the Court still perceives parenthood as basically a genetic, rather than a social or functional status,<sup>101</sup> insofar as it only requires the recognition of the legal parenthood of the intended father to be in a genetic relationship with the child. In comparison, in the Court's interpretation, the intended mother's legal motherhood is essentially a 'derivative of fatherhood,'<sup>102</sup> because she can only become legal mother if the intended father's legal paternity has been established. This also means that the ECtHR's case law so far has not defined the standards of the legal protection for all groups of children born through international surrogacy, and it is especially those children who are not genetically related to either intended parent who are in a precarious situation regarding their family status.

In our opinion, this position of the Court, which reflects a traditional understanding of parenthood, requires further development in the direction of a position that perceives the concept of family primarily as a social community rather than a genetic one. It is difficult to put forward plausible arguments why the level of human rights protection provided by the ECtHR to children born through international surrogacy should differ depending on whether the intended father is also a genetic parent or not. Instead, it would be much more justified to focus exclusively on whether the legal recognition of the *de facto* family relationship with the intended parents would serve the best interests of the child, and in the case of an affirmative answer, the refusal of the legal recognition should without exception be considered a violation of the ECHR.

## DISCLOSURE

The author is a judge at the District Court of Keszthely.

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<sup>100</sup>Margaletić, Preložnjak and Šimović (2019) 792.

<sup>101</sup>In comparison, Garrison already took the position in 2000 that 'parenthood itself is increasingly seen as a functional status, rather than one derived from biology or legal entitlement.' See Garrison (2000) 893.

<sup>102</sup>Margaria (2020) 424.



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