KEY THEME[1]
Article 8
Surrogacy

(Last updated: 29/02/2024)

Introduction

Surrogacy comprises a practice whereby the surrogate mother agrees to become pregnant and give birth for the purpose of then forfeiting any parental rights over the child in favour of another person or couple (the "intended parents").

Surrogacy can be divided into two categories: "traditional surrogacy" and "gestational surrogacy". In traditional surrogacy, a surrogate mother is artificially inseminated, either by the intended father or an anonymous donor, and carries the baby to term. The child is thereby genetically related both to the surrogate mother, who provides the egg, and to the intended father or anonymous donor. In gestational surrogacy, an egg is removed from the intended mother or an anonymous donor and fertilized with the sperm of the intended father or anonymous donor. The fertilized egg, or embryo, is then transferred to a surrogate who carries the baby to term. The child is thereby genetically related to the woman who donated the egg and the intended father or sperm donor, but not the surrogate.

Principles drawn from the current case-law

- Surrogacy arrangements raise sensitive ethical issues and may also come into conflict with States' legitimate concerns regarding the protection of children from human trafficking and compliance with the rules on international adoptions, which the Court has described as "very weighty public interests" (*Paradiso and Campanelli v. Italy* [GC], 2017, §§ 203-204).
- Nevertheless, the Court has accepted that Article 8 can extend to the potential relationship which may develop between intended parents and a child, even if family life has not yet been fully established (*D. and Others v. Belgium* (dec.), 2014, § 49).
- The existence of family life for the purposes of Article 8 is a question of fact in which the court will have regard to the emotional ties between the members of the family, the period of time spent in a familial relationship and the existence or non-existence of a biological link between the persons concerned. In the absence of any biological link, the duration of shared cohabitation necessary to establish family life will be longer (*D. and Others v. Belgium* (dec.), 2014, § 49, *Paradiso and Campanelli v. Italy* [GC], 2017, §§ 151-157 and *Valdís Fjölnisdóttir and Others v. Iceland*, 2021, §§ 59-62).
- In considering whether family life exists, the Court may also have regard to the "certainty of any legal ties", including the lawfulness of the parents' conduct under both national and international law (*Paradiso and Campanelli v. Italy* [GC], 2017, §§ 147-158; compare *Valdís Fjölnisdóttir and Others v. Iceland*, 2021, §§ 59-62).
- If family life is not established, the "private life" limb of Article 8 may nevertheless be engaged (*Paradiso and Campanelli v. Italy* [GC], 2017, §§ 161-165 and *A.M. v. Norway*, 2022, §§ 110-111).

[1] Prepared by the Registry. It does not bind the Court.

- An interference with the Article 8 rights, either under the family or private life limbs, may be occasioned by the refusal to legally recognise the parent-child relationship, or by the separation of the child from the parents, either temporarily or permanently.

Refusal to recognise relationship:

- The Court has accepted that a State's refusal to recognise a parent-child relationship arising from a surrogacy arrangement carried out in a country where such arrangements are legal may be in pursuit of a legitimate aim (the "protection of health" and the "protection of the rights and freedoms of others") where the aim is to protect children and surrogate mothers by deterring its nationals from having recourse to methods of assisted reproduction outside the national territory that are prohibited on its own territory (*Mennesson v. France*, 2014, § 62*; Labassee v. France*, 2014, § 54; *Valdís Fjölnisdóttir and Others v. Iceland*, 2021, § 65).
- There is no consensus amongst member States on the lawfulness of surrogacy or the legal recognition of the child-intended parent relationships: therefore, States must in principle be afforded a wide margin of appreciation both as regards the regulation of surrogacy and the recognition of such child-parent relationships. However, as the child-parent relationship forms an essential facet of a person's identity, the margin of appreciation will be narrower when the Court is assessing an interference with a child's Article 8 rights caused by the lack of formal recognition of his or her family ties (*Mennesson v. France*, 2014, §§ 77-80; *Labassee v. France*, 2014, §§ 56-59; *Advisory Opinion No. P16-2018-001*, 2019, §§ 43-44).
- Whenever a situation concerning a child is in issue, the best interests of that child are paramount (*A.L. v. France*, 2022, § 52). This situation takes on a special dimension where one of the intended parents is also the child's biological parent, having regard to the importance of biological parentage as a component of identity (*Mennesson v. France*, 2014, § 100).
- However, Article 8 of the Convention requires only that domestic law provide a possibility of recognition of the legal relationship between a child born through a surrogacy arrangement abroad and the intended father where he is the biological father. The lack of such a possibility will violate the child's right to respect for his or her private life (*Mennesson v. France*, 2014, §§ 97-100). Furthermore, the Court has found "no reason" to adopt a different approach in cases where a child was born to a surrogate in the respondent State (*H v. the United Kingdom* (dec.), 2022, § 56).
- In cases of assisted reproduction, a legal presumption at the moment of a child's birth that the woman who carried the child is the child's mother and, if she is married, that her husband is the father falls within the wide margin of appreciation enjoyed by States when deciding such matters. Article 8 does not require that the biological father be recorded as the child's father on the birth certificate at the moment of birth (*H v. the United Kingdom* (dec.), 2022, § 54).
- Where a child is born through a gestational surrogacy arrangement abroad, in a situation where he or she was conceived using the gametes of the intended father and the eggs of a third-party donor, and the intended mother is designated in a birth certificate legally established abroad as the "legal mother", the child's right to respect for his or her private life also requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother (*Advisory Opinion No. P16-2018-001*, 2019, §§ 37-46; see also *K.K. and Others v. Denmark*, 2022, §§ 74-77). The choice of means by which to achieve recognition of the legal relationship between the child and the intended mother falls within the State's margin of appreciation. However, once the relationship

between the child and the intended mother has become a "practical reality" the procedure laid down to establish recognition of the relationship in domestic law must be capable of being "implemented promptly and efficiently" (*Advisory Opinion No. P16-2018-001*, 2019, §§ 51-55).

- It would not impose an excessive burden on children born through a gestational surrogacy arrangement abroad to expect the intended mother to initiate adoption proceedings in order to be recognised as the legal mother (*C. and E. v. France* (dec.), 2019, § 43).
- Therefore, the obligation for children born under a surrogacy arrangement to be adopted in order to ensure the recognition between the genetic mother and her child does not violate the mother's right to private life (*D v. France*, 2020, §§ 63-72 applying the principles established in *Mennesson v. France*, 2014, and the *Advisory Opinion No. P16-2018-001*, 2019).
- In examining the necessity of an interference with family life, the Court will have regard to the existence of actual, practical hindrances in the enjoyment of family life, and the steps taken by the respondent State to regularise and secure the bond between the parties (*Valdís Fjölnisdóttir and Others v. Iceland*, 2021, § 75).
- Proceedings concerning the relationship between intended parents and a child born through a surrogacy arrangement must be carried out with exceptional diligence to prevent the legal issues from being determined on the basis of a *fait accompli* (*A.L. v. France*, 2022, § 54; see also *D.B. and Others v. Switzerland*, 2022, § 89).
- In order to ensure a rapid and effective result in accordance with the best interests of the child in establishing the parent-child relationship between the biological parent and the child born as a result of surrogacy abroad, the decision-making process must be sufficiently focused on the best interests of the child, free from excessive formalism and capable of achieving this interest independently of possible procedural defects; and the domestic courts must cooperate with the parties by indicating the solutions chosen by the system, irrespective of the requests of the parties concerned (see *C v. Italy*,2023, § 68).

Separation of the child from the intended parents:

- The Court has distinguished separation cases from those concerning the refusal to register birth certificates since questions of the child's identity and recognition of genetic descent do not arise.
- Moreover, as the reason for the separation, whether temporary or permanent, will often be grounded in the need to verify the identity of the child and/or protect him or her from trafficking or unlawful adoption ("very weighty public interests"), the Court has accepted that the margin of appreciation in these cases will generally be wide.
- In particular, it has found that the authorities' delay in authorising the arrival of a child onto national territory pending the receipt of sufficient evidence confirming a family relationship between the child and the intended parents was within a State's margin of appreciation, and rejected the complaint under Article 8 (*D. and Others v. Belgium* (dec.), 2014, §§ 58-59 and 63).
- Even in the case of permanent separation, the Court has accepted that the public interests at stake may weigh heavily in the balance, especially where the parents have acted in breach of important rules of domestic law, with the consequence that the permanent removal of the child may fall within the State's margin of appreciation (*Paradiso and Campanelli v. Italy* [GC], 2017, § 215).

Noteworthy examples

- *Paradiso and Campanelli v. Italy* [GC], 2017 – concerning the permanent removal of a child born via a surrogate from the intended parents, where neither of the parents were biologically related to the child and had acted in contravention of Italian law;
- *Mennesson v. France*, 2014 and *Labassee v. France*, 2014 – two of a number of cases against France concerning the lack of legal recognition of the relationship between intended parents and children born abroad *via* a surrogate (see also *Valdís Fjölnisdóttir and Others v. Iceland*, 2021);
- *D. and Others v. Belgium* (dec.), 2014 – concerning the temporary separation of the family as a result of a delay in granting a travel document allowing the child to travel to Belgium with the intended parents;
- *C. and E. v. France* (dec.), 2019 and *D v. France*, 2020 – concerning the requirement for the genetic mother to adopt the child born under a surrogacy arrangement in order to ensure the legal recognition;
- *S.-H. v. Poland* (dec.), 2021 – concerning the refusal to grant Polish citizenship to two children born via a surrogacy agreement who lived in Israel with the intended parents, both of whom were Israeli nationals (with one also holding Polish citizenship);
- *A.M. v. Norway*, 2022 – concerning the refusal to permit the intended mother to adopt the child in circumstances where the biological father withheld his consent;
- *A.L. v. France*, 2022 – concerning undue delay in proceedings to establish the paternity of a child born via a surrogacy arrangement;
- *H v. the United Kingdom* (dec.), 2022 – concerning the automatic recognition of the surrogate mother and her husband as the child's "mother" and "father".

Related (but different) topics

Article 8:

- Medically Assisted Procreation: *Evans v. United Kingdom* [GC], 2007;
- Medically Assisted Procreation: *Dickson v. United Kingdom* [GC], 2007;
- Ban on Sperm and Ova donation but permissible to avail of services outside jurisdiction: *S.H. v. Austria* [GC], 2011;
- Legal recognition of same-sex relationships: *Oliari and Others v. Italy*, 2015;
- Inability to recover embryos for the purpose of implantation: *Nedescu v. Romania*, 2018;
- *Medically assisted procreation: Petithory Lanzmann v. France* (dec.), 2019.

Article 8 and Article 1 Protocol No. 1 to the Convention:

- Prohibition on donation of in vitro embryos to scientific research: *Parillo v. Italy* [GC], 2015.

KEY CASE-LAW REFERENCES

Leading cases:

- *Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts) (no violation of Article 8 (family life), violation of Article 8 with regard to the children's right to respect for their private life, no need to examine the complaint under Article 14 in conjunction with Article 8);
- *D. and Others v. Belgium* (dec.), no. 29176/13, 8 July 2014 (inadmissible – manifestly ill-founded);
- *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, 24 January 2017 (no violation of Article 8);
- *Advisory Opinion No. P16-2018-001* 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 [GC], request no. P16-2018-001, French Court of Cassation, 10 April 2019.

Other cases under Article 8:

- *Labassee v. France*, no. 65941/11, 26 June 2014 (no violation of Article 8 (family life), violation of Article 8 with regard to the child's right to respect for her private life);
- *Foulon and Bouvet v. France*, nos. 9063/14 and 10410/14, 21 July 2016 (no violation of Article 8 (family life), violation of Article 8 with regard to the children's right to respect for their private life);
- *C. and E. v. France* (dec.), nos. 1462/18 and 17348/18, 19 November 2019 (inadmissible – manifestly ill-founded);
- *D v. France*, no. 11288/18, 16 July 2020 (no violation of Article 8 and Article 14 taken in conjunction with Article 8);
- *S.-H. v. Poland* (dec.), nos. 56846/15 and 56849/15, 16 November 2021 (inadmissible – incompatible *ratione materiae*);
- *Valdís Fjölnisdóttir and Others v. Iceland*, no. 71552/17, 18 May 2021 (no violation of Article 8);
- *A.M. v. Norway*, no. 30254/18, 24 March 2022 (no violation of Article 8 and Article 14 taken in conjunction with Article 8);
- *A.L. v. France*, no. 13344/20, 7 April 2022 (violation of Article 8);
- *H v. the United Kingdom* (dec.), no. 32185/20, 31 May 2022, (inadmissible – manifestly ill-founded);
- *D.B. and Others v. Switzerland*, nos. 58252/15 and 58817/15, 22 November 2022 (violation of Article 8 with regard to the child's right to respect for his private life and no need to examine his complaint with regard to the right to respect for his family life within the meaning of Article 8; no violation of Article 8 with regard to the first and second applicants' right to respect for their family life);
- *K.K. and Others v. Denmark*, no. 25212/21, 6 December 2022 (no violation of Article 8 with regard to the first applicant's right to respect for her private life, violation of Article 8 with regard to the children's right to respect for their private life);
- *C v. Italy*, no. 47196/21, 31 August 2023 (violation of Article 8 in respect of the applicant's right to respect for her private life in so far as the domestic courts refused to enter in the Italian register of births the name of her biological father, as recorded in the applicant's foreign birth certificate; and no violation of Article 8 in respect of the refusal to enter in the

register the name of the intended mother as she had the right, under the domestic law, to adopt the child).