



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law 228

April 2019

Advisory opinion requested by the French Court of Cassation

Request no. [P16-2018-001](#)

10.4.2019 [GC]

Legal summary

Article 8

Respect for private life

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

Background and questions – The questions asked by the Court of Cassation in its request for an advisory opinion were worded as follows:

“1. By refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the ‘intended mother’ as the ‘legal mother’, while accepting registration in so far as the certificate designates the ‘intended father’, who is the child’s biological father, is a State Party overstepping its margin of appreciation under Article 8 [of the Convention]? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the ‘intended mother’?”

2. In the event of an answer in the affirmative to either of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?”

The case-law of the Court of Cassation evolved in the wake of the *Mennesson* judgment (65192/11, 26 June 2014, [Information Note 175](#)). Registration of the details of the birth certificate of a child born through surrogacy abroad is now possible in so far as the certificate designates the intended father as the child’s father where he is the biological father. It continues to be impossible with regard to the intended mother. Where the intended mother is married to the father, however, she now has the option of adopting the child if the statutory conditions are met and the adoption is in the child’s interests; this results in the creation of a legal mother-child relationship. French law also facilitates adoption by one spouse of the other spouse’s child.

In a decision of 16 February 2018 the French Civil Judgments Review Court granted a request for re-examination of the appeal on points of law submitted on 15 May 2017 by Mr and Mrs Mennesson, acting as the legal representatives of their two minor children, against the Paris Court of Appeal judgment of 18 March 2010 annulling the entry in the French register of births, marriages and deaths of the details of the children’s US birth certificates.

The Court of Cassation's request for an advisory opinion from the Court was made in the context of re-examination of that appeal.

Opinion

(a) *Whether the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad through gestational surrogacy, which required the legal relationship between the child and the intended father, where he was the biological father, to be recognised in domestic law, also required 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", in a situation where the child had been conceived using the eggs of a third-party donor and where the legal parent-child relationship with the intended father had been recognised in domestic law*

(i) *The child's best interests* – The lack of recognition of a legal relationship between a child born through surrogacy abroad and the intended mother had a negative impact on several aspects of that child's right to respect for his or her private life. In general terms it was disadvantageous to the child, as it placed him or her in a position of legal uncertainty regarding his or her identity within society.

Furthermore, in view of the fact that the child's best interests also entailed 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 child to live and develop in a stable environment, the general and absolute impossibility of obtaining recognition of the relationship between a child born through surrogacy abroad and the intended mother was incompatible with the child's best interests, which required at a minimum that each situation be examined in the light of the particular circumstances of the case.

(ii) *The scope of the margin of appreciation available to the States Parties* – Despite a certain trend towards the possibility of legal recognition of the relationship between children conceived through surrogacy abroad and the intended parents, there was no consensus in Europe on this issue.

Accordingly, where a particularly important facet of an individual's identity was at stake, such as when the legal parent-child relationship was concerned, the margin allowed to the State was normally restricted. Furthermore, other essential aspects of the children's private life came into play where the matter concerned the environment in which they lived and developed and the persons responsible for meeting their needs and ensuring their welfare. This lent further support to the Court's finding regarding the reduction of the margin of appreciation.

(iii) *Conclusion* (unanimously): Given the requirements of the child's best interests and the reduced margin of appreciation, the right to respect for private life, within the meaning of Article 8, of a child born abroad through gestational surrogacy required 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".

(b) *Whether the right to respect for private life of a child born through a gestational surrogacy arrangement abroad, in a situation where he or she had been conceived using the eggs of a third-party donor, required the recognition of a legal parent-child relationship with the intended mother to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad, or whether it might allow other means to be used, such as adoption of the child by the intended mother*

An individual's identity was less directly at stake where the issue was not the very principle of the establishment or recognition of his or her parentage, but rather the means to be implemented to that end. Accordingly, the choice of means by which to permit recognition of the legal relationship between the child and the intended parents fell within the States' margin of appreciation, regard being had to the fact that there was no consensus in Europe on this issue.

In addition, the child's best interests, which were to be assessed primarily *in concreto*, required recognition of that relationship, legally established abroad, to be possible at the latest when it had become a practical reality. It was in principle first and foremost for the national authorities to assess whether and when, in the concrete circumstances of the case, the said relationship had become a practical reality. However, the child's best interests could not be taken to mean that recognition of the legal parent-child relationship between the child and the intended mother entailed an obligation for States to register the details of the foreign birth certificate in so far as it designated the intended mother as the legal mother. Depending on the circumstances of each case, other means might also serve those best interests in a suitable manner, including adoption, which, with regard to the recognition of the relationship, produced similar effects to registration of the foreign birth details.

In sum, given the margin of appreciation available to States regarding the choice of means, alternatives to registration, notably adoption by the intended mother, might be acceptable in so far as the procedure laid down by domestic law ensured that they could be implemented promptly and effectively, in accordance with the child's best interests as assessed by the courts in the light of the circumstances of the case.

It was a matter for the domestic courts to decide whether French adoption law satisfied the criteria set forth above by the Court, taking into account the vulnerable position of the children concerned while the adoption proceedings were pending.

Conclusion (unanimously): The child's right to respect for private life within the meaning of Article 8 did 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, might be used provided that the procedure laid down by domestic law ensured that it could be implemented promptly and effectively, in accordance with the child's best interests.

(See *Labassee v. France*, 65941/11, 26 June 2014, [Information Note 175](#); *Foulon and Bouvet v. France*, [9063/14](#) and [10410/14](#), 21 July 2016; and *Paradiso and Campanelli v. Italy* [GC], 25358/12, 24 January 2017, [Information Note 203](#). See also the Factsheet on [Gestational surrogacy](#))