



October 2018

This factsheet is not exhaustive and does not bind the Court

## Gestational surrogacy

Cases concerning gestational surrogacy arrangements raise issues mainly under **Article 8 (right to respect for private and family life) of the [European Convention on Human Rights](#)**, which states:

*"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

In order to determine whether the interference by the authorities with the applicants' private and family life was necessary in a democratic society and a fair balance was struck between the different interests involved, the European Court of Human Rights examines whether the interference was in accordance with the law, pursued a legitimate aim or aims and was proportionate to the aim(s) pursued.

### **[Mennesson v. France and Labassee v. France](#)**

26 June 2014 (Chamber judgments)

These cases concerned the refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy treatment and the couples who had had the treatment. In both cases the applicants complained in particular of the fact that, to the detriment of the children's best interests, they were unable to obtain recognition in France of parent-child relationships that had been legally established abroad.

The European Court of Human Rights firstly noted that in the present cases Article 8 (right to respect for private and family life) of the European Convention on Human Rights was applicable in both its "family life" aspect and its "private life" aspect. On the one hand, there was indeed no doubt that the applicants had cared for the children as parents since the children's birth and they lived together in a way that was indistinguishable from "family life" in the accepted sense of the term. On the other hand, the right to identity was an integral part of the concept of private life and there was a direct link between the private life of children born following surrogacy treatment and the legal determination of their parentage. The Court then noted that the interference with the applicants' right to respect for their private and family life resulting from the French authorities' refusal to recognise the legal parent-child relationship had been "in accordance with the law" within the meaning of Article 8 of the Convention. The Court also accepted that the interference in question had pursued two of the legitimate aims listed in Article 8, namely the "protection of health" and the "protection of the rights and freedoms of others". It observed in this regard that the refusal of the French authorities to recognise the legal relationship between children born as a result of surrogacy treatment abroad and the couples who had the treatment stemmed from a wish to discourage French nationals from having recourse outside France to a reproductive technique that was prohibited in that country with the aim, as the authorities saw it, of protecting the children and the surrogate mother. Lastly, examining whether the interference had been "necessary in a democratic society", the Court stressed that a

wide margin of appreciation had to be left to States in making decisions relating to surrogacy, in view of the difficult ethical issues involved and the lack of consensus on these matters in Europe. Nevertheless, that margin of appreciation was narrow when it came to parentage, which involved a key aspect of individuals' identity. The Court also had to ascertain whether a fair balance had been struck between the interests of the State and those of the individuals directly concerned, with particular reference to the fundamental principle according to which, whenever children were involved, their best interests must prevail. In both cases the Court held that there had been **no violation of Article 8** of the Convention **concerning the applicants' right to respect for their family life** and a **violation of Article 8** of the Convention **concerning the children's right to respect for their private life**. The Court observed in particular that the French authorities, despite being aware that the children had been identified in the United States as the children of Mr and Mrs Mennesson and Mr and Mrs Labassee, had nevertheless denied them that status under French law. It considered that this contradiction undermined the children's identity within French society. The Court further noted that the case-law completely precluded the establishment of a legal relationship between children born as a result of – lawful – surrogacy treatment abroad and their biological father. This overstepped the wide margin of appreciation left to States in the sphere of decisions relating to surrogacy.

*Similar cases* in which, relying on its judgments in *Mennesson and Labassee*, the Court held that there had been no violation of Article 8 of the Convention as regards the applicants' right to respect for their family life and a violation of Article 8 as regards the right to respect for private life of the children concerned: [Foulon and Bouvet v. France](#), judgment (Chamber) of 21 July 2016; [Laborie v. France](#), judgment (Committee) of 19 January 2017.

#### **D. and Others v. Belgium (no. 29176/13)**

8 July 2014 (Chamber decision – partly struck out of the list of cases; partly inadmissible)

This case concerned the Belgian authorities' initial refusal to authorise the arrival on its national territory of a child who had been born in Ukraine from a surrogate pregnancy, as resorted to by the applicants, two Belgian nationals. The applicants alleged in particular that their effective separation from the child, on account of the Belgian authorities' refusal to issue a travel document, had severed the relationship between a baby (aged only a few weeks) and his parents, which was contrary to the best interests of the child and in breach of their right to respect for family life. They also considered that this separation had subjected all three of them, parents and child, to treatment contrary to Article 3 (prohibition of inhuman or degrading treatment) of the Convention. Noting firstly that, even if the applicants had been separated from the child during the period under consideration, it was not disputed that they had wished to look after the child, as his parents, from his birth, and that they had taken steps in order to allow for an effective family life (quite apart from the fact that all three had been living together since the child arrived in Belgium), the Court considered that the situation complained of fell within the scope of Article 8 of the Convention. It however declared **inadmissible**, as being manifestly ill-founded, the applicants' complaints concerning the temporary separation of them and the child, finding that the Belgian authorities had not breached the Convention in carrying out checks before allowing the child to enter Belgium. In this respect, the Court observed that the refusal to authorise the arrival of the child on national territory, maintained until the applicants had submitted sufficient evidence to permit confirmation of a family relationship with the child, had admittedly resulted in the child effectively being separated from the applicants, and amounted to interference in their right to respect for their family life. Nonetheless, Belgium had acted within its broad discretion ("wide margin of appreciation") to decide on such matters. While acknowledging that the situation must have been difficult for the applicants, the Court considered for example that neither the urgent proceedings nor the period of the applicants' actual separation from the child could be considered as unreasonably long. The Convention could indeed not oblige the States to authorise entry to their territory of

children born to a surrogate mother without the national authorities having a prior opportunity to conduct certain legal checks. In addition, the Court took the view that the applicants could reasonably have foreseen the procedure to be followed in order to have the family relationship recognised and to take the child to Belgium, especially as they had been advised by a Belgian lawyer and a Ukrainian lawyer. Lastly, the time taken to obtain the laissez-passer had, at least in part, been attributable to the applicants themselves, in that they had not submitted sufficient evidence at first instance to demonstrate their biological ties to the child. The Court also considered that there was no reason to conclude that the child had been subjected to treatment contrary to Article 3 (prohibition of inhuman or degrading treatment) of the Convention during the period of his separation from the applicants. Lastly, in view of developments in the case since the application had been lodged, namely the granting of a laissez-passer for the child and his arrival in Belgium, where he had since lived with the applicants, the Court considered this part of the dispute to be resolved and **decided to strike out of its list**, pursuant to Article 37 (striking out applications) of the Convention, the applicants' complaint concerning the Belgian authorities' refusal to issue travel documents for the child.

### **Paradiso and Campanelli v. Italy**

24 January 2017 (Grand Chamber judgment)

This case concerned the placement in social-service care of a nine-month-old child who had been born in Russia following a gestational surrogacy contract entered into with a Russian woman by an Italian couple (the applicants); it subsequently transpired that they had no biological relationship with the child. The applicants complained, in particular, about the child's removal from them, and about the refusal to acknowledge the parent-child relationship established abroad by registering the child's birth certificate in Italy.

The Grand Chamber found, by eleven votes to six, that there had been **no violation of Article 8** (right to respect for private and family life) of the Convention in the applicants' case. Having regard to the absence of any biological tie between the child and the applicants, the short duration of their relationship with the child and the uncertainty of the ties between them from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bonds, the Grand Chamber held that a family life did not exist between the applicants and the child. It found, however, that the contested measures fell within the scope of the applicants' private life. The Grand Chamber further considered that the contested measures had pursued the legitimate aims of preventing disorder and protecting the rights and freedoms of others. On this last point, it regarded as legitimate the Italian authorities' wish to reaffirm the State's exclusive competence to recognise a legal parent-child relationship – and this solely in the case of a biological tie or lawful adoption – with a view to protecting children. The Grand Chamber also accepted that the Italian courts, having concluded in particular that the child would not suffer grave or irreparable harm as a result of the separation, had struck a fair balance between the different interests at stake, while remaining within the room for manoeuvre ("margin of appreciation") available to them.

### **Pending applications**

#### **Braun v. France (no. 1462/18)**

Application communicated to the French Government on 29 March 2018

#### **Saenz and Saenz Cortes v. France (no. 11288/18)**

Application communicated to the French Government on 29 March 2018

#### **Maillard and Others v. France (no. 17348/18)**

Application communicated to the French Government on 23 May 2018

**Request for an advisory opinion under Protocol No. 16 to the Convention**

On 16 October 2018 the Court received a [request for an advisory opinion](#) on the question of surrogacy from the French Court of Cassation.

---

**Media Contact:**

Tel.: + 33 (0)3 90 21 42 08