

## Recent jurisprudence of the European Court of Human Rights in the area of cross-border surrogacy: is there still a need for global regulation of surrogacy?\*

Key words: cross-border commercial surrogacy, legal parent-child relationship, recognition, European Court of Human Rights, global regulation.

The first part of this article examines the recent decisions of Chambers of the European Court of Human Rights ('the ECtHR') in cases of *Mennesson v. France*,<sup>1</sup> *Labassee v. France*,<sup>2</sup> and *Paradiso and Campanelli v. Italy*.<sup>3</sup> It then makes some suggestions as to how the Grand Chamber should deal with the *Paradiso and Campanelli* case before analysing the likely consequences of the *Mennesson* and *Labassee* judgments for national authorities in the context of surrogacy. The article then explores whether, following these decisions, there is still a need for an international Convention regulating cross-border surrogacy.

### ***Mennesson v. France and Labassee v. France***<sup>4</sup>

In June 2014, the ECtHR delivered two long expected judgments in cross-border surrogacy cases of *Mennesson v. France* and *Labassee v. France*.<sup>5</sup> The cases concerned the refusal to grant legal recognition in France to parent-child relationships that had been lawfully established in the US between children born as a result of a commercial surrogacy arrangement. The applications were lodged with the ECtHR jointly by the intended parents (the Mennessons and the Labassees respectively) and the children born as the result of the surrogacy arrangements (Valentina Mennesson and Fiorella Mennesson and Juliette Labassee respectively). In both cases the respondent was the French Government.

### *Facts*

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<sup>1</sup> *Case of Mennesson v. France*, Application n. 65192/11, Judgment 26 June 2014. Judgment of the Fifth Section of the European Court of Human Rights sitting as a Chamber.

<sup>2</sup> *Case of Labassee v. France*, Application n. 65941/11, Judgment 26 June 2014. Judgment of the Fifth Section of the European Court of Human Rights sitting as a Chamber. The same judges as in the *Mennesson* case but the judgment is not available in English.

<sup>3</sup> *Case of Paradiso and Campanelli v. Italy*, Application n. 25358/12, Judgment 27 January 2015. Judgment of the Twelfth Section of the European Court of Human Rights sitting as a Chamber. On 1 June 2015, the judgment was referred to the Grand Chamber and the hearing took place on the 9<sup>th</sup> December 2015. EUROPEAN COURT OF HUMAN RIGHTS (ECtHR), *Press Release*, 9 December 2015. At the time of the writing of this article the Grand Chamber judgment had not been released yet.

<sup>4</sup> *Mennesson*, cit. and *Labassee*, cit. respectively. For comments on these cases see for example DUTE, *Selected Legislation and Jurisprudence: European Court of Human Rights*, in *European Journal of Health Law*, 2015, 289-292; EUROPEAN COURT OF HUMAN RIGHTS (ECtHR), *Press Release*, 26 June 2014; PUPPINCK, DE LA HOUGUE, *ECHR: Towards the Liberalisation of Surrogacy: Regarding the Mennesson v France and Labassee v France Cases*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2500075](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500075) (originally published in French in *Revue Lamy de Droit Civil*, 2014, p. 78); EUROPEAN CENTRE FOR LAW AND JUSTICE (ECLJ), *Comments on the ECHR case of Paradiso and Campanelli v. Italy*, 30 January 2015, available at <http://eclj.org/Releases/Read.aspx?GUID=ec4d5af3-db22-4b01-8b44-2ab3846b770e&cs=eur>; WELSTEAD, *Parented at Last: Mennesson v France (65192/11); Labassee v France (6594/11)*, in *International Family Law*, 2014; and HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *The Parentage/Surrogacy Project: An Updating Note*, February 2015, paras. 5-12, available at [http://www.hcch.net/upload/wop/gap2015pd03a\\_en.pdf](http://www.hcch.net/upload/wop/gap2015pd03a_en.pdf).

<sup>5</sup> The two cases were conducted simultaneously. *Mennesson*, cit., par. 3.

In 2000 and 2001 respectively, two French married couples - the Mennessons and the Labassees - obtained children through commercial surrogacy arrangements in the US. The children were conceived using the intended fathers' sperm and donor eggs. Judgments given in California and in Minnesota respectively ruled that the intended parents were the children's legal parents. The French authorities, however, refused to enter the birth certificates in the French register of births, marriages and deaths. The couples then took the matter to court. Their claims were dismissed at final instance by the Court of Cassation in April 2011. The Court held that recording such entries in the register was contrary to the principle of inalienability of civil status which was one of the fundamental principles of French law.<sup>6</sup> The Court also stated that recording the entries in the French register of births, marriages and deaths would give effect to a surrogacy agreement that was null and void on public-policy grounds under the French Civil Code, although it was lawful in the United States.<sup>7</sup> The couples then brought the case before the European Court of Human Rights ('the ECtHR' or 'the Court'), relying primarily on the right to respect for their private and family life guaranteed by Article 8 of the European Convention on Human Rights ('the ECHR' or 'the Convention' or 'the European Convention').<sup>8</sup> The ECtHR found that there was no violation of Article 8 with regard to the intended parents' right to respect for their family life; however, the children's right to respect for private life had been infringed by the French authorities.

### *Decisions*

#### *Mennesson v France*

##### 1.) Applicability of Article 8: existence of 'family life' and 'private life'

The Court held that Article 8 was applicable with regards to both its limbs: 'family life' and 'private life'. In relation to the former, the Court found that it was without doubt that the Mennessons had been looking after the children as parents since the children were born.<sup>9</sup> Moreover, Mr and Mrs Mennesson lived together with the twins in a way that was identical with 'family life' in the established meaning of the term.<sup>10</sup> In relation to 'private life', the Court found that respect for private life demanded the right to establish details of one's identity, and that this included the legal parent-child relationship.<sup>11</sup> Consequently, in the words of the Court, 'an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned'.<sup>12</sup>

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<sup>6</sup> Per *Mennesson*, cit., par. 27.

<sup>7</sup> *Mennesson*, cit.

<sup>8</sup> Article 8 of the ECHR 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 in such as is 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.'

<sup>9</sup> ECtHR, *Press Release*, 26 June 2014, cit., p. 3.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Mennesson*, cit., par. 96.

<sup>12</sup> *Mennesson*, cit., paras. 80 and 96.

## 2.) Interference with the applicants' right to respect for their private and family life

There was no disagreement between the parties (the Mennessons and the French Government respectively) that the refusal to grant legal recognition in France of the parent-child relationships between Mr and Mrs Mennesson and the twins amounted to an 'interference' in their right to respect for their family life.<sup>13</sup> The Court agreed with this approach but added that in the present case there had been an interference not only with regards to 'the family life' but also 'the private life' element of Article 8.<sup>14</sup> The Court then explained that such interference would be in violation of Article 8 unless it was established that the interference was 'in accordance with the law', 'pursuing a legitimate aim(s) listed in Article 8', and 'necessary in a democratic society'.<sup>15</sup>

## 3.) Justification for the interference

The Court noted that although no provision of domestic law explicitly prohibited recognition of a legal parent-child relationship between the intended parents and the children, Articles 16-7 and 16-9 of the French Civil Code expressly stated that surrogacy arrangements were null and void on the grounds of public policy.<sup>16</sup> Consequently, the interference was 'in accordance with the law' within the meaning of Article 8 of the Convention.<sup>17</sup>

Similarly, the Court concluded that the interference pursued two of the legitimate aims listed in the second paragraph of Article 8, in particular 'the protection of health' and 'the protection of the rights and freedoms of others'.<sup>18</sup> Before reaching this conclusion, the Court noted that the French Government's refusal to recognise the legal parent-child relationship between the intended parents and the children established in the US stemmed from the desire to discourage French nationals from utilising methods of assisted reproduction outside France that are banned domestically, and 'in accordance with its [i.e. the French Government's] perception of the issue', to safeguard children and surrogate mothers.<sup>19</sup>

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<sup>13</sup> *Mennesson*, cit., par. 48.

<sup>14</sup> *Mennesson*, cit., par. 49. The Court referred to its two earlier judgments that were issued in the context of inter-country adoption and concerned the refusals of national courts to recognise an adoption that had been established in foreign judgments: *Case of Negrepontis-Giannisis v. Greece*, Application n. 56759/08, Judgment 3 May 2011, and *Case of Wagner and J.M.W.L. v. Luxembourg*, Application n. 76240/01, Judgment 28 June 2007. For illustration, the latter case concerned an adoption of a child in Peru by a single mother from Luxembourg. The case was comparable to the present case in that the applicant had circumvented a prohibition imposed by the legal system of her country of origin i.e. that under the law of Luxembourg single people were not eligible to adopt, and travelled abroad in search of a more favourable forum. The Court found that the case involved an effective family unit and that both aspects of Article 8 (i.e. 'family life' and 'private life') were applicable in this case. The Court held that despite the fact that domestic law had been circumvented the legal effects of the legal parent-child relationship lawfully established in Peru should be recognised in Luxembourg. See *Mennesson*, cit., par. 26.

<sup>15</sup> *Mennesson*, cit., par. 50. The concept of 'necessity' suggests that the interference 'corresponds to a pressing social need and, in particular that it is proportionate to the legitimate aim pursued.' Ibid. Also *Negrepontis-Giannisis*, cit., par. 61, and *Wagner*, cit., par. 124. Per *Mennesson*, cit., par. 50.

<sup>16</sup> *Mennesson*, cit., par. 58.

<sup>17</sup> *Mennesson*, cit., par. 58.

<sup>18</sup> *Mennesson*, cit., par. 62.

<sup>19</sup> *Mennesson*, cit., par. 62. The Court disagreed with the French Government that an additional 'legitimate aim' of the interference was 'the prevention of disorder or crime' as the Government failed to establish that entering into a surrogacy arrangement abroad actually constituted a criminal offence under French law. *Ibid* [61]. In the present case a criminal investigation was launched in France against an unknown person and the intended parents respectively for 'acting as an intermediary in a surrogacy arrangement'

The Court then moved on to considering the question of whether the interference was ‘necessary in a democratic society’. It noted that as there was no consistency in approach within the Member States of the Council of Europe in relation to surrogacy, in particular because surrogacy raised sensitive moral and ethical issues, the States’ margin of appreciation was wide.<sup>20</sup> This margin, however, was limited where, ‘a particularly important facet of an individual’s existence or identity is at stake’.<sup>21</sup> This was clearly the case in surrogacy situations as legal parentage involved an essential aspect of one’s identity.<sup>22</sup> In such circumstances – i.e. where competing interests were at stake – States should aspire to strike a balance between the interests of the community and those of the applicants.<sup>23</sup> Throughout this process, domestic courts were expected to take account of the applicants’ interest in ‘fully enjoying their rights to respect for their private and family life’, whilst respecting the paramountcy of the best interests of the child principle.<sup>24</sup> The Court examined the issues separately from the perspective of the applicants and from the perspective of the children.

#### 4.) The applicants’ right to respect for family life: existence of ‘family life’ and ‘private life’

With regard to the applicants’ right to respect for family life, the Court acknowledged that the lack of recognition under French law of the legal parent-child relationship between the intended parents and the children inevitably impacted on their family life.<sup>25</sup> However, the difficulties the applicants had to face were not overwhelming and did not preclude them from the enjoyment of their right to respect for family life.<sup>26</sup> Specifically, the intended parents were able to settle with the children in France shortly after the twins were born, and the family’s situation in France was similar to the situation of other families.<sup>27</sup> Moreover, there was no indication that the family would be separated by the French authorities.<sup>28</sup> Consequently, the Court considered that the French authorities had struck a fair balance between the interests of the intended

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and for ‘false representation infringing the civil status of children’. It was, however, held that as the acts had been committed in California where they did not amount to a crime, they did not constitute a criminal offence in France. *Ibid* [15-16] and [61].

<sup>20</sup> *Mennesson*, cit., paras. 77-79.

<sup>21</sup> *Mennesson*, cit., par. 77.

<sup>22</sup> *Mennesson*, cit., par. 77. See also section ‘Applicability of Article 8: existence of ‘family life’ and ‘private life’ above.

<sup>23</sup> *Mennesson*, cit., par. 84.

<sup>24</sup> *Mennesson*, cit., par. 84.

<sup>25</sup> *Mennesson*, cit., par. 87. The Court noted in particular the following obstacles the intended parents had to face: 1.) Where access to a right or a service required a proof of legal parentage (e.g. registering the children with social security, enrolling them at school-related facilities, and applying for financial assistance from the Family Allowances Office), in the absence of French civil status documents or a French family record book, the intended parents had to produce non-registered US civil status documents. The person dealing with the request often looked upon these documents with distrust. 2.) As the children had not been granted French nationality, complications often arose when the family was planning to travel. Moreover, there were concerns over the stability of the family unit as there was a risk that the children would not be eligible for unconditional leave to remain in France once they have attained their majority. 3.) There were concerns regarding the protection of family life between the intended parents and the children in case of the genetically-related intended father’s death or the potential separation of the couple. *Mennesson*, cit., paras. 88-91. See also *Mennesson*, cit., par. 68.

<sup>26</sup> *Mennesson*, cit., par. 92.

<sup>27</sup> *Mennesson*, cit., par. 92.

<sup>28</sup> *Mennesson*, cit., par. 92.

parents and the State.<sup>29</sup> Accordingly, there was no violation of Article 8 concerning the applicants' right to respect for their family life.<sup>30</sup>

5.) The right of the children to respect for their private life

A different conclusion was, however, reached in relation to the right of the twins to respect for their private life. The Court reiterated that there was a direct link between one's identity and respect for private life, and that a key aspect of one's identity was at stake where legal parentage was concerned.<sup>31</sup> As French law refused to recognise the parent-child relationship between the intended parents and the twins, the children were in a state of 'legal uncertainty' and this undermined their identity within French society.<sup>32</sup> The Court then identified nationality and the right to inheritance as the relevant elements of identity. Although the children's genetic father was French, they were unable to obtain French nationality.<sup>33</sup> In addition, the children's inheritance rights were 'less favourable' as they could only inherit from the intended parents as legatees.<sup>34</sup> Consequently, the children's right to respect for their private life, which implied the right to establish the essence of one's identity, including his/her parentage, was considerably affected.<sup>35</sup> Significantly, this situation was irreconcilable with the paramountcy of the best interests of the child principle.<sup>36</sup>

The significance of the above shortcomings was exacerbated by the fact that the intended father was also the genetic father of the children.<sup>37</sup> The Court held that by preventing the recognition and establishment under domestic law of the relationship between the twins and their genetic father,<sup>38</sup> France 'overstepped the permissible limits of its margin of appreciation'.<sup>39</sup> Consequently, the children's right to respect for their private life had been violated.

*Labassee v France*

In deciding this case, the Court adopted the same approach as in the *Mennesson* case, concluding that there had been no violation of Article 8 concerning the intended parents' right to respect for their family life, but that there had been a violation of Article 8 concerning the child's right to respect for her private life.

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<sup>29</sup> *Mennesson*, cit., par. 94.

<sup>30</sup> *Mennesson*, cit., par. 94.

<sup>31</sup> *Mennesson*, cit., par. 96. See also section 'Applicability of Article 8: existence of 'family life' and 'private life' above.

<sup>32</sup> *Mennesson*, cit., par. 96.

<sup>33</sup> *Mennesson*, cit., par. 97.

<sup>34</sup> *Mennesson*, cit., par. 98.

<sup>35</sup> *Mennesson*, cit., par. 99.

<sup>36</sup> *Mennesson*, cit., par. 99.

<sup>37</sup> *Mennesson*, cit., par. 100.

<sup>38</sup> The Court highlighted the fact that there were no means of formal recognition of the legal parent-child relationship between the intended father and the children. Not only did the French authorities refuse to register details of the US birth certificates, but other avenues such as a declaration of paternity or adoption or through the effect of de facto enjoyment of civil status were incompatible with the case-law of the Court of Cassation *Mennesson*, cit., par. 100.

<sup>39</sup> *Mennesson*, cit., par. 100.

## *Paradiso and Campanelli v. Italy*<sup>40</sup>

In January 2015, another important decision concerning cross-border surrogacy was issued by the ECtHR in the case of *Paradiso and Campanelli v. Italy*. The application concerned the refusal by Italian authorities to register a Russian birth certificate of a child born through surrogacy in Russia and the subsequent removal of the child by the Italian authorities from the intended parents. The key differences between the *Mennesson/Labasse* cases and the present case was that the child concerned was genetically unrelated to either of the intended parents<sup>41</sup>, and that the intended parents had not exhausted available domestic remedies to obtain the recognition in Italy of the legal parent-child relationship established in Russia.

### *Facts*

In 2010, Ms Donatina Paradiso and Mr Giovanni Campanelli ('the applicants' or 'the intended parents'), both Italian nationals and a married couple, entered into a surrogacy arrangement with a Moscow-based clinic called Rosjurconsulting whom they paid 49,000 EUR for their 'services'. A surrogate mother was implanted with two embryos on 19 June 2010 and she gave birth to a child in Moscow on 27 February 2011. On the same day the surrogate mother gave her written consent to the child being registered as the applicants' son. In accordance with Russian law, the applicants were registered as the child's parents. There was no indication in the Russian birth certificate that the child had been born through surrogacy. The Italian consulate in Russia issued travel documents for the child, allowing the intended parents to remove the child to Italy. In Italy, the intended parents applied to the municipal authority for the registration of the birth. Their request was, however, refused on 4 August 2011 by the Registry Office after the mother had conceded that the ova that was used was from a donor and a DNA test had revealed that Mr Campanelli was not the genetic father of the child. On 20 October 2011 the Youth Court decided that the child should immediately be removed from the intended parents, not only given the lack of any genetic relationship between the intended parents and the child, but also because the authorities had doubts over the intended parents' capabilities to raise the child as they had acted contrary to the law.<sup>42</sup> The decision to remove the child from the applicants was upheld by the Campobasso Court of Appeal on 28 February 2012. The baby was placed in a children's home, without the intended parents being informed of the child's location or permitted to

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<sup>40</sup> *Paradiso*, cit. For comments on this case see for example ECtHR, *Press Releases* of 27 January, 3 June and 9 December 2015; ECtHR, *Questions and Answers on the Paradiso and Campanelli v. Italy Judgment (27 January 2015)*; PUPPINCK and DE LA HOUGUE, *Paradiso and Campanelli v Italy: The ECHR Validates the Sale of a Child Through Surrogacy*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2605819](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605819) (originally published in French in *Revue Lamy de Droit Civil*, 2015, p. 41); DUTE, *Selected Legislation and Jurisprudence*, cit.; ECLJ, *Comments*, cit.; WELSTEAD, *Parented at Last*, cit.; FENTON-GLYNN, *European Case Law Update: European Court of Human Rights: Article 8: International Surrogacy*, in *International Family Law*, 2015, 178; and HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *The Parentage/Surrogacy Project*, cit., paras. 5-12.

<sup>41</sup> Although the intended parents unsuccessfully submitted that they had been unaware that Campanelli's sperm was not used for the purposes of the IVF procedure. *Paradiso*, cit., par. 34.

<sup>42</sup> In this context, the Court made a rather harsh statement that the intended parents had purposively circumvented the adoption law and 'it could be thought that the child resulted from a narcissistic desire on the part of the couple or indeed that he was intended to resolve problems in their relationship.' *Paradiso*, cit., par. 22.

see him. Afterwards the baby was entrusted to foster parents, whilst being left without a formal identity. Following the revelation that there was no genetic link between the child and the intended parents, the Italian authorities viewed the case as one of international adoption rather than a cross-border surrogacy arrangement. On 5 June 2013 the Youth Court declared that the applicants no longer had capacity to act in the adoption proceedings brought by them given that they were neither the child's parents nor members of his family. The intended parents then lodged an application with the ECtHR, relying on Articles 6, 8 and 14 of the Convention. In particular, they complained that the refusal to recognise the legal parent-child relationship established through the Russian birth documents, and the removal of the child by Italian authorities from their care violated the applicants' right to respect for private and family life.

### *Decision*

The Court dismissed the complaint regarding the refusal by Italian authorities to register the child's birth certificate, finding that the applicants had not exhausted available domestic remedies as they had not appealed to the Italian Court of Cassation.<sup>43</sup> The Court also dismissed the applicants' attempt to bring an action on behalf of the child who was born in Moscow on 27 February 2011 because in the absence of any biological ties with the child or any authorisation from a lawful representative of the child the applicants did not have legal standing to represent the child's interests in the context of judicial proceedings.<sup>44</sup>

Nevertheless, the Court decided to deal with the case entirely under Article 8 and decided that the second complaint fell within the scope of that Article on the basis that there had been a *de facto* family life between the child and the applicants.<sup>45</sup> Although the Court found that the removal of the child had been in accordance with law and served the legitimate aim of 'preventing disorder' and protecting the 'rights and freedoms of the child',<sup>46</sup> it concluded that the actions of the Italian authorities were not necessary in a democratic society.<sup>47</sup> Indeed, the removal of a child from the family setting is 'an extreme measure, which should only be resorted to as a very last resort. Such a measure can only be justified if it corresponds to the aim of protecting a child who is faced with immediate danger'.<sup>48</sup> The Court also criticized the Italian court's

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<sup>43</sup> *Paradiso*, cit., paras. 62 and 90.

<sup>44</sup> *Paradiso*, cit., paras. 48-50. Very surprisingly the second section found the applicants' objection to the decision that they had no standing to contest the adoption proceedings to be admissible even though the applicants could have appealed that decision at two levels and did not appeal the decision at all, see *Paradiso*, cit., par. 64.

<sup>45</sup> *Paradiso*, cit., paras. 54 and 67-69. This complaint was admissible because the decision to remove the child from the applicants and place him under guardianship was confirmed by the Campobasso Court of Appeal and could not be appealed on a point of law to the Italian Court of Cassation because it was a non-final decision, see *Paradiso*, cit., par. 63. De facto family life was established in this case on the basis of the period of 6 months the child spent with the applicants in Italy from the age of 3 months to 9 months and the first few weeks of the child's life spent with the female applicant in Russia, par. 69 and this was agreed with rather reluctantly by the two dissenting judges in their opinion, see *Paradiso*, cit., dissent par. 2, but with a critique that the majority did not apply a 'proportionality' test given that the de facto family life was based on a 'tenuous link' between the applicants and the child, see *Paradiso*, cit., dissent par. 3.

<sup>46</sup> *Paradiso*, cit., paras. 72-73 and dissent par. 6.

<sup>47</sup> *Paradiso*, cit., par. 81. .

<sup>48</sup> *Paradiso*, cit., par. 80. The Court noted that a high standard had been set in previous ECtHR case-law in this respect. It highlighted in particular the case of *Wagner*, cit., where the national authorities refused to recognise the parent-child relationship established abroad through adoption on the grounds of public policy. The situation in *Wagner*, however, differed from the present case as family life had not been interfered with through a physical removal of the child from the adoptive mother.

rationale that the intended parents, who had been assessed as suitable to adopt in 2006, were later held to be unfit as prospective adopters on the sole ground that they had breached domestic adoption laws, ‘without any expert report having been ordered by the courts’.<sup>49</sup> Moreover, following the removal of the child from the intended parents, he was left without any formal identity for over two years.<sup>50</sup> The child’s lack of identity until April 2013 may have been contrary to Article 7 of the United Nations Convention on the Rights of the Child,<sup>51</sup> as no child should be ‘disadvantaged on account of the fact that he or she was born to a surrogate mother, especially in terms of citizenship or identity [...]’.<sup>52</sup> Consequently, the Court held by five votes to two that the Italian authorities had failed to strike the correct balance between the interests of the State and those of the intended parents, whilst also having failed to take account of the paramountcy of the child’s best interest principle.<sup>53</sup> Nevertheless, this finding was not to be understood as obliging Italy to return the child to the physical care of the intended parents as in the meantime the boy had undoubtedly developed emotional ties with his foster family.<sup>54</sup> In a powerful dissent Judges Raimondi and Spano accused the majority of acting as a “fourth-instance” by substituting its own assessment for that of the domestic authorities even though the decision of the relevant domestic authorities to remove the child from the care of the applicants was not arbitrary.<sup>55</sup> Their final conclusion about the impact of the majority judgment is compelling:

‘In addition, the majority’s position amounts, in substance, to denying the legitimacy of the State’s choice not to recognise gestational surrogacy. If it suffices to create, illegally, a link with the child abroad in order for the national authorities to be obliged to recognise the existence of “family life”, then it is clear that the States’ freedom not to give legal effect to gestational surrogacy, a freedom that has nonetheless been acknowledged by the Court’s case-law (see *Mennesson v. France*, no. 65192/11, 26 June 2014, § 79, and *Labassee v. France*, (no. 65941/11), 2 June 2014, § 58), is reduced to nought.’<sup>56</sup>

The case is now pending before the Grand Chamber of the ECtHR as a panel of five judges on 1 June 2015 accepted the request made by Italy for a referral of the Chamber decision to the Grand Chamber.

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<sup>49</sup> *Paradiso*, cit., par. 84. Clearly the lack of an expert report may be seen to make the removal of the child appear ‘arbitrary’ but as the dissent point out, par. 12, this was not enough to make the decisions of the domestic courts to remove the child from the applicants arbitrary because they were dealing with a sensitive and urgent case where ‘the suspicions hanging over the applicants were serious.’ Although the majority acknowledged the risk that leaving the child with the applicants would have “developed closer emotional ties”, *Paradiso*, cit., par. 82, between the child and the applicants, the majority did not give enough weight to the legitimate interest in the Italian authorities in preventing such harm to the child in forming these deeper emotional links if the child was not to be adopted by the applicants because of their breach of Italian adoption law.

<sup>50</sup> *Paradiso*, cit., par. 85.

<sup>51</sup> United Nations Convention on the Rights of the Child, 20 November 1989, see *Paradiso*, cit., par. 85. However, the dissent, par. 14, correctly says that this argument about the child’s identity did not have an impact on the 2011 decision to separate the child from his parents and was therefore irrelevant to the applicants’ case.

<sup>52</sup> *Paradiso*, cit., par. 85.

<sup>53</sup> *Paradiso*, cit., paras. 80 and 86.

<sup>54</sup> *Paradiso*, cit., par. 88.

<sup>55</sup> *Paradiso*, cit., dissent paras. 12-14.

<sup>56</sup> *Paradiso*, cit., dissent par. 15.

## *Analysis*

Despite the common theme (i.e. cross-border surrogacy), the *Paradiso* case differs from the *Menesson/Labassee* decision in two important respects. First, in *Paradiso* neither of the intended parents was genetically linked to the child. Second, the intended parents in that case had not exhausted available domestic remedies when seeking the recognition by Italian authorities of the legal parent-child relationship established in Russia, and, as a consequence, the ECtHR refused to rule on that aspect of the case. Notwithstanding these differences, a number of common themes can be identified within the decisions and examined in more detail.

### a. Genetic link

In *Paradiso* the Chamber did not rule on the question of the recognition of legal parentage established through surrogacy abroad involving a genetically-unrelated intended parent (correctly because it was not necessary to do so in that case). In *Menesson/Labassee* the Chamber appeared to suggest that a person's identity was intrinsically linked with biological parentage<sup>57</sup> and stated that it is not in 'the interests of the child to deprive him or her of a legal relationship of this nature'.<sup>58</sup> According to the Chamber's reasoning, the right to establish one's identity is in turn connected with the right to respect for private life under Article 8. Consequently, it is clear from the judgment that in order to prevent a violation of Article 8 (private life), a State is obliged to legally recognise a parent-child relationship established abroad between a child born through surrogacy and his/her biological parent. The Court in *Menesson/Labassee*, however, did not clearly address the legal parentage of the genetically unrelated intended parent (in both the *Menesson* and *Labassee* applications, the non-genetically related intended parent was the intended mother). The following question therefore remains unanswered: Is a State obliged to recognise the legal parent-child relationship legally established abroad between a child born through surrogacy and a genetically unrelated intended parent?<sup>59</sup> Similarly, it has been rightly pointed out that, as in both cases (*Menesson* and *Labassee*) the genetically-related intended parent was the children's father, a different approach might have to be taken in cases where the genetically-related intended parent is the child's mother.<sup>60</sup> Interestingly, the Chamber did not expressly

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<sup>57</sup> *Menesson*, cit., par. 100. In the words of the chamber, 'biological parentage' is 'a component of identity'.

<sup>58</sup> *Menesson*, cit., par. 100. The chamber added the qualifiers where the biological relationship has been established and the child and parent concerned demand full recognition thereof. Of course the latter qualification in relation to the "child" is rather meaningless because a young child is not in a position to decide whether or not to "demand" full recognition of the parent child relationship between him or her and the intending biological parent. The chamber does not consider what would happen if the surrogate mother were to contest the parental rights of the intending biological father (or indeed of the intending genetic mother).

<sup>59</sup> Interestingly, in a 2013 decision of the Kammergericht Berlin (Germany) the concept of the right of the child to know his/her identity led to the court to the conclusion that a US judgment which stated two German intending fathers as the legal parents of a child born through surrogacy in California could not be recognised in Germany in relation to the non-genetically related intended father on the grounds of public policy. The court also held that 'full transcription of the foreign judgment would also infringe the child's right to know his identity due to the fact it would not contain any information concerning the surrogate mother'. A decision of 1 August 2013, case ref. 1 W 413/12, per HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, March 2014, par. 164, available at [http://www.hcch.net/index\\_en.php?act=text.display&tid=178](http://www.hcch.net/index_en.php?act=text.display&tid=178).

<sup>60</sup> HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *The Parentage/Surrogacy Project*, cit., par. 8.

discuss whether there is a difference between legal fatherhood and legal motherhood, and, instead, referred to a single concept of legal parenthood. It would, however, not be straightforward to analogically apply the Court's reasoning in *Mennesson/Labassee* to a situation where the genetically-related intended parent was the intended mother. This is in particular because the *Mennesson/Labassee* approach would be contrary to the gestational test on which the establishment of legal motherhood is traditionally based.<sup>61</sup>

Although the Court in *Paradiso* did not address the problem of the recognition of legal parentage, it did touch upon the issue of genetic link. This was, however, in relation to the question of whether 'family life' for the purposes of Article 8 existed between the child and the intended parents of whom neither was the child's genetic parent but who had acted as parents and cared for the child for a substantial part of the first nine months of his life. The Court held that a genetic link was not a necessary pre-requisite for the existence of 'family life' for the purposes of Article 8 as a *de facto* family had been established. This was qualified by judges Raimondi and Spano in their joint partly dissenting opinion where they argued that in the absence of a biological link between the applicants and the child if the custody of the child was obtained through an illegal act that was contrary to public policy (i.e. in the present case commercial surrogacy or an illegal adoption), Article 8(1) should not be interpreted as enshrining family life.<sup>62</sup>

We would urge the Grand Chamber in *Paradiso* to take the opportunity to restrict the notion of *de facto* family in Article 8 ECHR. It is not for the ECtHR to effectively create 'family rights' for any couple in Europe who want to have a baby by hiring a surrogate mother anywhere in the world even when neither intending parent has a genetic relationship with the child. This has to be a matter on which countries in Europe are allowed to have different views. Therefore intention to be a parent, coupled with under nine months of *de facto* parenting – the situation in *Paradiso* –, should not be regarded as a *de facto* family for the purposes of Article 8 ECHR. The Grand Chamber should respect democracy and subsidiarity by exercising restraint and saying that the case falls outside the scope of the Convention as the applicants had no right to family life to protect. Even if the Grand Chamber were to decide that there was a *de facto* family life here

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<sup>61</sup> The application of the gestational approach in the surrogacy context was confirmed by the Irish Supreme Court in the *Case of M.R. and D.R. (suing by their father and next friend O.R.) & ors -v- An t-Ard-Chláraitheoir & ors* [2014] IESC 60. This case involved a domestic altruistic surrogacy arrangement where both intended parents were the genetic parents of twins born to a surrogate mother. The surrogate was the sister of the intended mother and was happy for her sister to be registered as the only mother of the child. The intended parents initiated court proceedings seeking a declaration that the intended mother was the legal mother of the children. The court decided to grant the petition, abandoning the irrebuttable presumption deriving from the 'age-old maxim' that the mother was always the woman who gave birth to the child. The High Court decision was, however, overturned by the Irish Supreme Court which ruled 6:1 against the intended parents and held that the birth certificate of the twins could not be changed to register the genetic mother as the legal mother. The Court concluded that it was a matter for the Irish legislature to determine such rights by way of legislation. See TRIMMINGS, BEAUMONT, *Parentage and Surrogacy in a European Perspective*, in SCHERPE (ed.), *European Family Law (Vol. III)* 2016. For a detailed analysis of issues arising from this case see CAFFREY, *Surrogacy – Genetics v Gestation: The Determination of "Mother" in Irish Law*, in *Medico-Legal Journal of Ireland*, 2013, pp. 34-36; MURRAY, *Recent Developments in Irish Law on Guardianship in the Context of Surrogacy Arrangements*, in *International Family Law*, 2013, pp. 261-266; and MARTINEZ GARCIA, *Case Comment: High Court Appeal – Surrogacy Agreement*, in *Medico-Legal Journal of Ireland*, 2015, pp. 44-47.

<sup>62</sup> *Paradiso*, cit., dissenting opinion par. 3.

within the scope of the Convention it should also resist the temptation to act as a ‘fourth–instance’ court<sup>63</sup> and second guess that it was not in the best interests of the child for the Italian authorities to remove the child from the applicants when the child had been with them only for 9 months, the applicants had no genetic link with the child and had not been approved by the Italian authorities to adopt a very young child<sup>64</sup> when they had earlier gone through an adoption process in Italy and the longer the child remained in the applicants’ care the more emotionally damaging it would be to the child to remove him from that care.

- b. The freedom of a State to outlaw surrogacy vs the obligation to recognise the effects of a cross-border commercial surrogacy arrangement

Importantly, the problem raised by judges Raimondi and Spano in their dissenting opinion in *Paradiso* has attracted wider attention among commentators. Critics have rightly observed that the ECtHR’s approach, although not directly challenging the State’s choice to outlaw surrogacy,<sup>65</sup> compels States to accept the effects of cross-border commercial surrogacy arrangements by requiring them not to remove a child from the care of the intending parents established through surrogacy abroad unless the child is in immediate danger.<sup>66</sup> An unintended but likely consequence of this approach is that it will encourage intended parents to circumvent national legislation prohibiting surrogacy.

At the State level, the ECtHR approach in *Menesson* (unless tempered in any way by the Grand Chamber decision in *Paradiso*) is likely to result in two sets of consequences: first, changes at the conflicts level, i.e. in relation to the recognition of legal parentage established in the country of birth; and, second, modifications at the level of substantive law, i.e. potential shift towards a more liberal attitude to surrogacy at the domestic level.

First, States will have to align their practices in relation to the recognition of legal parentage established abroad where the child was born as a result of surrogacy with the *Menesson/Labassee* reasoning. This may, however, lead to a dual treatment of surrogacy arrangements within a jurisdiction as the effects of surrogacy could be approached differently at the domestic and the conflicts levels. In jurisdictions where altruistic and commercial surrogacy are banned, the legal parentage (at least that of the biological father) established abroad in a cross-border surrogacy case of either form will be recognised domestically while all domestic surrogacy arrangements will remain illegal with no effects regarding legal parentage. In jurisdictions where

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<sup>63</sup> See *Paradiso*, cit., dissent par. 13 and a similar critique of the ECtHR’s tendency to act as a fourth instance in family cases by BEAUMONT, TRIMMINGS, WALKER and HOLLIDAY, *Child Abduction, Recent Jurisprudence of the European Court of Human Rights*, in 64 *International and Comparative Law Quarterly*, 2015, pp.39-63, at pp.45-48 and 62-63.

<sup>64</sup> *Paradiso*, cit., par. 12. It is also worth noting that the Italian Government argued before the ECtHR that the applicants could have adopted an older child in Russia making use of the bilateral agreement between Italy and Russia, see *Paradiso*, cit., par. 66.

<sup>65</sup> In both decisions *Menesson/Labassee* and *Paradiso* the Chambers acknowledged that the States had the freedom to outlaw surrogacy arrangements. In the former case the ban pursued the legitimate aim of ‘the protection of health’ and the ‘protection of the rights and freedoms of others’, and in the latter case it pursued the legitimate aim of the ‘prevention of disorder’ and the ‘protection of the rights and freedoms of others’. (See the analyses of the cases above).

<sup>66</sup> PUPPINCK, DE LA HOUGUE, *ECHR: Towards the Liberalisation of Surrogacy*, cit.

only commercial surrogacy is banned, domestic and cross-border altruistic surrogacy arrangements will be treated equally. In relation to commercial surrogacy cases, however, the legal parentage (at least that of the biological father) established abroad will be recognised domestically, while domestic commercial surrogacy will remain illegal with no effects regarding legal parentage. Such ‘double standard’ approach to the legal effects of surrogacy arrangements is clearly undesirable, in particular because it amounts to a discrimination between children born as a result of cross-border surrogacy arrangements and those born as a result of domestic surrogacy arrangements.<sup>67</sup> It has rightly been noted that this approach appears like ‘a back door legalisation of surrogacy’, similar to the UK approach where commercial surrogacy is illegal but courts have been willing to retrospectively authorise sums amounting to commercial payments in surrogacy arrangements.<sup>68</sup>

Second, it can be expected that, in order to avoid such discriminatory treatment, States are likely to gradually abandon their restrictive domestic approaches to surrogacy and move towards an acceptance of surrogacy arrangements, perhaps even those of a commercial nature. The ECtHR jurisprudence will thus become a vehicle of the pro-surrogacy lobby groups that have commercial interests in the area of surrogacy in the receiving countries. This is another reason why a cautious approach should be taken by the Grand Chamber in *Paradiso*.

It is expected that the above changes will occur in stages, with the approach to the recognition of a legal parentage lawfully acquired abroad altering first and, substantive domestic approaches to surrogacy changing subsequently over a longer period of time. In relation to the former, there are already signs of the impact of the ECtHR jurisprudence on the treatment of cross-border surrogacy arrangements.

For example, in Germany, in December 2014, the Federal Court of Justice overturned a decision of the lower court, holding that a Californian judgment that named a gay couple as the legal parents of a child born to a surrogate mother in California should be recognised in Germany.<sup>69</sup> Significantly, this decision represented a departure from the earlier German case-law<sup>70</sup> and the Federal Court expressly relied on Article 8 and the *Mennesson/Labassee* decisions, concluding that the legal parentage established in the USA had to

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<sup>67</sup> It might be expected that it is only a matter of time before a complaint alleging such discrimination will be brought before the ECtHR.

<sup>68</sup> WELSTEAD, *Parented at Last*, cit. For more information on the UK approach to surrogacy see n 80 below.

<sup>69</sup> Bundesgerichtshof decision No XII ZB 463/13, 10 December 2014.

<sup>70</sup> Traditionally, Germany took a restrictive approach to the recognition of legal parentage established abroad through surrogacy. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *A Study of Legal Parentage*, cit., par. 164. In Germany, surrogacy is expressly prohibited by the Embryo Protection Act 1990 which bans ‘medical methods used for abusive reproduction or those leading to ‘split motherhood’. Certain prohibitive provisions related to surrogacy can be found also in the Adoption Placement Act 2001. GÖSSL, *National Report on Surrogacy: Germany*, in TRIMMINGS, BEAUMONT (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level*, Oxford, 2013, pp. 131-142, p. 131. On the German approach to surrogacy see also WAGNER, *International Surrogacy Agreements: Some Thoughts from a German Perspective*, in *International Family Law*, 2012, pp. 129-132.

be recognised in Germany on the basis of the best interests of the child.<sup>71</sup> The Federal Court, however, indicated that it would not have been possible to reach the same decision had the surrogate mother been the genetic mother of the child or had there been a conflict between the surrogate mother and the intended parents as to the custody of the child.<sup>72</sup>

In Spain,<sup>73</sup> in October 2010, the Dirección General de los Registros y del Notariado (DGRN), which is an administrative body in charge of the Civil Register, issued a resolution to instruct civil registrars how to proceed in cases involving cross-border surrogacy.<sup>74</sup> Prior to that, civil registrars in Spain registered legal parenthood established by a foreign judgment only if the judgment had first been formally recognised by a Spanish court. The resolution, however, instructed the registrars that in cross-border surrogacy cases, the prior recognition of the foreign judgment by the court was not necessary. Instead, if certain conditions were met, the civil registry was competent to pronounce the authenticity of the foreign judgment and to register the birth in Spain without recognition of the foreign judgment by a court.<sup>75</sup> Importantly, the resolution did not require that the foreign judgment was not contrary to Spanish public policy.<sup>76</sup> However, in a ruling made in February 2014, the Spanish Supreme Court held that the civil registry had to examine not only the authenticity of the birth certificate but also whether the certificate was contrary to Spanish public policy.<sup>77</sup> The Court acknowledged that the best interests of the children had to be taken into account in this scrutiny; however, a balance had to be achieved between the children's interests and the interests of the Spanish State to prevent commodification of children and women.<sup>78</sup> Nevertheless, in response to the ECtHR decisions, the DGRN has issued a Circular stating that the 2010 DGRN Instruction must now be applied again by registries regardless of the contradictory Supreme Court decision.<sup>79</sup>

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<sup>71</sup> HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *The Parentage/Surrogacy Project*, cit., Annex I, par. 1. For a detailed analysis of the case see VON HEIN, German Federal Court of Justice on Surrogacy and German Public Policy, 4 March 2015, available at <http://conflictoflaws.net/2015/german-federal-court-of-justice-on-surrogacy-and-german-public-policy/>. See also GÖSSL, *The Recognition of a "Judgment of Paternity" in a Case of Cross-Border Surrogacy under German Law – Commentary to BGH, 10 December 2014*, az. *Xii Zb 463/13*, available for download from <https://www.academia.edu>.

<sup>72</sup> VON HEIN, *German Federal Court*, cit.

<sup>73</sup> For a detailed analysis of the problem of surrogacy from the Spanish perspective see for example OREJUDO, *National Report on Surrogacy: Spain*, in TRIMMINGS, BEAUMONT (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level*, Oxford, 2013, pp. 347-356; AMORÓS, *Surrogacy Arrangements in a Global World: The Case of Spain*, in *International Family Law*, 2013, pp. 68-72;

<sup>74</sup> Instrucción de 5 de octubre de 2010, de la Dirección General de los Registros y del Notariado, sobre regimen registral de la filiación de los nacidos mediante gestación por sustitución. Per OREJUDO, *National Report*, in TRIMMINGS, BEAUMONT (eds.), *International Surrogacy*, cit., p. 350.

<sup>75</sup> The resolution required, for example, that: a.) The foreign judgment was issued in uncontested proceedings; b.) Procedural rights of the parties, in particular the surrogate mother, were guaranteed in the foreign proceedings; c.) There was no infringement of the best interests of the child and the surrogate mother; and d.) The surrogate mother gave her consent freely and voluntarily, without error, violence or fraud. OREJUDO, *National Report*, in TRIMMINGS, BEAUMONT (eds.), *International Surrogacy*, cit., p. 353.

<sup>76</sup> OREJUDO, *National Report*, in TRIMMINGS, BEAUMONT (eds.), *International Surrogacy*, cit., p. 352.

<sup>77</sup> Spanish Supreme Court decision 835/2013, 6 February 2014. For an in-depth commentary on this case see PEDREÑO, *Surrogacy in Spain: Reality v Legality*, in *International Family Law*, 2014, pp. 100-102.

<sup>78</sup> See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *A Study of Legal Parentage*, cit., par. 164.

<sup>79</sup> HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *The Parentage/Surrogacy Project*, cit., Annex I, par. 3. Moreover, on 11 December 2014, the Spanish Minister of Justice announced that an amendment was planned to the draft Spanish Law on Civil Registries with the view of ensuring compliance with the ECtHR jurisprudence. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *The Parentage/Surrogacy Project*, cit., Annex I, par. 3.

In the United Kingdom,<sup>80</sup> the English High Court was recently faced with the question whether a parental order, the effect of which is the transfer of legal parentage from the surrogate mother (and her husband if applicable) to the intended parents, could be granted even though the application was made after the expiration of the statutory six-month period.<sup>81</sup> The case concerned a young child born in India in December 2011 as a result of a surrogacy arrangement that had been entered into between the child's genetic father and his wife and an Indian surrogate mother and her husband (the surrogate parents). The High Court held that legal parentage 'goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being'.<sup>82</sup> Given the paramount importance of legal parentage, it surely was not the intention of the legislator that an application would fail because of a delay in initiating parental order proceedings by the intended parents.<sup>83</sup> The High Court also stated that, if its interpretation of the statute was incorrect, the ECHR would in any case oblige the court to read the statute in a way that would guarantee that Article 8 was not violated.<sup>84</sup> It must, however, be noted that the present case does not represent the first instance of a rather liberal approach to cross-border commercial surrogacy arrangements in the UK.<sup>85</sup> Instead, the decision only re-affirms the trend towards a more and more lenient approach to parental order applications that has for some time been applied by the English High Court. The novelty is, however, represented by the court's references to Article 8 of the ECHR and the explanation of the link between the concept of legal parentage and the child's identity, as elaborated by the ECtHR in the *Mennesson/Labassee* decisions.

c. The best interests of the child principle vs public policy considerations regarding surrogacy

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<sup>80</sup> It must be noted at the outset that in the UK (and other common law jurisdictions) the problem of the transfer of legal parenthood is approached differently from civil law jurisdictions. In particular, in most common law countries, internal law (*lex fori*) will be applied to the establishment of legal parenthood where a child is born outside the jurisdiction (the '*lex fori*' method). In contrast, in most civil law countries the issue of the legal parenthood of a child born abroad will be approached through the application of relevant private international law rules on recognition of foreign judgments or the application of the relevant foreign law where there is no judgment to recognize (the 'conflict of laws' method). See TRIMMINGS, BEAUMONT, *Parentage and Surrogacy*, in SCHERPE (ed.), *Research Handbook*, cit.; TRIMMINGS, BEAUMONT, General Report on Surrogacy, in TRIMMINGS, BEAUMONT (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level*, Oxford, 2013, pp. 439-548, p. 510; and HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *The Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, March 2012, paras. 35-41, available at [http://www.hcch.net/index\\_en.php?act=text.display&tid=178](http://www.hcch.net/index_en.php?act=text.display&tid=178). For more information on the UK approach to surrogacy see WELLS-GRECO, National Report on Surrogacy: United Kingdom, in TRIMMINGS, BEAUMONT (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level*, Oxford, 2013, pp. 367-386; WELSTEAD, *A Judicial Glide Through the Minefield of International Surrogacy*, in *Family Law Journal*, 2014, pp. 1299-1304; CABEZA, *International Surrogacy: An English Perspective*, in *Family Law Journal*, 2014, pp. 1445-1449; and CRAWSHAW, BLYTH, VAN DEN AKKER, *The Changing Profile of Surrogacy in the UK – Implications for National and International Policy and Practice*, in *Journal of Social Welfare and Family Law*, 2012, 1-11.

<sup>81</sup> *In Re X (Surrogacy: Time Limits)* [2014] EWHC 3135 (Fam). For a detailed analysis of this case see TRIMMINGS; *Six Month Deadline for Applications for Parental Orders Relax by the High Court: Case Comment*, in *Journal of Social Welfare and Family Law*, 2015, 241-243; WELSTEAD, *Surrogacy: One More Nail in the Coffin*, in *Family Law Journal*, 2014, pp. 1637-1639; ISAACS, MAYNARD, LAKIN, HOWELLS, *Parental Order Time Limits: Policy – What Policy?*, in *Family Law Journal*, 2014, pp. 1723-1732.

<sup>82</sup> *In Re X (Surrogacy: Time Limits)*, cit., par. 54.

<sup>83</sup> *In Re X (Surrogacy: Time Limits)*, cit., par. 55.

<sup>84</sup> *In Re X (Surrogacy: Time Limits)*, cit., par. 58.

<sup>85</sup> The English courts have consistently taken a rather liberal approach when interpreting the requirements for an award of a parental order that are set out in s 54 of the 2008 Human Fertilisation and Embryology Act. For a detailed overview of these requirements and related case-law see WELSTEAD, *International Surrogacy: Arduous Journey to Parenthood*, in RAINS (ed.), *The 1980 Hague Abduction Convention: Comparative Aspects*, London, 2014, pp. 359-409.

Both the *Mennesson/Labassee* and the *Paradiso* decisions point to the conclusion that the principle of the best interests of the child should prevail over public policy considerations regarding surrogacy and adoption.

In *Mennesson/Labassee*, the Chambers' reflections regarding the best interests of the child centred on the compatibility of public policy considerations with the applicants' Article 8 right to respect for private and family life.<sup>86</sup> The Court pointed out that respect for the child's best interests must 'guide any decision',<sup>87</sup> including a decision concerning the recognition of legal parentage as in the present case. The Court concluded that 'having regard to the importance to be given to the child's interests when weighing up the competing interests at stake',<sup>88</sup> in the given case the children's right to respect for their private life was infringed by the French authorities.

In *Paradiso*, the best interests of the child were examined in relation to the physical removal of the child from the intended parents' care. The Chamber observed that the reference to public policy could not be used as giving 'carte blanche' for any measure as States have to take account of the best interests of the child, irrespective of the existence of a genetic link between the child and the intended parents.<sup>89</sup> This observation was in principle favourable to the intended parents as neither of them was genetically related to the child. Nevertheless, the best interests' principle compelled the Court to conclude that, although the removal of the child violated the applicants' Article 8 rights, the child could not be returned to the applicants as he had in the meantime settled with his foster parents.<sup>90</sup>

#### d. Commercial surrogacy vs altruistic surrogacy

Both the *Mennesson/Labassee* and *Paradiso* decisions involved commercial surrogacy arrangements. The ECtHR, however, completely ignored this fact and failed to make any differentiation between commercial and altruistic surrogacy. This is particularly worrying for two principal reasons.

Firstly, payments beyond reasonable expenses in surrogacy are often the determinative characteristic when it comes to States deciding whether to allow or ban surrogacy arrangements. Some jurisdictions allow altruistic surrogacy but ban commercial surrogacy arrangements on ethical grounds as they seek to prevent

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<sup>86</sup> See *Mennesson*, cit., par. 84.

<sup>87</sup> *Mennesson*, cit., par. 99.

<sup>88</sup> *Mennesson*, cit., par. 101.

<sup>89</sup> *Paradiso*, cit., par. 80.

<sup>90</sup> It has been critically observed that this outcome did not secure the protection of 'real human rights' as in practical terms the judgment did not result in any change for the intended parents. ECLJ, *Comments*, cit. but the child's best interests must trump those of the intending parents and therefore leaving the child with the foster family he had been with for 2 years is a protection of 'real' human rights.

the commercialisation of conception.<sup>91</sup> Other jurisdictions ban surrogacy in both its forms.<sup>92</sup> In either scenario, the undesirable consequences of the ECtHR jurisprudence are that States are expected to undermine their moral objections against surrogacy where their citizens circumvent national laws by obtaining a child through commercial surrogacy abroad, and afterwards seek a recognition in their home country of the legal parent-child relationship established in the foreign jurisdiction. Should the ECtHR have the authority to, albeit in an indirect way, interfere with a country's choice not to allow its citizens to reproduce through surrogacy, especially through commercial surrogacy?

Secondly, commercial surrogacy raises serious concerns over the exploitation of women and commodification of children.<sup>93</sup> Indeed, there have been numerous reports of cases involving serious human rights abuses, including child abandonment, problems with the consent of surrogate mothers and difficulties with intermediaries.<sup>94</sup> These concerns are particularly disturbing where developing countries are involved as the countries of origin.<sup>95</sup> The Court's failure to distinguish between commercial and altruistic surrogacy is worrying as it implies an acceptance on the part of the Court of commercial surrogacy with all its risks and the ethical concerns that are associated with this practice.<sup>96</sup>

### The way forward

The following principles can be deduced by national authorities grappling with the problem of cross-border surrogacy from the recent jurisprudence of the ECtHR.

1. The existence of a genetic link between a child born through surrogacy and the intended parent(s) is not an inevitable prerequisite for the establishment of 'family life' under Article

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<sup>91</sup> E.g. the UK where commercial surrogacy is banned but altruistic surrogacy is allowed. For more information on the issue of payments in surrogacy arrangements in the UK see WELLS-GRECO, *National Report*, in TRIMMINGS, BEAUMONT (eds.), *International Surrogacy Arrangements*, cit. pp. 377-380.

<sup>92</sup> Such countries can be referred to as 'anti-surrogacy jurisdictions'. For more information see TRIMMINGS, BEAUMONT, General Report, in TRIMMINGS, BEAUMONT (eds.), *International Surrogacy Arrangements*, cit. pp. 463-464.

<sup>93</sup> See for example, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *The Parentage/Surrogacy Project*, cit., par. 18; TRIMMINGS, BEAUMONT, General Report, in TRIMMINGS, BEAUMONT (eds.), *International Surrogacy Arrangements*, cit. pp. 528-531.

<sup>94</sup> For a detailed analysis see HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *The Parentage/Surrogacy Project*, cit., Annex II.

<sup>95</sup> For a long time, India has been the 'hub' of the global commercial surrogacy market. Currently, however, there is pending legislation which, if adopted in the current form, will place a number of restrictions on the cross-border surrogacy market in the country (for example, banning surrogacy for foreigners in India (with the exception of 'Overseas Citizens of India', 'People of Indian Origin', 'Non-Resident Indians' and 'foreigners married to Indian citizens') and excluding gay couples as potential intended parents and limiting surrogacy to married couples only). See the Indian Assisted Reproductive Technology (Regulation) Bill (2014), Chapter VII, paras 60(11)(a) and 60(21)(a) respectively. This pending legislation seems to have had a significant practical effect on the surrogacy market in India already including a partial shift in the market to Nepal at least until the 2015 earthquake there, and the declaration made by the Government of Nepal in October 2015 to the effect that exit permits will no longer be given to children born as a result of cross-border surrogacy, see MALHOTRA, *Earthquake rocks surrogacy*, in *The Daily Post*, 9 May 2015, and HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Background Note for the Meeting of the Experts' Group on the Parentage/Surrogacy Project*, January 2016, para 22, available at <https://assets.hcch.net/docs/8767f910-ae25-4564-a67c-7f2a002fb5c0.pdf>. Thailand used to be a popular destination, especially of Australian intended parents. Nevertheless, the country has recently banned commercial cross-border surrogacy arrangements, see PHOTOPOULOS, *Thailand outlaws commercial surrogacy for foreigners*, available at [http://www.bionews.org.uk/page\\_498893.asp](http://www.bionews.org.uk/page_498893.asp).

<sup>96</sup> Nevertheless, it is hoped that the ECtHR will address the ethical aspects of cross-border surrogacy arrangements in its upcoming decision in the *Case of Foulon v. France*, Application n. 9063/14 where the surrogacy arrangement was entered into in India.

8 of the ECHR (but this issue is before the Grand Chamber of the ECtHR in *Paradiso and Campanelli* and we hope it will curtail the scope of *de facto* family rights, or leave much more discretion to States as to when it is in the best interests of a child to be removed from its *de facto* family, in order to leave more room for different policy approaches on surrogacy in different States in the Council of Europe).

2. A child's identity is inherently connected with genetic parentage (at least with the genetic parentage of their biological father). The right to establish the child's identity is in turn interrelated with the right to respect for private life under Article 8 of the ECHR.
3. It is acceptable for States to outlaw the practice of surrogacy on ethical grounds.
4. Even where surrogacy is banned domestically, the State is obliged to legally recognise the effects of a cross-border surrogacy agreement executed abroad if the following three conditions are met:
  - a. The recognition concerns the legal parentage of the genetically-related intended parent (at least where the parent is the biological father).
  - b. The legal parentage was established legally in the country of birth.
  - c. There is no alternative way by which the legal parent-child relationship could be legally established in the receiving State.<sup>97</sup>
5. The above obligation arises even in commercial cross-border surrogacy cases.
6. The best interests of the child principle prevails over public policy considerations regarding surrogacy and adoption.

Admittedly, the above guidance gives some limited direction to national authorities. It is, however, very patchy and leaves too many questions unanswered. For example: To what extent can one disassociate a surrogacy arrangement from its effects? Should the home country of the intended parents be compelled to recognise the effects of a commercial surrogacy agreement executed abroad? Should the genetically-unrelated intended parent also have the right to have his/her legal parenthood recognised in the receiving country? Should it matter whether the child was born through altruistic or commercial surrogacy? Should it matter whether the child was born through a traditional or gestational surrogacy arrangement? Does the child have a right to his or her genetically related intending mother being recognised as his or her legal mother? What happens if the surrogate mother wishes to be regarded as the child's legal parent and would it make a difference if she had already consented (before or after the birth) to the child being handed over to the intending parents or if she had actually already participated in the handover of the child to the intending parents?

The main drawbacks of the ECtHR's approach are that it offers only an *ex post facto* solution to some of the issues surrounding cross-border surrogacy and that it is based solely on the recognition method. This method, although capable of reducing limping relationships, does not address other serious issues that arise

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<sup>97</sup> *Mennesson*, cit., par. 67.

from cross-border commercial surrogacy. Indeed, this approach is not suitable to tackle a complex phenomenon such as surrogacy. Instead, there is a need for a truly multilateral approach whereby an international Convention on surrogacy, which would depart from the traditional method of the unification of the conflicts rules, would be developed.<sup>98</sup> This would help to solve the problem at its source in countries which permit commercial surrogacy and are happy for foreign intending parents to take advantage of this service. Rather than focusing on traditional rules on jurisdiction and applicable law, the Convention should establish a framework for international co-operation with emphasis on the need for substantive safeguards and on procedures for courts, administrative authorities and private intermediaries. The Convention would be based on a pre-approval system and would not only seek to tackle the problem of legal parenthood but also to protect the people involved (notably intending parents, surrogate mothers, and, above all, the intended child(ren)) and to regulate the cross-border surrogacy market. The Convention should draw inspiration from the highly successful 1993 Hague Intercountry Adoption Convention which is also based on the principle of cooperation between the country of origin and the receiving country and on the need to regulate international adoptions to protect the people involved, especially the children.<sup>99</sup> Regulation has the benefits of: reducing the risks of exploitation of surrogate mothers by middlemen (eg those operating fertility clinics) and sometimes by intending parents; of creating mechanisms to screen out intended parents who are a potential danger to children; of ensuring that intending mothers, possibly whether genetically linked to the child or not, are treated equally with genetically linked intending fathers as the legal parents; and ensuring that children will be able to trace their surrogate (birth) mother and understand their complex identity when they become adults.

Recent developments at the Hague Conference for Private International Law demonstrate the pressing need for a global regulation of cross-border surrogacy.<sup>100</sup> At the Council on General Affairs and Policy meeting in March 2015, it was decided that an Experts' Group be set up to explore the feasibility of further work in the area of international surrogacy arrangements.<sup>101</sup> The first meeting of the Experts' Group was held in February 2016<sup>102</sup>, and in March 2016 the Council on General Affairs and Policy of the Conference

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<sup>98</sup> For a detailed outline of a potential Convention on surrogacy see TRIMMINGS, BEAUMONT, General Report, in TRIMMINGS, BEAUMONT (eds.), *International Surrogacy Arrangements*, cit. pp. 531-549.

<sup>99</sup> Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993. The Convention is one of the most successful family law instruments that have been developed under the auspices of the Hague Conference on Private International Law. As of June 2015, there are 95 Contracting States to the Convention. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption: Status Table*, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69). *Ibid*, TRIMMINGS and BEAUMONT and following and developing our approach see MARGALIT, *From Baby M to Baby M(anji): Regulating International Surrogacy Arrangements*, in *The Journal of Law and Policy*, 2016, forthcoming, available at [https://works.bepress.com/hezi\\_margalit/14/](https://works.bepress.com/hezi_margalit/14/).

<sup>100</sup> See Hague Conference website, section 'Parentage/Surrogacy Project', [http://www.hcch.net/index\\_en.php?act=text.display&tid=178](http://www.hcch.net/index_en.php?act=text.display&tid=178).

<sup>101</sup> HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Council on General Affairs and Policy of the Conference: Conclusions and Recommendations*, March 2015, par. 5, available at [http://www.hcch.net/upload/wop/gap2015concl\\_en.pdf](http://www.hcch.net/upload/wop/gap2015concl_en.pdf).

<sup>102</sup> The Group concluded that work should continue, whilst its focus should be primarily on recognition. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Report of the February 2016 Meeting of the Experts' Group on Parentage / Surrogacy*, February 2016, para 16, available at <https://www.hcch.net/en/news-archive/details/?varevent=470>. It is suggested here that this is a rather narrow approach which does not adequately address the complex nature of a cross-border surrogacy arrangement. For an overview of possible future approaches as considered prior to the Experts' Group meeting see Hague Conference see HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *The Desirability and Feasibility of*

took a decision to extend the Group's mandate until 2017.<sup>103</sup> It is to be hoped that the Expert Group and the Hague Council of General Affairs and Policy quickly come to realise that an *ex post facto* solution based on recognition of parentage is not a satisfactory way forward for surrogacy and instead bite the bullet and press forward with a regulatory solution in order to protect the rights of the vulnerable (notably the putative child and the surrogate mother).

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<sup>103</sup>HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Council on General Affairs and Policy of the Conference: Conclusions & Recommendations*, March 2016, para 15, available at <https://www.hcch.net/en/governance/council-on-general-affairs>.

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