BEFORE THE GRAND CHAMBER
EUROPEAN COURT ON HUMAN RIGHTS

Advisory Opinion under Protocol 16, Cour de Cassation, Assemblèe plénière, 5 Octobre 2018, 10-19.053

Application no. P16-2018-001

WRITTEN SUBMISSIONS ON BEHALF OF THE AIRE CENTRE (ADVICE ON INDIVIDUAL RIGHTS IN EUROPE)

INTERVENERS

Pursuant to the Registrar's notification dated 10 January 2019 that the Court had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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January 2019

Questions posed by the Cour de Cassation:

(1) By refusing to enter, in the civil register of births, the birth of a child born abroad to a surrogate mother, in so far as the foreign birth certificate designates the child's "intended mother" as its "legal mother", whereas the registration is accepted in so far as it designates the "intended father", who is also the child's biological father, will a State party be overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn as 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 one 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?

1. The interveners will provide information **from the perspective of the affected children** on the international standards applicable to the legal recognition of parentage between parents and their children born abroad from surrogacy arrangements.

I. INTERNATIONAL STANDARDS ON CHILDREN'S RIGHTS, SURROGACY AND PARENTAGE AND THEIR RELEVANCE FOR THE ECHR

2. Art 53 ECHR provides that *'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.'* All contracting parties to the ECHR are also parties to the United Nations Convention on the Rights of the Child (CRC) which must therefore inform any construction of a Convention provision and the Advisory Opinion sought by the *Cour de Cassation* must also reflect the obligations contained in Art 53.

A. The Key CRC Provisions (See Annexes 1 to 6)

3. Particular attention is drawn to the following Articles and their associated General Comments (GC's) as follows.
4. **Article 3** provides: *'1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a* ***primary consideration****.'* (emphasis added)
5. The CRC Committee tasked, inter alia, with providing GC's on the CRC provisions has stated, in GC14 which deals specifically with Article 3, that the best interests of the child is a three-fold concept[1]: **a substantive right**; **a fundamental, interpretative legal principle**; **a rule of procedure** (GC 14 para 6). The obligations on states parties include[2]:
    1) *"**To ensure that the child's best interests are <u>appropriately integrated and consistently applied</u> in every action taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children**.*
    2) ***To ensure that all judicial and administrative decisions as well as policies and legislation concerning children <u>demonstrate</u> that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision**.*

    (emphasis in bold supplied, underlining in original)
6. **Article 5** provides: *'States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.*'
7. **Article 7** of the UNCRC provides that the child has the right to know and to be cared by his or her parents. *'1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and* ***be cared for by his or her parents****. » 2. States Parties shall* ***ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field****, in particular where the child would otherwise be stateless.'* (emphasis added)
8. GC 14 states that '*The term "family" must be interpreted in* ***a broad sense*** *to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom'*[3] (emphasis added). Not only the genetic or gestational parents, but also the intended

[1] General Comment No.14, para 6.
[2] General Comment No.14, para 14.
[3] General Comment No.14, para 59.

parents and actual social parents are to be included in this broad sense definition of family and thus in the consequent rights and guarantees afforded to the affected children by the CRC.

9. **Article 8** provides: '*1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.'* The interveners submit that the word "illegally" should be understood as to include incompatibility with international standards.
10. **Article 12** reads: '*1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2.* ***For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child****, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'* (See also GC 12, on the right of the child to be heard in these proceedings, see Annex 4)
11. **Article 18(1)** provides: *'States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.'*
12. In addition to the specific paragraphs already drawn to the Court's attention in conjunction with the Articles set out earlier, the AIRE Centre also invites the Court to consider GC No. 5 (2003) on the implementation of the CRC, GC No. 7 (2005) on implementing child rights in early childhood (in particular paragraphs 3, 4, 13 and 16) and to GC No. 20 in relation to implementation of the rights of the child during adolescence (in particular paragraph 46).
13. The intervenors note that the CRC makes several references to the role of "parents" without expressly defining who is to be considered a child's parent.
14. In the context of who is to be considered the child's parent in the present case, the AIRE Centre invites the Court to note that those commonly described as "parents" fall into several categories. Traditionally "parents" were those who were the biological, social and legal progenitors of and providers and carers for a child, typically in wedlock. It is well known that many thousands of children at all levels of society have always been born out of wedlock with varying consequences – from ennoblement at the one extreme to infanticide at the other. The CoE Convention on the Legal Status of Children Born out of Wedlock 1975 (See Annex 18) addressed this issue as did the very early case of *Marckx v Belgium.*[4] As of 2018, 60,3% of children in France were born out of wedlock.[5]

Biological parents

15. In modern times and with the advent of Assisted Reproductive Technology (ART), children's biological parents can be of several different kinds: they can be the same genetically as "natural" parents would be, that is the child is the product of the gametes of each parent. Sometimes the child is the genetic product of the gametes of one intended parent and one other person who is not an intended social parent – either a known or an anonymous donor of either eggs or sperm (cf *Keegan v Ireland*[6]). In surrogacy cases, the gestational mother is often not genetically related to the child she carries and delivers[7], as the egg can be donated by a third person. It is in that way that gestational surrogacy differs from 'traditional surrogacy', in which the gestational mother provides the egg and is thus genetically related to the child she carries.

[4] *Marckx v Belgium*, ECHR, App. No. 6833/74, 13 June 1979.
[5] See the official statistics of the INSEE, available at https://www.insee.fr/fr/statistiques/2381394#tableau-Donnes.
[6] *Keegan v Ireland*, ECHR, App. No. 16969/90, 26 May 1994.
[7] *Paradiso and Campanelli v Italy*, ECHR, App. No. 25358/12, 24 January 2017.

16. In both cases, normally at least one of the intended parents will be genetically linked to the child, by donation of sperm (the egg being provided by the surrogate mother or a third person), of an egg or part of an egg (the sperm being donated by a third person), or both (gestational surrogacy).
17. Whichever genetic material is not being supplied in that way is normally provided pursuant to a separate enforceable contract between the donor and a clinic. Full consent of all the parties involved is required at all stages.

Social parents[8]

18. Children have always had both *de facto* (and *de iure*) "social parents" who may or may not be their biological parents. The range is large. They can be their step-parents, ex-parents, the parents of half siblings, godparents, guardians and other substitute parents such as "foster parents" (*parents d'acceuil)*) and adoptive parents. Islamic law prohibits adoption, but the institution of *kafala* which in many Islamic countries is almost identical to "*adoption simple*" in those European states that have this institution (see infra, para 50) and imposes on the *makfuls* (the new parents) very strict obligations of parental care[9]. The degree to which such "parents" are recognised as a child's social parents will depend on the circumstances of each individual case and the durability of the relationship. And the degree to which the social relationship transmutes into a legal one is similarly variable.

Legal parents

19. Legal parents need not be either biological or social parents. In most CoE States there is a presumption of legal parenthood in favour of the married spouse of a woman who gives birth, though with the advent of DNA testing such a presumption is increasingly rebuttable and rebutted.[10] Many countries have adopted legislation to provide for the orderly regulation of the status of children who are the products of Assisted Reproductive Technology (ART).
20. In *I.S. v Germany*, this Court recalled at para 70 that there were both positive and negative obligations in relation to Article 8, and came to the conclusion that the biological family of adopted children could become irrelevant if it was in the best interests of the child.[11]

The giving up of children by their birth mother

21. There has been, for many centuries, a widespread practice across Europe for women to give up at birth children they were, or felt they were, unable or unwilling (for a wide variety of reasons) to keep. Facilitating and encouraging this practice was intended to reflect prevailing social attitudes and to reduce the incidence of infanticide. It is still possible in France and a number of other European countries for a mother to give birth anonymously and to give up the child at birth without sanction (*accouchement sous X*).[12] It is thus clear that French law still facilitates the giving up of a child by its birth mother in this way, but does not permit it by prior arrangement in surrogacy cases. In 2003 in the case of *Odièvre v France* this court held that respecting that decision and preserving that anonymity was in accordance with Art 8 ECHR from the perspective of the child who was given up. The State has in addition always been able to remove babies from their mother, without their consent, at birth or later if their welfare demands this and to place them with new families. This practice is now under the consideration of the Grand Chamber in *Strand Lobben*[13].
22. In surrogacy arrangements typically in place in the USA a legally enforceable contract is drawn up between the intended gestational mother and the intended parents. If the gestational mother is married,

[8] The term "social parents" is used in this intervention to describe those who act as parents in the day to day life of the child.
[9] SM (Algeria) v Entry Clearance Officer, UK Visa Section, C-129/18, pending.
[10] *Kroon and others v the Netherlands*, ECHR, App. No. 18535/91, 27 October 1994.
[11] *I.S. v Germany*, ECHR, App. No. 31021/08, 05/06/2014, para 70.
[12] *Odièvre v France*, ECHR, App. No. 42326/98, 13/02/2003. See Article 326 of the Civil Code.
[13] *Strand Lobben and Others v Norway*, ECHR, App. No. 37283/13, pending.

she and her spouse (because of the presumption of parenthood) are recorded on the first birth certificate. If the sperm has been donated by the intended socio-legal father, in proceedings before a judge, his name will be substituted by the judge for that of the husband. In further proceedings before a judge the intended social mother's name will be substituted for the gestational mother and the change of legal parentage is complete. Consent is required at all stages. Since the *ius soli* still exists in the USA and Canada (except for children born to foreign diplomats) all children born in the USA are US citizens and the issue of *ius sanguinis* does not arise).[14]

B. Wider International Context

23. The AIRE Centre invites the court to note the following developments at international level.

(i) Hague Conference on Private International law: Project on Parentage and Surrogacy[15]

24. Some eight years ago the Hague Conference noted that: '*International surrogacy arrangements (ISAs) can often result in the difficulties … concerning the establishment or recognition of the legal parentage of the child(ren) born as a result of the arrangement, sometimes rendering the child parentless. This can have far-reaching legal consequences for all involved: for example, it may affect the child's nationality, immigration status, the attribution of parental responsibility regarding the child or the identity of the individual(s) under a duty to financially maintain the child, etc. Difficulties may also arise because the parties involved in such an arrangement are vulnerable and at risk.'*[16]
25. The Hague Conference's initiative was prompted by concerns in 2010[17] that if international surrogacy arrangements were not regulated it would have an adverse impact on the practical functioning of the Hague Convention on Inter-Country Adoption (1993). In 2013/14 a study (see Annex 15) was conducted of 'Legal Parentage and the issues arising from International Surrogacy Arrangements'. In 2015 an Expert Group was set up and has conducted meetings and presented reports at least annually, sometimes bi-annually since then (see Annexes 8 to 17). The latest meeting of the Group is taking place in The Hague from 29th January to 1st February 2019 and the Report will be available shortly after that.
26. The Hague Conference's Expert Group has been exploring the drafting of an international instrument which would ***regulate*** cross border issues relating to parentage and in particular to international surrogacy (para 48 preliminary Report of 2015, see Annex 13).
27. The approach in France is different[18]. In a number of advisory opinions (see Annexes 32 to 34) the *Comité Consultatif National d'Ethique* (which is an independent administrative organ, providing non-binding opinions on matters of bioethics) has re-affirmed its opposition to surrogacy on public policy grounds. In its latest advisory opinion, the Committee has even called for an international agreement that would not regulate but would ***prohibit*** surrogacy.[19]
28. The Jan/ Feb Report for 2017 of the Hague Expert Group notes (at para 25): *'**All children, irrespective of the circumstances of their birth, should be treated the same.** The Group also acknowledged the different approaches of States to surrogacy. The Group recognised continued concerns at the international level and the consequent public policy considerations relating to surrogacy arrangements including, for example, the potential for exploitation.'* (emphasis added)

[14] See Hague Conference on Private International Law, 'A Study Of Legal Parentage And The Issues Arising From International Surrogacy Arrangements', March 2014, page 65, para 150.
[15] The Hague Conference on Private International Law (HCCH) is an intergovernmental organisation in the area of private international law, that administers several international conventions, protocols and soft law instruments.
[16] See About the Project, available at: https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy
[17] Permanent Bureau of the Hague Conference on Private International Law, Preliminary Note on the private international law issues surrounding the status of children (2011), § 2.
[18] A different approach is registered in Germany, where in light of the best interest of the child parentage of both parents is recognised. See for example: Decision of the BGH, 10.12.2014, XII ZB 463/13 and Decision of the BGH, BGH, 05.09.2018, XII ZB 224/17.
[19] Comité Consultatif national d'éthique, Advisory Opinion No 129, p.124.

29. The intervenors fully recognise that unregulated international surrogacy can open the doors to abuse and exploitation. They agree with the Hague Conference that much could be achieved by progress towards international agreement on the regulation of this issue. However until such an agreement is reached, States and social parents and their children, are confronted with the *fait accompli* of the *de facto* inclusion in a family unit of a child whose social parentage is recognised legally in the country of birth but not in the country of the parents' citizenship and residence. The Hague Conference Project concerns parentage as well as surrogacy and is working towards providing an international legal framework which will have the best interest of the affected children as a primary consideration.

(ii) The Council of Europe Oviedo Convention

30. **Article 21** of the 1997 **Convention on Human Rights and Biomedicine** provides that *'the human body and its parts shall not, as such, give rise to financial gain'*.
31. As the Explanatory Report makes clear this provision prohibits the sale and purchase of human body parts, or trafficking for organ removal, but this Article does not prevent a person from whom an organ or tissue has been taken from receiving compensation which, while not constituting remuneration, compensates that person equitably for expenses incurred or loss of income (e.g. as a result of hospitalisation).

II. EUROPEAN CONVENTION ON HUMAN RIGHTS

32. This Court has already considered international surrogacy, looking at it from the *fait accompli* of the birth of children from surrogacy agreements.[20] The interveners share this position of the Court and address the issue from the perspective of the children and the primacy of their best interests.
33. In its case law concerning children, the ECtHR has imported some of the core principles of the CRC into its findings. The phenomenon of cross fertilization of international human rights standards from universal treaties to regional conventions is an important practice for international comity.
34. Firstly, the principle of the best interest of the child must be a '*primary consideration'* (see supra, para 4).
35. In the context of surrogacy, children should be considered as independent rights holders and therefore entitled to appropriate safeguards and protection irrespective of whether their procreation may have contravened or circumvented national law.
36. To this end, the interveners echo the words of the Court in the judgment *Mennesson v France*: '*the effects of non-recognition in French law of the legal parent-child relationship between children thus conceived and the intended parents* ***are not limited to the parents alone, who have chosen a particular method of assisted reproduction prohibited by the French authorities. They also affect the children themselves****'* (emphasis added).[21] These children should not be disadvantaged on the basis of the manner of their birth by its legality not being recognised in France.
37. The CRC establishes in Art 2: '*States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability,* ***birth*** *or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status,* ***activities****, expressed opinions, or beliefs of the child's parents, legal guardians, or family members*' (emphasis added). The Committee on the Rights of the Child in its General Comment no.7 (see Annex 3 on rights in early childhood) gives further guidance on the issue by stating '*Young children may also suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock* ***or in other circumstances that deviate from***

[20] *Mennesson v France*, ECHR, App. No. 65192/11, 26 June 2014, paras 63, 78-79.
[21] Ibid, para 99.

***traditional values**, [..] actions may be required that guarantee that all children have an equal opportunityto benefit from available services.'*[22] (emphasis added)

38. The interveners submit that children should not be deprived of the enjoyment of their rights as the legal offspring of their social parents as a consequence of their birth through surrogacy.

Children's right to establish their identity

39. Issues of identity come within the private life rubric of Article 8.[23] Consequently, the Court has stated that *'where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted'.*[24]

40. In *Mennesson* and *Labassée*, the Court held that the respect for private life *'requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship'*.[25] Article 8 ECHR should therefore be interpreted as including the children's right to be able, in appropriate circumstances, to have their social parentage recognised as legal parentage. This right exists *a fortiori* when that parentage is legally recognised in the state of the children's origin.

41. The Court reached the conclusion in *Mennesson* and *Labassée* that the non-recognition of the legal parent-child relationship between the children born from a surrogacy arrangement and the intended and biological father amounted to an unnecessary interference from the State in the children's right to private life. The same reasoning has been reiterated in similar subsequent cases.[26]

42. Paragraph 75 of *Labassée v France* noted that the details of one's identity as a human being entails the relationship between children and their parents.[27] This reflects the **Art 18(1) of CRC** which emphasizes *'both parents have common responsibilities for the upbringing and development of the child'*, with fathers and mothers recognized as equal caregivers. The Committee in its General Comment no.7 (supra) highlights how '*in practice family patterns are variable and changing in many regions, as is the availability of informal networks of support for parents, with an overall trend towards greater diversity in family size, parental roles and arrangements for bringing up children*' and further adds *'that each of these relationships can make a distinctive contribution to the fulfilment of children's rights under the Convention and that a range of family patterns may be consistent with promoting children's well-being.'*

43. No distinction should be drawn between mother and father in the children's enjoyment of right to have the social parental relationship recognised and thus fully enjoy their right to legal identity. Art 8 ECHR must, under Art 53 ECHR, be read in conjunction with Art 18(1) of the CRC. In such circumstances the best interests of the child are, as always, a primary consideration. The right of the children is to enjoy their private and family life and therefore have their mother-child relationship recognized. This is particularly so in circumstances where proper legal procedures with the necessary safeguards against abuse have determined that legal relationship in another jurisdiction.

Question 1, part 2. Existence of a genetic link

44. The interveners note that in *Menesson*, the presence of a genetic link was considered to bring a '*special dimension*'.[28] The wording of the judgment suggests therefore that the presence of a genetic link will ***add*** a special factor in the context of recognition of a parent-child relationship, but that this relationship will

[22] UNCRC General Comment No. 7, para 12.
[23] See inter alia *Gaskin v UK*, ECHR, App. No. 10454/83, 7 July 1989, para 39; *Mikulic v Croatia*, App. No. 53176/99, 7 February 2002, para 54.
[24] *S.H. and Others v Austria*, ECHR, App. No. 57813/00, 3 November 2011, para 94.
[25] *Mennesson v France*, ECHR, App. No. 65192/11, 26 June 2014, para 46; *Labassée v France*, ECHR, App. No. 65941/11, 26 June 2014, para 38.
[26] *Foulon and Bouvert v France* ECHR, App. Nos. 9063/14 and 13010/14, 21 July 2016; *Laborie v France*, ECHR, App. No. 44024/13, 19 January 2017.
[27] *Labassée v France*, ECHR, App. No. 65941/11, 26 June 2014, para 75.
[28] *Mennesson v France*, ECHR, App. No. 65192/11, 26 June 2014, para 100.

enjoy guarantees on its own irrespective of a genetic link. The Court did not find that, absent that genetic link, the child had no right to recognition of the relationship.

45. The Grand Chamber in the case of *Paradiso and Campanelli v Italy* found no violation of Art 8 in the removal of the child from the intended parents.[29] The case differs from the cases mentioned above, as the intended parents in that judgment did not share any genetic link with the child born out of surrogacy. Despite the applicants insistence that the lack of genetic link was due to an error on the part of the clinic (see para 31 of judgment), the Court in *Paradiso and Campanelli* noted that, the surrogacy had taken place in factual circumstances which violated both Italian and Russian law. Italian law also prohibited adoption because it considered that the age difference between the child and the adopters meant that adoption was not in the child's best interests. Absent such specific factors, a general prohibition in law on legalising the mother-child relationship cannot be justified by reference to this judgment.
46. The interveners submit that -irrespective of the presence of a genetic link- failure to recognise the intended mother as legal mother of the child would have similar effects on the children's rights as those identified in respect of the father-child relationship in *Mennesson* and *Labassée*. Without commenting on the facts of the present case, this might include: travelling, obtaining citizenship, inheritance rights, completing administrative tasks, etc[30] (the implications for EU law are discussed in Section III infra).
47. The CRC in its General Comment no. 7 (supra) stresses how failure or impossibility to register children at birth '*can impact negatively on a child's sense of personal identity and children may be denied entitlements to basic health, education and social welfare*'.[31]
48. Even in the absence of a genetic link to the primary carer – the social mother – the required primary consideration given to the child's best interests should lead to the conclusion that Art 8 would be violated by the refusal of national law to endorse the legal parentage already recognised in the state of children's birth and reflect in the child's social reality.

Question 2. The intended mother is not registered as birth mother but as adoptive mother

49. Since the *Mennesson* and *Labassée* judgments, the French Court of Cassation has significantly modified its approach to surrogacy cases. In two decisions rendered on the 3 July 2015[32], the Court of Cassation stated that the sole fact that a child was born out of a surrogacy arrangement does not constitute an obstacle to the legal recognition of the intended parents as the legal parents, as long as (1) the surrogacy arrangement was lawful in the foreign country where it took place, and (2) the foreign birth certificate established abroad corresponds to the reality. The Court of Cassation has further refined its reasoning with another series of judgments on the 5 July 2017[33], which gave rise to this reference. In these decisions, the Court specified that 'corresponds to the reality' should be understood as 'corresponds to the biological reality'. This implies that legal filiation can be established by the surrogate child but only with his or her ***biological*** parent. If one of the intended parents does not share a biological link with the surrogate child, that parent will not be able to be registered on the birth certificate. The Court de Cassation noted however that the excluded parent retains the possibility to adopt the child of their spouse. This statement raises a number of general concerns, especially with regard to the children's right to private life and family life under Article 8.
50. **First**, it is noted that the "full adoption" ("*adoption plenière*")[34] is only available to married couples.[35] Given the social trend away from children being born to married couples (see para 14 supra) this results in a

[29] *Paradiso and Campanelli v Italy*, ECHR, App. No. 25358/12, 24 January 2017.
[30] *Mennesson v France*, ECHR, App. No. 65192/11, 26 June 2014, paras 68, 89, 98.
[31] UNCRC General Comments No. 7, para 25.
[32] Court of Cassation, Plenary Assembly, 3 July 2015, Decisions Nos. 14-21.323 and 15-50.002.
[33] Court of Cassation, 1st Civil Chamber, 5 July 2017, Decisions Nos. 16-16.495, 15-28.597, 16-16.455, 16-16.901, 16-50.025, 16-20.052.
[34] Only few European countries have two distinctive adoption procedures ("full adoption" and "simple adoption"), namely: Belgium, Bulgaria, France, Luxembourg, Malta, Poland and Portugal.
[35] Art 343 Civil Code.

discrimination between unmarried couples and married couples who wish to procreate through a surrogacy agreement concluded and conducted with the necessary social and legal procedural safeguards abroad . The interveners note that this Court has recognised on several occasions that unmarried couples should not be discriminated against automatically, as family life is a notion that '*is not confined solely to marriage-based relationships and may encompass other de facto "family ties" where parties are living together outside marriage'.*[36] The State has a positive obligation to grant children born out of wedlock the legal status, rights, and privileges needed to ensure that their Article 8 rights are secured[37] (see also CoE Convention on Legal Status of Children Born out of Wedlock 1975, Annex 18).

51. **Second**, adoption of the child is not automatic. Adoption proceedings can be lengthy, several years can pass before the child is recognised as the adoptive child of the social parent. Both the child and the non-recognised parent remain in legal limbo. This situation does not protect the child's best interests. The unrecognised parent may be unable to travel alone with the child, and have difficulty completing -without the intervention of the recognised parent- otherwise simple administrative processes, such as enrolling the child in school or applying for child benefits. Furthermore, if the recognised parent and the non-recognised parent divorce before the end of the adoption process, and the recognised parent refuses to give his or her consent to the adoption, then it would become impossible for the non-recognised parent to become the legal parent of the surrogate child. In an analogous situation, where the father of a child born out of wedlock was unable to obtain custody without the mother's consent, with whom his relationship had deteriorated, the Court found that there had been a violation of Article 14 of the Convention taken together with Article 8[38].
52. **Third**, the adoption of the spouse's child can only be achieved through a judicial decision. A recent decision of the Court of Appeal of Paris[39] noted that Article 348-1 of the Civil Code provides that where the legal filiation is legally established with only one of the parents of the child, his or her sole consent is enough to proceed with the full adoption of the child. However, the Court of Appeal of Paris ruled that the full adoption of the surrogate child by the husband of the biological father could not be pronounced because they lacked information on the birthmother, including consent to the adoption of her child (even though the birthmother was not legally recognised as the mother of the child, only the father was, hence his consent should have sufficed in principle).
53. **Fourth**, because the "full adoption" ("*adoption plenière*") process is particularly complex, many parents are only left with the option of "simple adoption" ("*adoption simple*"), which is a simplified procedure, but which does not produce the same effects. Contrary to "full adoption", "simple adoption" does not erase the previous filiation links between the child and the birthmother; the adoptive parent does not have parental authority over the child unless the spouse agrees to it; last but not least, simple adoption is revocable under certain circumstances.[40] The legal parent and the adoptive parent are placed in a situation of asymmetry, which could be problematic for the children in cases of divorce. In such circumstances, the children might be put at a disadvantage regarding their relationship with their two parents.
54. The intervenors submit that the solution advanced by the Cour de Cassation is not satisfactory as it does not sufficiently ensure the respect for the children's Article 8 and 14 rights, nor does it aim at preserving the best interest of the child by establishing irrevocable and stable legal family ties as expeditiously as possible.

[36] *Kroon and Others v The Netherlands*, ECHR, App. No. 18535/91, 27 October 1994, para 30.
[37] *Marckx v Belgium*, ECHR, App. No. 6833/74, 13 June 1979.
[38] *Zaunegger v Germany*, ECHR, App. No. 22028/04, 3 December 2009.
[39] Court of Appeal of Paris, Division 1 – Chamber 1, 30 January 2018, Decision No. 16/20118.
[40] Regarding effects of full adoption see Art 355-359 and regarding the effects of simple adoption see Art 363-370-2.

General preventive principle versus the best interest of the child

55. The Court has accepted that a State '*may wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory*' but has stressed that the State is also obliged to assess the '*compatibility [..] with the children's best interests, respect for which must guide any decision in their regard'.* (see para 99 *Mennesson*)

56. The interveners acknowledge the margin of appreciation left to States in deciding whether to permit surrogacy or to prohibit it within their own jurisdiction. However as this court held in *Orlandi v Italy*[41], the decision to refuse to register the legal relationship (concluded in the Netherlands) in any form constituted a violation of Art 8 ECHR. This principle *mutatis mutandis* must apply *a fortiori* where the interests at stake are those of children. A general prohibition of surrogacy cannot prevail over the best interests of the children so as to justify a blanket refusal to recognize their legal identity.

III. THE IMPLICATIONS FOR EU LAW

57. In situations engaging EU law, Art 53 ECHR requires that the Convention cannot be construed in a manner which limits or derogates from the respect for human rights found in EU law and especially in the Charter of Fundamental Rights, in particular Art 24 (1) and (2) (Annex 23).

58. The intervenors wish to draw the Court's attention to certain aspects of EU law that are likely to be engaged in the dispute of principle before it in this case.

    1) The free movement of persons is a fundamental EU freedom. Directive 2004/38 Art 7(1)(d) provides in for the free movement of the family members of EU citizens. A family member includes "direct descendants" so that the registered children of a French Citizen father are included. However in the event that the EU citizen who exercising the primary right to freedom of movement is not the registered parent (but e.g. the unregistered mother), it is unclear whether the children can benefit from this right or whether they would fall to be treated under the less favourable provisions regarding "beneficiaries" set out in art 3(2). The Court of Justice is shortly to deliver the AG's Opinion in *SM (Algeria)*[42] which concerns the non-recognition by the UK (for free movement purposes) as a "family member" of a child in a permanent legal *kafala* relationship with French Citizen parents. In the analogous case of *Coman*[43], the CJEU recently held that Romania was obliged to recognise (for free movement purposes) the same sex spouse of an EU citizen although same sex marriages are still prohibited in Romania.

    2) Regulation 2201/2003, which is the EU complement to the 1980 and 1996 Hague Conventions, applies to civil matters relating to rights of custody (*"droit de garde"*) and access, and parental responsibility although it does not apply to the establishment or contesting of the parent child relationship. It is most frequently engaged in child abduction cases. An unregistered parent does not have automatic legal custody of a child although it is possible to apply to the courts for this (see art 372 Civil Code). An abducted child may therefore be left in limbo in the absence of custody having been awarded to an unregistered parent. Decisions about relocation and abduction are likely to be rendered even more complex by the absence of a recognised legal parentage between a parent and the child irrespective of whether this is the abducting or left behind parent

59. For reasons of space the intervenors have refrained from drawing the court's attention to other aspects of EU law (such as social security and welfare benefits) likely to be affected by the absence of legal parentage.

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[41] *Orlandi v Italy*, EHCHR, App. No. 26431/12, 2017, at paras 203 et seq and in particular paras 209 and 210.

[42] *SM (Algeria) v Entry Clearance Officer*, UK Visa Section, C-129/18, pending, AG's opinion to be delivered on the 24th of February 2019.

[43] *Adrian Coman and Others v Romania*, CJEU, Case C673/16, 2016.

IV. THE INTERVENERS' PROPOSED ANSWERS

60. In the present case, the Court was asked two questions:

    (1) By refusing to enter, in the civil register of births, the birth of a child born abroad to a surrogate mother, in so far as the foreign birth certificate designates the child's "intended mother" as its "legal mother", whereas the registration is accepted in so far as it designates the "intended father", who is also the child's biological father, will a State party be overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn as 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 one 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?

61. The interveners therefore propose that this Court should answer the first part of the first question in the affirmative; a refusal to enter the child's "intended mother" in the civil register of births based on a blanket legal prohibition lacks the flexibility necessary to take proper account of the personal context, situation and needs that is required for the best interests of the child to be a primary consideration and thus oversteps the State's margin of appreciation under Article 8.

62. They propose that the Court should answer the second part of the first question in the negative, namely that the answer to the first part of the first question does not depend on whether or not the child was conceived using the eggs of the intended mother. Giving primary consideration to the best interests of the child cannot mean that those interests can be eclipsed by the biological circumstances of conception and gestation.

63. They propose that the Court should answer the second question in the negative. The theoretical possibility of the adoption of the child by the social mother would not ensure compliance with Article 8 as it would not secure the child's best interests because of (i) the fact that adoption is not available as of right ("de plein droit") (ii) the unpredictability of the outcome and the length of the adoption proceedings, (iii) the uncertain access to "adoption plenière" and (iv) the second class nature of "adoption simple".

This intervention was drafted on behalf of the AIRE CENTRE by:

Nuala Mole, Founder and Senior Lawyer, MA Oxon, Dip European Law College de l'Europe, Bruges
Bianca Valperga, Laurea in Giruisprudenza University of Turin, LLM University of Munster
Suzanne Dominguez, Licence en Droit et Sciences Politiques, Universite de Bordeaux
Marion Giard, Licence en Droit, Universite de Lille 2

The AIRE Centre
Third Party Intervenor

ANNEX - Documents

The United Nations Convention on the Rights of the Child

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- Decision No. 16-16.455, available at https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000035146562&fastReqId=467344695&fastPos=1
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