



How does the right to respect for private life protect the child born in surrogacy? Findings in ECtHR case law

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Abstract: Surrogacy is becoming a more and more popular way of having offspring. The lack of proper standards of children's rights in national law raises the risk of their violation. It is worth looking at how relevant monitoring bodies have addressed such a challenge.

In many countries without regulations on surrogacy, the legal principle *mater semper certa est* grants the status of mother to the woman who gave birth to the child. This principle does not consider the genetic ties of the child that may arise in surrogacy.

The international nature of many surrogacy cases is essential. Due to the existence of the phenomenon of '[surrogacy tourism](#)', in a significant number of cases, the intended parents have a different nationality to the surrogate mother and, consequently, to the child. This implies legal challenges in relation to

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determine the rights linking the child to the intended parents and grant due protection to the child after departure from the country of birth.

The best interests of the child principle

In recognising this issue, the United Nations Committee on the Rights of the Child ([CRC](#)) has developed the principle of the best interests of the child to include the rights of children born through surrogacy. Specifically, according to the CRC's position in its [General Comments No. 7](#) (2005) and [General Comments No. 14](#) (2013), all national and international surrogacy regulations should first consider the child's best interests.

The right to protection for private life

The European Court of Human Rights ([ECtHR](#)) has partially adopted the aforementioned view. Precisely, in some applications relating to surrogacy, the ECtHR has ruled that there has been a violation of Article 8 of the European Convention on Human Rights ([ECHR](#)). The right to protection for the private life of a child born through surrogacy includes, among others, a legal parent-child relationship, the possibility to establish details of their identity, legal identification of the persons responsible for raising them, and the opportunity for them to live and develop in a stable environment.

Following the best interests of the child principle as developed by the CRC, the Strasbourg Court has stated that the child's best interests in surrogacy cases should always be paramount. It means that, when weighing the interests of those involved in the surrogacy procedure, the interests of the child should prevail. The former will take precedence in a conflict between the right to respect for the child's private life and the intended parents.

Labassee v. France

One of the first judgments where ECtHR spotted the issue of the private life of the child born through surrogacy was [Labassee v. France](#) (Appl. No. 65941/11). The applicant, Monique Labassee, was infertile, so she and her husband, Francis Labassee, decided to go to the USA and carry out a surrogacy procedure there. The third applicant, Juliette Labassee, was born in Minnesota. Francis Labassee was the donor of the genetic material, and the egg cell came from an anonymous donor. Upon their return to France, the applicants were refused entry of the child's birth certificate in the national register.

In the Court's opinion, if at least one intended parent is also the genetic parent of a child born in surrogacy, it is not in the child's best interests to be deprived of the legal bond with the genetic parent. Moreover, the Court observed that the right to respect private life requires everyone to establish the details of their identity, including their parentage. The Court pointed out that the third applicant (a child) was in legal uncertainty. For this reason, among others, France violated her right

to the protection of her private life. Moreover, the Court noted that although Article 8 ECHR does not guarantee the right to acquire a particular nationality, the fact remains that nationality remains an element of personal identity. France violated her right to protect her private life by refusing to give effect to the judgement of the State of her birth and by refusing to transcribe her civil status record.

Mennesson v. France

The ECtHR's judgement in the [Mennesson v. France](#) (Appl. No. 65192/11) case, which confirmed its previous position, represents another milestone. The married couple Dominique Mennesson and Sylvie Mennesson wanted to have a child, but Sylvie was infertile. They decided to carry out a surrogacy procedure in the USA. The surrogate mother gave birth to twins. The genetic father of the children is Dominique, and the genetic mother is the anonymous egg donor. After the birth of the children, the applicants returned to France. The national authorities refused to enter the children in the national registers.

The ECtHR considered that France had violated the right to respect the private lives of children born through surrogacy. The Court noted that in this case, the children born in the surrogacy procedure were in a position of legal uncertainty, which is never in the best interests of the children. As the Court pointed out, although the children's intended father (and genetic father) is French, the children do not have French nationality.

Furthermore, the Court emphasised that the relationship between children and intended parents also impacts inheritance rights. Accordingly, the Court concluded that, having regard to the consequences of this severe restriction on the identity and the right to respect for the private life of the twins, thus preventing both the recognition and establishment of their legal relationship with their biological father under domestic law, France overstepped the permissible limits of its margin of appreciation.

Paradiso and Campanelli v. Italy

One of the ECtHR's pivotal judgments on surrogacy is related to the [Paradiso and Campanelli v. Italy](#) (App. No. 25358/12). An Italian couple, Donatina Paradiso and Giovanni Campanelli, wanted a child but were unsuccessful despite many attempts. They decided to use the surrogacy procedure. To do this, they travelled to Russia, where they concluded a contract with the company Rosjurconsulting, which was to find a surrogate mother. The male genetic material was from the applicant, Paradiso, and the egg cell was from an anonymous donor. The surrogate mother gave birth to the child. However, it turned out that Rosjurconsulting mixed up the embryos, and the child born was unrelated to any of the applicants. Upon return to Italy, the authorities refused to register the birth certificate of the child born by the surrogate mother.

In this case, the ECtHR held that there was no violation of the right to respect the private life of the intended parents (in the case the child born through surrogacy was not an applicant). The Court noted that the applicants had been acting unlawfully since they had brought a child to Italy in breach of the national Adoption Act ([Law no. 184 of 1983](#) entitled 'The Child's Right to a Family'), and the agreement entered into between the applicants and Rosjurconsulting violated the Italian Medically Assisted Reproduction Act ([Law no. 40 of 2004](#)). Furthermore, the Court observed that the measures taken by the state are motivated by the urgency of taking measures in respect of the child, whom they considered to be 'in a state of abandonment'.

Concluding remarks

In cases related to surrogacy, the ECtHR has consistently referred to the best interests of the child principle as explained in relevant general comments of the CRC. Sometimes, the Strasbourg Court has found a violation of the right to protect private life in these cases. From the perspective of the victims of possible violations of the rights at stake, the aforementioned judgments can lead to the following key considerations. First, the best interests of the child principle is becoming a more relevant ground for ECtHR judgments. Second, according to ECtHR case law, the child's best interests should be paramount. Third, the lack of national legislation on the surrogacy procedure does cause legal uncertainty for the child born in surrogacy.