

**The European Court of Human Rights in *Paradiso and Campanelli v. Italy* and the way forward  
for regulating cross-border surrogacy  
Paul Beaumont and Katarina Trimmings\***

*Introduction*

The issue of how cross-border surrogacy should be regulated has been a significant strand of the present authors' research for several years. The Nuffield Foundation funded them from 2010 to 2012 to work on this topic and the main fruit of that labour was a substantial edited book that set out how surrogacy was being dealt with in many legal systems and presented the arguments for a new hard law solution of a Treaty regulating cross-border surrogacy arrangements along the lines of the highly successful Hague Convention on Intercountry Adoption.<sup>1</sup> As a follow up to that work the present authors have systematically analysed the law on cross-border surrogacy from a comparative perspective in Europe<sup>2</sup> and have recently analysed how the European Court of Human Rights has decided cases where a cross-border surrogacy arrangement was involved. The most recent work considered the case of *Paradiso and Campanelli v Italy*<sup>3</sup> at the stage when the Chamber had taken its decision and the decision of the Grand Chamber was pending.<sup>4</sup> In this contribution the authors intend to analyse the Grand Chamber decision in *Paradiso and Campanelli* and to consider the possible use of international soft law to help move States closer to achieving the consensus needed to regulate cross-border surrogacy arrangements in a Hague Convention.

*Facts of Paradiso and Campanelli*

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

---

\* Director and Deputy Director of the Centre for Private International Law, University of Aberdeen. The authors are grateful for the comments of Justin Borg-Barthet on an earlier version of this paper. It is intended that the final version of this paper will be published in J Scherpe and C Fenton-Glynn (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, 2017).

<sup>1</sup> K Trimmings and P Beaumont (eds) *International Surrogacy Arrangements* (Hart, 2013) (549 pages and prelims).

<sup>2</sup> Katarina Trimmings and Paul Beaumont, 'Parentage and Surrogacy in a European Perspective', in J Scherpe (ed) *European Family Law*, vol III (Edward Elgar 2016) 232-283.

<sup>3</sup> Application no. 25358/12. The Chamber decision was given on 27 January 2015 and the Grand Chamber decision was given on 24 January 2017.

<sup>4</sup> Paul R Beaumont and Katarina Trimmings, "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?" in G Biagioni (ed) *Migrant Children in the XXI Century: Selected Issues of Public and Private International Law* (Editoriale Scientifica, 2016), Chapter 5. Available as a Centre for Private International Law Working Paper No 2016/4 at [http://www.abdn.ac.uk/law/documents/CPIIL\\_2016-4.pdf](http://www.abdn.ac.uk/law/documents/CPIIL_2016-4.pdf) accessed on 10 March 2017.

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>5</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 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 of the Chamber*

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>6</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>7</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>8</sup> Although the Court found that the removal of the child had been

---

<sup>5</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*, para. 22.

<sup>6</sup> *Paradiso*, paras. 62 and 90.

<sup>7</sup> *Paradiso*, 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*, para. 64.

<sup>8</sup> *Paradiso*, 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

in accordance with law and served the legitimate aim of ‘preventing disorder’ and protecting the ‘rights and freedoms of the child’,<sup>9</sup> it concluded that the actions of the Italian authorities were not necessary in a democratic society.<sup>10</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>11</sup> The Court also criticized the Italian court’s 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>12</sup> Moreover, following the removal of the child from the intended parents, he was left without any formal identity for over two years.<sup>13</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>14</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>15</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>16</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>17</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

---

to the Italian Court of Cassation because it was a non-final decision, see *Paradiso*, para. 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, para. 69, and this was agreed with rather reluctantly by the two dissenting judges in their opinion, see *Paradiso*, cit., dissent para. 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*, dissent para. 3.

<sup>9</sup> *Paradiso*, paras. 72-73 and dissent para. 6.

<sup>10</sup> *Paradiso*, para. 81.

<sup>11</sup> *Paradiso*, para. 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 and J.M.W.L. v Luxembourg* (no 76240/01) judgment of 28 June 2007, 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.

<sup>12</sup> *Paradiso*, para. 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, para. 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*, para. 82, between the child and the applicants, the majority did not give enough weight to the legitimate interest of 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>13</sup> *Paradiso*, para. 85.

<sup>14</sup> United Nations Convention on the Rights of the Child, 20 November 1989, see *Paradiso*, para. 85. However, the dissent, para. 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>15</sup> *Paradiso*, para. 85.

<sup>16</sup> *Paradiso*, paras. 80 and 86.

<sup>17</sup> *Paradiso*, para. 88.

relevant domestic authorities to remove the child from the care of the applicants was not arbitrary.<sup>18</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*,... § 79, and *Labassee v. France*,... § 58), is reduced to nought.<sup>19</sup>

*The suggestions by the present authors made prior to the Grand Chamber decision*

When the case was pending before the Grand Chamber of the ECtHR the present authors made the following analysis.<sup>20</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), the relationship does not constitute 'family life' as protected by Article 8(1).<sup>21</sup>

The present authors urged the Grand Chamber in *Paradiso* to take the opportunity to restrict the notion of *de facto* family life in Article 8 ECHR.<sup>22</sup> They suggested that 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.<sup>23</sup> 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 was encouraged to respect democracy and subsidiarity by exercising restraint and saying that the case falls outside the scope

---

<sup>18</sup> *Paradiso*, dissent paras. 12-14.

<sup>19</sup> *Paradiso*, dissent para. 15.

<sup>20</sup> Katarina Trimmings and Paul Beaumont, *supra* n 4.

<sup>21</sup> *Paradiso*, dissent para. 3.

<sup>22</sup> See Katarina Trimmings and Paul Beaumont, *supra* n 4, at 10.

<sup>23</sup> *Ibid.*

of the Convention as the applicants had no right to family life to protect.<sup>24</sup> Were the Grand Chamber to decide that there was a *de facto* family life (or an interference with private life) in this case within the scope of the Convention, it was exhorted to resist the temptation to act as a ‘fourth–instance’ court.<sup>25</sup> The present authors advised against the Grand Chamber second guessing the view of the national courts on the best interests of the child.<sup>26</sup> It was well within Italy’s margin of appreciation (especially on an issue like the assessment of the best interests of a child which turns on the facts of the individual case and an appraisal of the suitability of the applicants to exercise parental responsibility which it is hard for any appellate court to do but particularly hard for a human rights review court to do years after the event) for the Italian authorities to remove the child from the applicants when the child had been with them for less than 9 months, the applicants had no genetic link with the child, the applicants had not been approved by the Italian authorities to adopt a very young child<sup>27</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.

The present authors noted that the problem raised by judges Raimondi and Spano, in their dissenting opinion in the Chamber decision in *Paradiso*, had attracted wider attention among commentators.<sup>28</sup> Critics had rightly observed that the ECtHR’s approach, although not directly challenging the State’s choice to outlaw surrogacy,<sup>29</sup> compelled 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>30</sup> An unintended but likely consequence of this approach is that it will encourage intended parents to circumvent national legislation prohibiting surrogacy.

The present authors also noted the risk that the ECtHR jurisprudence will become a vehicle for the pro-surrogacy lobby groups that have commercial interests in the area of surrogacy in the receiving countries.<sup>31</sup> This was another reason why they urged a cautious approach to be taken by the Grand Chamber in *Paradiso*.

---

<sup>24</sup> Ibid.

<sup>25</sup> See *Paradiso*, dissent para. 13 and a similar critique of the ECtHR’s tendency to act as a fourth instance in family cases by Paul Beaumont, Katarina Trimmings, Lara Walker and Jayne Holliday, ‘Child Abduction, Recent Jurisprudence of the European Court of Human Rights’, (2015) 64 *International and Comparative Law Quarterly* 39-63, at pp.45-48 and 62-63.

<sup>26</sup> Katarina Trimmings and Paul Beaumont, supra n 4, at 11.

<sup>27</sup> *Paradiso*, para. 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*, para. 66.

<sup>28</sup> Katarina Trimmings and Paul Beaumont, supra n 4, at 11.

<sup>29</sup> In *Mennesson v France* (no. 65192/11, 26 June 2014), *Labassee v. France*, (no. 65941/11), 26 June 2014) and *Paradiso* the Chambers acknowledged that the States had the freedom to outlaw surrogacy arrangements. In the first two cases the ban pursued the legitimate aim of ‘the protection of health’ and the ‘protection of the rights and freedoms of others’, and in the last case it pursued the legitimate aim of the ‘prevention of disorder’ and the ‘protection of the rights and freedoms of others’.

<sup>30</sup> Gregor Puppincck and Claire 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) accessed 23 March 2017 (originally published in *Revue Lamy de Droit Civil*, 2014, p. 78).

<sup>31</sup> Katarina Trimmings and Paul Beaumont, supra n 4, at 12.

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>32</sup> This observation was in principle favourable to the intended parents as neither of them were 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>33</sup>

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 the commercialisation of conception.<sup>34</sup> Other jurisdictions ban surrogacy in both its forms.<sup>35</sup> In either scenario, the undesirable consequence of the ECtHR jurisprudence is 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 seek 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?

The present authors noted that commercial surrogacy raises serious concerns over the exploitation of women and commodification of children.<sup>36</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>37</sup> The failure of the ECtHR to distinguish between commercial and altruistic surrogacy in its jurisprudence 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>32</sup> *Paradiso*, para. 80.

<sup>33</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, see

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&s=eur> accessed 23 March 2017. However 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.

<sup>34</sup> Eg 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 Michael Wells-Greco, 'United Kingdom', in Trimmings and Beaumont, *supra* n 1, 367 at 377-380.

<sup>35</sup> Such countries can be referred to as 'anti-surrogacy jurisdictions'. For more information see Katarina Trimmings and Paul Beaumont, 'General Report on Surrogacy' in Trimmings and Beaumont, *supra* n 1, 439 at 463-464.

<sup>36</sup> See for example, 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), par. 18 accessed 23 March 2017; Trimmings and Beaumont, 'General Report on Surrogacy' *ibid* at 528-531.

<sup>37</sup> For a detailed analysis see Hague Conference on Private International Law, 'The Parentage/Surrogacy Project', *ibid* Annex II.

### *Grand Chamber decision*

On 24 January 2017 the Grand Chamber gave its judgment. It is lamentable that it took the Court so long to reach a judgment. The decision of the Chamber was delivered on 27 January 2015, the Italian Government asked that the case be referred to the Grand Chamber on 27 April 2015, a panel of the Grand Chamber granted that request on 1 June 2015 and a hearing took place in the Grand Chamber on 9 December 2015. However, it took the Grand Chamber over 13 months from the hearing to give its judgment. This of course has the effect that the ECtHR is not in a position to rectify human rights breaches in individual cases, particularly where young children are involved because their *de facto* position should almost always not be disrupted after a year never mind after several years, but rather is effectively giving opinions which it hopes will help States to determine how they treat individuals in future cases. The Grand Chamber decided by 11 votes to 6 that there had been no violation of Article 8 in this case. This reversal of the Chamber decision is greatly to be welcomed.

The present authors had argued that the Chamber were wrong to find that *de facto* ‘family life’ existed in this case. The majority of the Grand Chamber acknowledged that in certain situations *de facto* family life can exist between an adult or adults and a child in the absence of biological ties or a recognised legal tie ‘provided that there are genuine personal ties’.<sup>38</sup> The majority accepted that ‘the applicants had developed a parental project and had assumed their role as parents *vis-à-vis* the child ...had forged close emotional bonds with him in the first stages of his life, the strength of which was, moreover, clear from the report drawn up by the team of social workers following a request by the Minors Court’.<sup>39</sup> The majority found that the couple had spent about 6 months together with the child in Italy and that the intended mother had spent about 2 months before that with the child in Russia.<sup>40</sup> The majority were not willing to establish a minimum period of shared life which would be necessary to constitute *de facto* family life ‘given that the assessment of any situation must take account of the “quality” of the bond and the circumstances of each case.’<sup>41</sup> The majority acknowledged that the Court had accepted the existence of family life protected by Article 8 in *D and Others v Belgium*<sup>42</sup> in which a Belgian couple had been together with a child born to a Ukrainian surrogate mother for only 2 months. It distinguished that case on the grounds that there was a biological tie with at least one of the parents in that case and no biological tie with either parent in the *Paradiso* case and because the cohabitation had subsequently resumed.<sup>43</sup> The majority concluded that:

Having regard to the above factors, namely the absence of any biological tie between the child and the intended parents, the short duration of the relationship with the child and the uncertainty

---

<sup>38</sup> At para 148.

<sup>39</sup> At para 151.

<sup>40</sup> At para 152.

<sup>41</sup> At para 153.

<sup>42</sup> Decision no. 29176/13 of 8 July 2014.

<sup>43</sup> At para 154.

of the ties from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bonds, the Court considers that the conditions enabling it to conclude that there existed a *de facto* family life have not been met.<sup>44</sup>

In the view of a joint dissenting opinion of five judges,<sup>45</sup> *de facto* family life did exist in this case. The minority argued that it is essentially a ‘question of fact’<sup>46</sup> whether the close personal ties between the applicants and the child constituted *de facto* family life. The reason why they reached a different conclusion to the majority was as follows:

For us it is important that the cohabitation started from the very day the child was born, lasted until the child was removed from the applicants, and would have continued indefinitely if the authorities had not intervened to bring it to an end. The majority dismiss this argument on the ground that the intervention was the consequence of the legal uncertainty created by the applicants themselves ‘by engaging in conduct that was contrary to Italian law and by coming to settle in Italy with the child’ ... We fear that the majority thus make a distinction between a ‘legitimate’ and an ‘illegitimate’ family, a distinction that was rejected by the Court many years ago ..., and do not give full weight to the long-established principle that the existence or non-existence of ‘family life’ is essentially a question of fact. Although the period of cohabitation was in itself relatively short, we consider that the applicants had acted as parents towards the child and conclude that there existed, in the particular circumstances of the present case, a *de facto* family life between the applicants and the child.

One problem with this conclusion of the minority is that it does not really explain why from a factual point of view the 8 months cohabitation of one parent with the child, 6 months of which also involved the other parent as well, is sufficient to constitute *de facto* family life. It is an assertion rather than a reasoned opinion. The more normative problem with the approach of the dissent is that it does not seem to allow any analysis of the illegality of the formation of family life to come into the picture of determining the ‘factual’ question as to whether there is *de facto* family life. If one were to apply the approach of the dissenters what would prevent the formation of *de facto* family life when a couple kidnap a baby from an orphanage and look after the baby for 8 months before they are caught by the police?

It is surely correct for the majority to treat the question of whether there is *de facto* family life as a mixed question of fact and law. It is permissible to take into account, as the majority does, ‘the uncertainty of the ties from a legal perspective’. A couple who have created a connection with a child unlawfully, and

---

<sup>44</sup> Para 157.

<sup>45</sup> Joint dissenting opinion of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev. It is not clear who the sixth dissenting judge was and what opinion he or she had in this case.

<sup>46</sup> Para 3 of the dissent.



know that the connection with the child could be severed by the relevant authorities at any time, should not have the status of a human right to family life conferred on their relationship as quickly as a couple who tried to act legally in establishing their family. *De facto* family life should not depend simply on the fact that a person cares for a child for a few months but must take account of the legal context in which that came about. This means that a couple who are looking after a child, who was born to a surrogate mother in another country as part of an altruistic surrogacy arrangement, and who was willingly handed over by the surrogate mother to the intending parents could be treated as being in *de facto* family life with the child in a country that, in principle permits altruistic surrogacy, in the period before the authorities have legally conferred parental status on the intending parents. Whereas on the same facts in a country where even altruistic surrogacy arrangements are banned no such *de facto* family life would be created.

Although the majority of the Grand Chamber did not find that there was *de facto* family life in *Paradiso and Campanelli* the Court did find that there was an interference with the ‘private life’ of the applicants by the authorities taking away the child from them.<sup>47</sup> The Court is not very clear on what the dividing line between ‘family life’ and ‘private life’ is. The latter seems to encompass ‘the emotional bonds created and developed between an adult and a child in situations other than the classic situations of kinship.’ The Court seems to want to include ‘informal’ parenting arrangements within the category of ‘private life’ rather than ‘family life’. In doing so it cited *X v Switzerland*<sup>48</sup> in which a friend of a couple looked after their child for several years before the parents asked for the child back and the European Commission of Human Rights regarded the friend’s rights to care for the child as falling within her private life under Article 8 of the Convention. It seems much more logical to view that case as a *de facto* ‘family life’ case because the friend had been conferred the right to look after the child by the parents (no hint of unlawfulness) and had been doing so for such a long period that ‘genuine personal ties’ had developed between the friend and the child. The issue was surely whether after such a long period of time the parents could just unilaterally insist on the child coming back to them. The Grand Chamber in *Paradiso* also seems to confuse ‘private life’ and ‘family life’ by arguing that the reason why there was an ‘interference with the applicants’ private life’ was as follows:

what is at issue is the right to respect for the applicants’ decision to become parents ... and the applicants’ personal development through the role of parents that they wished to assume *vis-à-vis* the child ... the Court concludes that the facts of the case fall within the scope of the applicants’ private life.<sup>49</sup>

---

<sup>47</sup> See paras 161-163 of the Court’s judgment.

<sup>48</sup> No 8257/78 Commission Decision of 10 July 1978, Decisions and Reports 5.

<sup>49</sup> Paras 163-4.

In the present authors' view if the 'close personal ties' between an adult and a child are not enough to constitute *de facto* 'family life' then the removal of the child from the care of an adult should not be treated as an interference with their 'private life'.

The Grand Chamber went on to consider whether there was an interference with the private lives of the applicants. It said:

The Court considers that the measures taken in respect of the child – removal, placement in a home without contact with the applicants, being placed under guardianship – amounted to an interference with the applicants' private life.<sup>50</sup>

The four judges in the majority that issued a Joint Concurring Opinion were critical of the lack of clarity from their colleagues in the Grand Chamber majority judgment as to why the applicants' private life was found to be interfered with in this case.<sup>51</sup>

In relation to the question whether this interference was 'in accordance with the law' the Grand Chamber said that this:

not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects...

In the present case the domestic courts applied the Italian rule on conflict of laws which provides that the legal parent-child relationship is determined by the national law governing the child at the time of his or her birth (Private International Law Act...). However, as the child had been conceived from the gametes of unknown donors, his nationality was not established in the eyes of the Italian courts.

Section 37bis of the Adoption Act provides that, for the purposes of adoption, placement and urgent measures, Italian law is applicable to foreign minors who are in Italy... The situation of the child T.C., whose nationality was unknown, and who had been born abroad to unknown biological parents, was equated with that of a foreign minor.

In such a situation, the Court considers that the application of Italian law by the national courts, giving rise to the finding that the child was in a 'state of abandonment', was foreseeable.

It follows that the interference with the applicants' private life was 'in accordance with the law'.<sup>52</sup>

---

<sup>50</sup> Para 166.

<sup>51</sup> Judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov at para. 5.

The Grand Chamber also decided that the action of Italy in this case had a legitimate aim:

In so far as the applicants' conduct ran counter to the Adoption Act and the Italian prohibition on heterologous artificial reproduction techniques, the Grand Chamber accepts the Chamber's view that the measures taken in respect of the child pursued the aim of 'preventing disorder'. Moreover, it accepts that those measures were also intended to protect the 'rights and freedoms' of others. The Court regards as legitimate under Article 8 § 2 the Italian authorities' wish to reaffirm the State's exclusive competence to recognise a legal parent-child relationship – and this solely in the case of a biological tie or lawful adoption – with a view to protecting children.<sup>53</sup>

In relation to whether the measures taken by Italy were necessary in a democratic society the Grand Chamber said the following:

In cases arising from individual applications the Court's task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it ...

According to the Court's established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests... In determining whether an interference was 'necessary in a democratic society' the Court will take into account that a margin of appreciation is left to the national authorities, whose decision remains subject to review by the Court for conformity with the requirements of the Convention...

While the authorities enjoy a wide margin of appreciation in the area of adoption (see *Wagner* ...) or in assessing the necessity of taking a child into care (see *Kutzner v. Germany*, no. 46544/99, § 67, ECHR 2002-I), in particular where an emergency situation arises, the Court must still be satisfied in the particular case that there existed circumstances justifying the removal of the child (see *Zhou v. Italy*, no. 33773/11, § 55, 21 January 2014).<sup>54</sup>

On the margin of appreciation the Grand Chamber stated that:

---

<sup>52</sup> Paras 169-174.

<sup>53</sup> Para 177.

<sup>54</sup> Paras. 180-183.

The Court observes that the facts of the case touch on ethically sensitive issues – adoption, the taking of a child into care, medically assisted reproduction and surrogate motherhood – in which member States enjoy a wide margin of appreciation...

In contrast to the situation in the *Mennesson* judgment (cited above, §§ 80 and 96-97), the questions of the child's identity and recognition of genetic descent do not arise in the present case since, on the one hand, any failure by the State to provide the child with an identity cannot be pleaded by the applicants, who do not represent him before the Court and, on the other, there are no biological links between the child and the applicants. In addition, the present case does not concern the choice to become genetic parents, an area in which the State's margin of appreciation is restricted.<sup>55</sup>

The contrast with *Mennesson* is very important because it implies that the Grand Chamber may accept the decision of the Chamber in that case that if one of the intended parents is also a genetic parent that greatly narrows the margin of appreciation of the State and makes it difficult for the State to remove the child from their genetic parent without violating the child's human rights, even when the child came into the world through a commercial surrogacy arrangement. However, four judges in the majority in the Grand Chamber issued a joint concurring opinion arguing that commercial surrogacy is contrary to human dignity and is illegal under international law.<sup>56</sup>

On relevant and sufficient reasons the Grand Chamber said:

As regards the reasons put forward by the domestic authorities, the Court observes that they relied in particular on two strands of argument: they had regard, firstly, to the illegality of the applicants' conduct and, secondly, to the urgency of taking measures in respect of the child, whom they considered to be 'in a state of abandonment' within the meaning of section 8 of the Adoption Act.

The Court has no doubt that the reasons advanced by the domestic courts are relevant. They are directly linked to the legitimate aim of preventing disorder, and also that of protecting children – not merely the child in the present case but also children more generally – having regard to the prerogative of the State to establish descent through adoption and through the prohibition of certain techniques of medically assisted reproduction ...

Turning to the question of whether the reasons given by the domestic courts were also sufficient, the Grand Chamber reiterates that, unlike the Chamber, it considers that the facts of the case fall

---

<sup>55</sup> Paras. 194-195.

<sup>56</sup> Judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov.

not within the scope of family life but only within that of private life. Thus, the case is not to be examined from the perspective of preserving a family unit, but rather from the angle of the applicants' right to respect for their private life, bearing in mind that what was at stake was their right to personal development through their relationship with the child.

In the particular circumstances of the case, the Court considers that the reasons given by the domestic courts, which concentrated on the situation of the child and the illegality of the applicants' conduct, were sufficient.<sup>57</sup>

The Grand Chamber reached the correct decision on reviewing the relevance and sufficiency of the reasons why the national authorities took the child away from the applicants but the Grand Chamber's reasoning on 'sufficiency' could be said to be rather minimal if not even 'insufficient'.

On proportionality the Grand Chamber said:

In the proceedings before the Court, the respondent Government submitted that in Italian law descent may be established either through the existence of a biological relationship or through an adoption respecting the rules set out in the law. They argued that, in making this choice, the Italian legislature was seeking to protect the best interests of the child as required by Article 3 of the Convention on the Rights of the Child. The Court accepts that, by prohibiting private adoption based on a contractual relationship between individuals and restricting the right of adoptive parents to introduce foreign minors into Italy to cases in which the rules on international adoption have been respected, the Italian legislature is seeking to protect children against illicit practices, some of which may amount to human trafficking.

Furthermore, the Government relied on the argument that the decisions taken had to be seen against the background of the prohibition of surrogacy arrangements under Italian law. There is no doubt that recourse to such an arrangement raises sensitive ethical questions on which no consensus exists among the Contracting States (see *Mennesson*, cited above, § 79). By prohibiting surrogacy arrangements, Italy has taken the view that it is pursuing the public interest of protecting the women and children potentially affected by practices which it regards as highly problematic from an ethical point of view. This policy is considered very important, as the Government have pointed out, where, as here, commercial surrogacy arrangements are involved. That underlying public interest is also of relevance in respect of measures taken by a State to discourage its nationals from having recourse abroad to such practices which are forbidden on its own territory.

---

<sup>57</sup> Paras 196-199.

In sum, for the domestic courts the primary concern was to put an end to an illegal situation. Having regard to the considerations set out above, the Court accepts that the laws which had been contravened by the applicants and the measures which were taken in response to their conduct served to protect very weighty public interests...

The present case differs from cases in which the separation of a child from its parents is at stake, where in principle separation is a measure which may only be ordered if the child's physical or moral integrity is in danger (see, among other authorities, ... Kutzner, cited above, §§ 69-82). In contrast, the Court does not consider in the present case that the domestic courts were obliged to give priority to the preservation of the relationship between the applicants and the child. Rather, they had to make a difficult choice between allowing the applicants to continue their relationship with the child, thereby legalising the unlawful situation created by them as a *fait accompli*, or taking measures with a view to providing the child with a family in accordance with the legislation on adoption.

The Court has already noted that the public interests at stake were very weighty ones. Moreover, it considers that the Italian courts' reasoning in respect of the child's interests was not automatic or stereotyped (see, *mutatis mutandis*, *X. v. Latvia* [GC], no. 27853/09, § 107, ECHR 2013). In evaluating the child's specific situation, the courts considered it desirable to place him with a suitable couple with a view to adoption, and also assessed the impact which the separation from the applicants would have. They concluded in essence that the separation would not cause the child grave or irreparable harm.

In contrast, the Italian courts attached little weight to the applicants' interest in continuing to develop their relationship with a child whose parents they wished to be. They did not explicitly address the impact which the immediate and irreversible separation from the child would have on their private life. However, this has to be seen against the background of the illegality of the applicants' conduct and the fact that their relationship with the child was precarious from the very moment that they decided to take up residence with him in Italy. The relationship became even more tenuous once it had turned out, as a result of the DNA test, that there was no biological link between the second applicant and the child.

The applicants argued that the procedure suffered from a number of shortcomings. As to the alleged failure to accept an expert opinion, the Court observes that the Minors Court did have regard to the psychologist's report submitted by the applicants. However, it disagreed with its conclusion that the separation from the applicants would have devastating consequences for the child. In this connection, the Court attaches importance to the Government's argument that the

Minors Court is a specialised court which sits with two professional judges and two expert members...

As to the applicants' argument that the courts failed to examine alternatives to immediate and irreversible separation from the child, the Court observes that before the Minors Court the applicants had initially requested that the child be temporarily placed with them with a view to subsequent adoption. In the Court's view, it has to be borne in mind that the proceedings were of an urgent nature. Any measure prolonging the child's stay with the applicants, such as placing him in their temporary care, would have carried the risk that the mere passage of time would have determined the outcome of the case.

Moreover, apart from the illegality of the applicants' conduct, the Government pointed out that they had exceeded the age limit for adoption laid down in section 6 of the Adoption Act, namely a maximum difference in age of forty-five years in respect of one adopting parent and fifty-five years in respect of the second. The Court observes that the law authorises the courts to make exceptions from these age-limits. In the circumstances of the present case, the domestic courts cannot be reproached for failing to consider that option.<sup>58</sup>

The Grand Chamber's final conclusion was:

The Court does not underestimate the impact which the immediate and irreversible separation from the child must have had on the applicants' private life. While the Convention does not recognise a right to become a parent, the Court cannot ignore the emotional hardship suffered by those whose desire to become parents has not been or cannot be fulfilled. However, the public interests at stake weigh heavily in the balance, while comparatively less weight is to be attached to the applicants' interest in their personal development by continuing their relationship with the child. Agreeing to let the child stay with the applicants, possibly with a view to becoming his adoptive parents, would have been tantamount to legalising the situation created by them in breach of important rules of Italian law. The Court accepts that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them in the present case.

It follows that there has been no violation of Article 8 of the Convention.<sup>59</sup>

## **The way forward**

---

<sup>58</sup> Paras. 202-204 and 209-214

<sup>59</sup> Paras 215-216.

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>60</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>61</sup> Regulation has the benefits of: reducing the risks of exploitation of surrogate mothers by middlemen (e.g. 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, whether genetically linked to the child or not, are treated equally with genetically linked intending fathers as the

---

<sup>60</sup> For a detailed outline of a potential Convention on surrogacy see Trimmings and Beaumont, General Report, supra n 35 at 531-549. Other commentators advocating a hard law Treaty solution along the lines of the 1993 Hague Adoption Convention, have taken a slightly more restrained approach towards the utility of the Adoption Convention in the surrogacy context. See eg Hans van Loon, 'The Global Horizon of Private International Law' (2016) 380 *Recueil des Cours* 76; and Hannah Baker, 'A Possible Future Instrument on International Surrogacy Arrangements: Are There 'Lessons' to be Learnt from the 1993 Hague Intercountry Adoption Convention?' in Trimmings and Beaumont *ibid* at 411 (See Karen Smith Rotabi and Nicole Bromfield, *From Intercountry Adoption to Global Surrogacy A Human Rights History and New Fertility Frontiers* (Routledge, 2017), for a detailed social science-oriented analysis of the differences and similarities between intercountry adoption and cross-border surrogacy). Yet other commentators have highlighted the need for an approach rooted primarily in the human rights perspective. See eg Michael Wells-Greco, *The Status of Children Arising from Inter-Country Surrogacy Arrangements* (Eleven, 2016), Claire Fenton-Glynn, 'Review Article: Human Rights and Private International Law: Regulating International Surrogacy' (2014) 10 *Journal of Private International Law* 157, Richard Blauwhoff and Lisette Frohn, 'International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law', in C Paulussen *et al* (eds) *Fundamental Rights in International and European Law – Public and Private Law Perspectives* (Asser Institute, 2016) 211-241; and Barbara Stark, 'Transnational Surrogacy and International Human Rights Law' (2012) 18 *ILSA Journal of International and Comparative Law* 369. Alternative proposals have centred either around a complete global ban on surrogacy (see eg Usha Smerdon, 'Crossing Bodies, Crossing Borders: International Surrogacy Agreements between the United States and India' (2009) 60 *Cumberland Law Review* 81; and Sonia Allan, 'Governing Transnational Surrogacy Practices: What Role Can National and International Regulation Play?', in M Davies (ed) *Babies for Sale? Transnational Surrogacy, Human Rights and the Politics of Reproduction* (Zed Books, 2017)), or the need for a domestic regulation of surrogacy that would deter intended parents from seeking to commission surrogacy abroad (see eg Claire Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24 *Medical Law Review* 59). For an exploration of regulatory options at the EU level see European Parliament, 'A Comparative Study on the Regime of Surrogacy in EU Member States' 2013, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI\\_ET\(2013\)474403\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf) accessed 10 April 2017. See also C Thomale, 'State of play of cross-border surrogacy arrangements – Is there a case for regulatory intervention by the EU?', available at [http://www.ipr-uni-heidelberg.de/md/jura/ipr/personen/weller/europaparlament\\_policy\\_hub\\_statement.pdf](http://www.ipr-uni-heidelberg.de/md/jura/ipr/personen/weller/europaparlament_policy_hub_statement.pdf) accessed 10 April 2017, wisely suggesting that the EU should refrain from regulating on the problem of cross-border surrogacy and instead support relevant global initiatives.

<sup>61</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 March 2017, there are 98 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 <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69> accessed on 23 March 2017. Trimmings and Beaumont, General Report, *ibid* and following and developing that approach see Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Arrangements*, in *The Journal of Law and Policy*, 2016, available at [https://works.bepress.com/hezi\\_margalit/14/](https://works.bepress.com/hezi_margalit/14/) accessed on 23 March 2017.



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 on Private International Law demonstrate the pressing need for global regulation of cross-border surrogacy.<sup>62</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>63</sup> The first meeting of the Experts' Group was held in February 2016,<sup>64</sup> and in March 2016 the Council on General Affairs and Policy of the Conference took a decision to extend the Group's mandate until 2017.<sup>65</sup>

The work of the Hague Conference on Private International Law was noted by the Grand Chamber in *Paradiso*:

The Hague Conference thus considered that there is now a pressing human rights requirement, including from the perspective of children's rights, for its work in 'this area'.<sup>66</sup>

It is to be hoped that the Experts' Group and the Hague Council on 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). However, the early signs are not encouraging. The Experts' Group met from 31 January to 3 February 2017 and reached the following conclusions and recommendations as to its future work:

[T]he Group agreed:

a) in principle, on the feasibility of developing a binding multilateral instrument dealing with the recognition of foreign judicial decisions on legal parentage. Further consideration and discussion are needed on how such an instrument could operate;

---

<sup>62</sup> See Hague Conference website, section 'Parentage/Surrogacy Project', <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> accessed on 23 March 2017.

<sup>63</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>64</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>. This view was endorsed by the Hague Council on General Affairs and Policy in its Conclusions and Recommendations at the March 2016 Council, see No. 15, available at <https://assets.hcch.net/docs/55122e44-d132-441f-a1f3-d4c543c99e97.pdf> accessed on 23 March 2017. It is suggested here that this is a rather narrow approach, focusing on "recognition", 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 Prel Doc No 3 of March 2014, Hague Conference on Private International Law, 'The Desirability and Feasibility of Further Work on the Surrogacy / Parentage Project', paras. 44-47 and 52-60, available at [http://www.hcch.net/upload/wop/gap2015pd03b\\_en.pdf](http://www.hcch.net/upload/wop/gap2015pd03b_en.pdf) accessed 23 March 2017.

<sup>65</sup> 'Council on General Affairs and Policy of the Conference: Conclusions & Recommendations, March 2016', *ibid*.

<sup>66</sup> *Paradiso*, Grand Chamber, para 80.

b) that owing to the diversity of approaches with respect to the determination of legal parentage and the recognition of the legal parentage when recorded in a public document, further consideration and discussion are needed in relation to this issue;

c) that owing to the complexity of the subject and the diversity of approaches by States in cases of ISAs, definitive conclusions could not be reached at this meeting as to the feasibility of the possible application of future agreed general PIL rules on legal parentage to ISAs and the possible need for additional rules and safeguards in these cases and in cases of ART. The Group concluded that further consideration and discussion of these matters are needed.

The Group therefore recommends to Council that its mandate be continued to work on these matters, noting the urgency already identified. In this regard, the Group also recommends that Council direct the Permanent Bureau to undertake the necessary work with a view to preparing a next meeting of the Group and to allocate resources accordingly.

However, a recognition of parentage Convention would probably leave most of the important issues open and not resolve the human rights issues referred to by the ECtHR. The fundamental problem with a recognition Convention in this context is that for many States this will only be possible in relation to foreign judgments (see the latest conclusion from the Experts' Group above). In that limited context the question of whether to recognise the parentage of the intended parents in a surrogacy arrangement (especially any parent with no genetic link to the child) would ultimately be left to the decision of individual national courts in each Contracting State determining whether the recognition of that particular foreign judgment granting parentage is contrary to the receiving State's public policy. The further question as to whether the child should be removed from his or her intending parent(s) if the foreign judgment was not recognised on grounds of public policy would not be regulated by the Convention either. It will probably not be possible to agree to recognition of foreign status documents or to harmonised applicable law rules regarding parentage.<sup>67</sup>

Given that reaching consensus in The Hague Conference on Private International Law on the need for a Convention providing for a regulatory solution to the problem of cross-border surrogacy seems like a medium to long term objective the present authors will explore below the value of a project seeking to develop global soft law principles for the handling of cross-border surrogacy arrangements.

### **Principles for better protection of the human rights of children in cross-border surrogacy**

In July 2013, the International Social Service (ISS) issued a call for action titled 'International Surrogacy and Donor Conceived Persons: 'Preserving the Best Interest of Children'', where it noted an increasingly frequent occurrence of surrogacy cases within its casework and called for a coordinated action to tackle

---

<sup>67</sup> See Hague Conference on Private International Law, *Report of the Experts' Group on the Parentage / Surrogacy Project*, February 2017, para 38, available at <https://assets.hcch.net/docs/ed997a8d-bdcb-48eb-9672-6d0535249d0e.pdf>.

the legal and ethical problems inherent in this practice.<sup>68</sup> The document suggested that such an action should take account of a variety of perspectives by involving specialists from diverse backgrounds, in particular ‘international legal, social service, psycho-social and child advocacy communities’.<sup>69</sup> Building on this proposal, in February 2016 the ISS issued a second call for action in respect of cross-border surrogacy titled ‘Urgent need for regulation of international surrogacy and artificial reproductive technologies’.<sup>70</sup> In this document, the ISS pointed out that unregulated cross-border surrogacy paved the way for ‘very lucrative business opportunities’ as well as ‘potentially worrying activities and practices of intermediary agencies, specialized clinics and candidates for parenthood’.<sup>71</sup> It called for a regulatory initiative embedded in the children’s rights perspective, in particular ‘the rights of children to be protected from being sold’, referring to the specific circumstances of unregulated cross-border surrogacy.<sup>72</sup> This approach finds its starting point in relevant human rights treaties, in particular, the United Nations Convention on the Rights of the Child<sup>73</sup> (UNCRC) and its Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.<sup>74</sup>

Following the 2016 call, the ISS established a group of experts from a variety of backgrounds to develop a set of principles that would provide a much needed international human rights framework, comprehensively addressing a wide range of relevant issues from a multi-disciplinary perspective.<sup>75</sup>

The project, which is purely literature-based, aims to target two key research questions:

1. What considerations (human rights/legal/psycho-social/ medical/political and ethical) should be taken into account to protect children’s rights born through cross-border surrogacy?

---

<sup>68</sup> International Social Service, General Secretariat, ‘International Surrogacy and Donor Conceived Persons: “Preserving the Best Interest of Children”: Call for Action by the International Social Service Network’ July 2013, available at [http://www.iss-ssi.org/images/Surrogacy/Call\\_for\\_Action2013\\_ANG.pdf](http://www.iss-ssi.org/images/Surrogacy/Call_for_Action2013_ANG.pdf) accessed 05 April 2017.

<sup>69</sup> Ibid.

<sup>70</sup> International Social Service, ‘Call for Action 2016: Urgent Need for Regulation of International Surrogacy and Artificial Reproductive Technologies’ February 2016, available at [http://www.iss-ssi.org/images/Surrogacy/Call\\_for\\_Action2016.pdf](http://www.iss-ssi.org/images/Surrogacy/Call_for_Action2016.pdf) accessed 05 April 2017.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid. The document refers to the following finding by the Committee on the Rights of the Child: “Commercial use of surrogacy, which is not properly regulated, is widespread, leading to the sale of children and the violation of children’s rights.” Committee on the Rights of the Child, ‘Convention on the Rights of the Child: Concluding observations on the combined third and fourth periodic reports of India’ 2014, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIND%2fCO%2f3-4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIND%2fCO%2f3-4&Lang=en) accessed 05 April 2017.

<sup>73</sup> United Nations Convention on the Rights of the Child, 2 September 1990, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> accessed 05 April 2017.

<sup>74</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 18 January 2002, available at

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx> accessed 05 April 2017. See D Smolin, ‘Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry’s Global Marketing of Children’ Samford University, Selected Works, 2015, available at [https://works.bepress.com/david\\_smolin/19/](https://works.bepress.com/david_smolin/19/) accessed 05 April 2017. More generally, see UNICEF, ‘Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography’ 2009, available at [https://www.unicef-irc.org/publications/pdf/optional\\_protocol\\_eng.pdf](https://www.unicef-irc.org/publications/pdf/optional_protocol_eng.pdf) accessed 05 April 2017.

<sup>75</sup> ‘Principles for a better protection of children’s rights in cross-border reproductive arrangements, in particular international surrogacy’. See International Social Service, Call for Action 2016 (n 62).

2. How should these considerations be translated into concrete principles to safeguard the human rights protection of children born through cross-border surrogacy?

In order to answer the above research questions, the project will coordinate a process of multidisciplinary research, analysing the various aspects of cross-border surrogacy. The main objective is to establish a set of approximately 20 principles for the concrete protection of the human rights of children born through cross-border surrogacy. These could be considered as minimum elements for the development and implementation of relevant domestic, regional and international instruments, policies and practices in this regard.

Each principle will be supported by an explanatory text, focusing on the following considerations:

1. Human rights considerations: with a focus on the approaches and/or opinions expressed by the various United Nations bodies and instruments, as well as at regional level, such as within the European Union and the European and Inter-American human rights systems;
2. Legal considerations: with a focus on how different jurisdictions have responded to surrogacy. As a part of this element, the differences between domestic legislation, relevant case-law and existing good practices as well as customary international standards will be explored;
3. Psychosocial and medical considerations: with a focus on the identification of risks throughout the whole process, its follow-up and with an emphasis on promising practices that may provide useful practical and ethical responses to the identified risks (including a review and comparative study of the lessons learned from intercountry adoption);
4. Political considerations: with a focus on the (shared) responsibility and cooperation needed amongst the various actors involved (governmental bodies, specific institutions, intermediary agencies, civil society organisations, etc);
5. Ethical considerations: with a focus on the dignity of the human person, commercialisation and commodification of persons and of the processes of human procreation, exploitation and inequality, ethical evaluation of claimed rights to procreate, and ethical aspects of splitting biological motherhood and of legal parenthood regimes based on intent or contract.

The project is coordinated by the ISS, with the research work being carried out jointly by the ISS and a core group of experts. In order to ensure the inclusion of the variety of opinions, a platform to foster constant exchanges has been established in the form of the project advisory group. This platform serves as a consultative and advisory body where complex issues are shared and discussed. In order to galvanise support for the principles at international level, two expert consultations will be held to disseminate

preliminary findings and consider eventual commentary.<sup>76</sup> This will be followed by advocacy efforts undertaken at the United Nations Human Rights Council<sup>77</sup> and through the United Nations treaty body system,<sup>78</sup> facilitated by the fact that some members of the advisory group are members of United Nations bodies or already closely working with them. A launch event to disseminate final principles at an international arena will also be arranged. Advocacy efforts will then be undertaken to promote international endorsement.

---

<sup>76</sup> The first expert consultation will be held between the 18<sup>th</sup> and 20<sup>th</sup> May at the University of Verona, Italy.

<sup>77</sup> The UN Human Rights Council is an inter-governmental body within the United Nations responsible for the worldwide promotion and protection of human rights. See <http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx> accessed 07 April 2017.

<sup>78</sup> Such as a UN General Assembly resolution or a General Comment. See, generally, United Nations, 'General Assembly Resolutions', available at <http://www.un.org/en/sections/documents/general-assembly-resolutions/index.html> accessed 07 April 2017; and United Nations Human Rights Office of the High Commissioner, 'Human Rights Treaty Bodies - General Comments', available at <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx> accessed 07 April 2017.