

Does the practice of the European Court of Human Rights have any legal implications on the development of cross-border surrogacy?

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Abstract:

Medical tourism is the area of tourism, the aim of which is to organize the treatment of citizens abroad. Medical tourism appeared relatively recently, but already established itself as one of the most popular types of tourism. It combines several areas: recreation; health improvement; therapy etc. According to G. Pennings, „ In recent years the term ‘**reproductive tourism**’ has been increasingly used to refer to couples travelling from their country of residence to another in order to receive specific infertility treatment not allowed or not available in their own country “. ⁴ The cross-border or international surrogacy is the kind of reproductive tourism. It means that „the patients have the purpose of going around the restrictions and bans their national legislation has set down in the country of origin and obtaining care not available to them domestically. This is often a direct consequence of restrictive legislation in domestic countries, and as such needs to be dealt with by their domestic legislation”. ⁵ International or cross-border surrogacy (also referred as reproductive tourism) is a contract between potential parents and a surrogate mother abroad. In most cases, they are commercial in nature. That is to say, women are paid for their services. Many countries ban paid surrogacy. Others allow for reasonable medical expenses to be paid. Nineteen states of the USA have laws recognizing compensated surrogacy. Some scholars argue that India and Ukraine are two of the most popular destinations for commercial surrogacy. ⁶

Article 8 of the European Convention on Human Rights protects private life, home and correspondence of the person. Moreover, the content of Article 8 is more broad and, among other things, it refers to a number of the so called „medical rights.” The judicial practice of the European Court on Human Rights shows that

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⁴ PenningsG (2004) Legal harmonization and reproductive tourism in Europe. Hum Reprod 19,2689–2694.

⁵ Rintamo S. „Regulation of Cross-Border Surrogacy In Light of the European Convention on Human Rights and Domestic and the European Court of Human Rights Case law”. University of Helsinki. 2016. p. 3.

⁶ Bala N. „The hidden costs of the European Court of Human Rights’ Surrogacy Decision”. The Yale Journal of International Law Online. p. 12.

the reproductive tourism cases fall under article 8 of the European Court on Human Rights. Moreover, the court takes liberal approach with this regard noting that „, the best interests of the child, covered by article 8 of the Convention, must take precedence”. **The paper considers one of the most problematic issues related to the domestic legislative restrictions and a different approach to the issue of the European Court of Human Rights.**

The European Court on Human Rights considers that states have the power within their sovereignty to allow or forbid surrogacy transactions. In **S.H. and Others v. Austria case** the court notes: „, The Court reiterates that it is not contrary to the requirements of Article 8 of the Convention for a State to enact legislation governing important aspects of private life which does not provide for the weighing of competing interests in the circumstances of each individual case. Where such important aspects are at stake it is not inconsistent with Article 8 that the legislator adopts rules of an absolute nature which serve to produce legal certainty”.⁷ At the same time states have general obligations resulting from the convention, which includes: 1) the right or entitlement granted at national level must be effective; 2) the relevant legislation must be coherent and 3) the right or entitlement must be granted in a non-discriminatory manner. The Court reiterates that in the assessment of the present case it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32). While Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decision-making process is fair and such as to afford due respect to the interests safeguarded by it. What has to be determined is whether, having regard to the particular circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests (see, *mutatis mutandis*, *Hatton and Others v. the United Kingdom [GC]*, no. 36022/97, § 99, ECHR 2003-VIII).⁸ ⁹ Furthermore, „states States must furthermore shape their legal framework in the area of reproductive matters ‘in a coherent manner which allows the different legitimate interests involved to be adequately taken into account’”.¹⁰ ¹¹ Apart from that, rights and obligations that come within the scope of the Convention must be awarded in a non-discriminatory manner.¹²

In **Mennesson v. France Case** the court held that the refusal violated children’s right to family under the European Convention on Human Rights.¹³ The court ruled that „surrogate children—in this case, born in the US and having US citizenship—should not be prevented from registering as French citizens, as this would be a violation of their right to respect for their private life. The Strasbourg court’s view, which is very

⁷ S.H. and Others v. Austria. ECHR. 2011. paragraph 110.

<http://www.unionedirittiumani.it/wp-content/uploads/2014/11/CASE-OF-S.H.-AND-OTHERS-v.-AUSTRIA-1.pdf>

⁸ Tysiac v. Poland. ECHR. 2007. Paragraph 113.

[http://hudoc.echr.coe.int/eng#{"fulltext":\["Tysiac v. Poland"\],"documentcollectionid":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-79812"\]}](http://hudoc.echr.coe.int/eng#{)

Poland"], "documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-79812"]}

⁹ Koffeman N.R. „, Legal responses to cross-border movement in reproductive matters within the European Union”. p.8.

¹⁰ S.H. and Others v. Austria. ECHR. 2011. Paragraph 100.

¹¹ Koffeman N.R. „, Legal responses to cross-border movement in reproductive matters within the European Union”. p.8.

¹² Koffeman N.R. „, Legal responses to cross-border movement in reproductive matters within the European Union”. p.8.

¹³ MENNESSON V. FRANCE. ECHR. 2014. CASE BRIEF

[HTTPS://WWW.CRIN.ORG/EN/LIBRARY/LEGAL-DATABASE/MENNESSON-V-FRANCE](https://www.crin.org/en/library/legal-database/mennesson-v-france)

understandable, is that nationality is an important part of a person's identity".¹⁴ Similarly, in **Labassee v. France Case**, the court held that the French authorities violated the child's right to family life under the European Convention. „ The Court based its decision on the right of the child, rather than the right of the parents. Examining the rights of the parents, the Court considered that the effects of the French authorities' decision were not such that caused excessive disruption to their family life so as to be in violation of their human rights".¹⁵

It should be noted, that in both cases the court does not refer to the prohibition of cross-border surrogacy as such, but its severe consequences. In *Mennenson v. France Case* the court notes that the states have „ a wide margin of appreciation, regarding the decision not only whether or not to authorise this method of assisted reproduction but also whether or not to recognise a legal parent-child relationship between children legally conceived as the result of a surrogacy arrangement abroad and the intended parents".¹⁶ In addition the court reinforces the principle according to which „ the fact that an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned".¹⁷ In both cases the court held that prohibition of surrogacy infringed the family life and the private life of the children. With regard to family rights the court notes that „ the degree of the potential risks for the applicants' family life, the Court considers that it must determine the issue having regard to the practical obstacles which the family has had to overcome on account of the lack of recognition in French law of the legal parent-child relationship between the first two applicants and the third and fourth applicants (see, mutatis mutandis, X, Y and Z [v. the United Kingdom, 22 April 1997], § 48[Reports of Judgments and Decisions 1997-II]). It notes that the applicants do not claim that it has been impossible to overcome the difficulties they referred to and have not shown that the inability to obtain recognition of the legal parent-child relationship under French law has prevented them from enjoying in France their right to respect for their family life. In that connection it observes that all four of them were able to settle in France shortly after the birth of the third and fourth applicants, are in a position to live there together in conditions broadly comparable to those of other families and that there is nothing to 24 *MENNESSON v. FRANCE JUDGMENT* suggest that they are at risk of being separated by the authorities on account of their situation under French law (see, mutatis mutandis, *Shavdarov*, cited above, §§ 49-50 and 56)".¹⁸

Similarly, with respect to the children, the court notes „ As the Court has observed, 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 ...; an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned (see paragraph 80 above). As domestic law currently stands, the third and fourth applicants are in a position of legal uncertainty. While it is true that a legal parent-child relationship with the first and second applicants is acknowledged by the French courts in so far as it has been established under Californian law, the refusal to grant any effect to the US judgment and to record the details of the birth certificates accordingly shows that the relationship is not recognised under the French legal system. In other words, although aware that the children have been identified in another

¹⁴ Arden J.L. „Surrogacy: how the law develops in response to social change». OUPblog, 2015.
<http://blog.oup.com/2015/02/international-surrogacy-law/>

¹⁵ *LABASSEE v. FRANCE*. ECHR. 2014. CASE BRIEF
<https://www.crin.org/en/library/legal-database/labassee-v-france>

¹⁶ *Mennenson v. France*. ECHR. 2014. Paragraph 79.

¹⁷ *Mennenson v. France*. ECHR. 2014. Paragraph 80.

¹⁸ *Mennenson v. France*. ECHR. 2014. Paragraph 92.
Labassee v. France. ECHR. 2014. Paragraph 92.

country as the children of the first and second applicants, France nonetheless denies them that status *MENNESSON v. FRANCE JUDGMENT 25* under French law. The Court considers that a contradiction of that nature undermines the children's identity within French society".¹⁹ In *Campanelli v. Italy Case* the court „decided, by five votes to two, that a child born by surrogacy abroad and those who ordered the child enjoy protection of the right to family life even though the child was obtained fraudulently, against payment, without any genetic relation and after a very short period of cohabitation (The child was purchased for 49,000 Euros and was produced on order by in vitro fertilization and then through surrogacy, and did not have any biological connection with the purchasing couple). The Court concluded that Italy could refuse to recognise the filiation established in Russia, but that taking the child away from the sponsors infringed their right to private and family life".²⁰ Susan Gately notes that „the Court considered that the Italian authorities had not given sufficient weight to the best interests of the child when balancing them against public-policy considerations. The authorities had decided to remove the child and to place him under guardianship on the grounds that he had no biological relationship with the applicants and that the applicants had been in an unlawful situation (by contacting a Russian agency in order to become parents and subsequently bringing a child to Italy whom they passed off as their child, they had circumvented the prohibition in Italy on surrogacy and the rules on international adoption). The Court said in particular, the authorities had not recognised the de facto relationship between the applicants and the child and had imposed an extreme measure, reserved for cases where children were in danger. The Court found that the couple was entitled to benefit from the protection granted by “family life” even though they had purchased the baby in violation of Italian and international norms, and kept him for six months. The Court concluded that Italy could refuse to recognise the parent-child bond established in Russia, but taking the child away from the sponsors infringed their right to private and family life”.²¹

The above mentioned cases show, that the court always makes decisions taking into account the best interests of the families and children. The court does not oblige states to change their laws imperatively, but by its decisions, it facilitates the legal problems of the families who, face problems in the state of registration. Thus, the court supports the families, who can't have their own biological children and promotes the development of medical (reproductive) tourism.

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4. *S.H. and Others v. Austria.* ECHR. 2011. Paragraph 110

¹⁹ *Mennesson v. France.* ECHR. 2014. Paragraph 96.

Labassee v. France. ECHR. 2014. Paragraph 96.

²⁰ <http://noticias.juridicas.com/actualidad/noticias/3900-el-tedh-declara-contraria-al-convenio-europeo-de-los-derechos-humanos-la-negativa-a-reconocer-la-filiacion-a-los-hijos-nacidos-de-ventre-de-alquiler/>

²¹ Gately S. „Italian surrogacy case goes to ECHR Grand Chamber». *CATHOLICIRELAND.NET.* 2015.

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