Åbo Akademi University

The European Court of Human Rights and (d)evolution of family life: An analysis of the Paradiso and Campanelli case

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Institute for Human Rights Working Paper

No. 1/2022

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1. Infertility as a spectrum and scope of the work

The state of being childless can result from one's own lack of interest to reproduce and voluntarily avoiding procreation. It can also result from the inability of persons, for medical or social reasons, to produce children. The first sub-group of childless people are more accurately termed 'childfree' persons as they have made the intentional choice to remain without child. However, the second sub-group of persons are 'involuntarily childless' because they have not chosen to not bear children. I will use the umbrella term infertility/involuntary childlessness to describe the latter group as childfree persons are out of the ambit of this work.

The World Health Organization defines clinical infertility as a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.[1] Social infertility refers to involuntary childlessness outside of medical reasons attributed to sexual orientation, relationship status, age etc. Infertility can range from persons not being able to carry a child to birth while having the genetic material needed for reproduction (pregnancy infertile persons) to those that do not produce reproductive material at all (conception infertile persons).[2]

Over the years, assisted reproductive technologies (ARTs) have been developed to cure some forms of infertility via human and technological intervention in the reproduction process. Our ability to intervene in biological processes and manipulate human life has raised new questions about the nature of life and death and has brought novel ethical and legal questions into the world of clinical and legal practice.[3] Infertility becomes a legal issue when persons that cannot naturally procreate resort to ARTs to have a child and seek legal recognition of the relationship in their state. One of the most highly

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[1] See WHO Factsheet on infertility, 14 September 2020, https://www.who.int/news-room/fact-sheets/detail/infertility, last accessed on 17.10.2022.

[2] World Health Organization (WHO), *International Classification of Diseases*, 11th Revision (ICD-11) Geneva, GA31, WHO 2018.

[3] Evans, Donald, *Creating the Child, in Evans, Donald (ed.),* Creating the Child-The Ethics, Law and Practice of Assisted Procreation, Martinus Nijhoff Publishers, 1996, p. 3.

debated technologies is the use of IVF using heterologous techniques, including in surrogacy arrangements.[4] The term surrogacy refers to the process through which a woman intentionally becomes pregnant with a baby that she does not intend to keep.[5] It involves bearing of a child on request for another family or person.[6]

Because of diverse practices among Council of Europe (CoE) member states, medical travel from prohibitionist states that proscribe such Medically Assisted Procreation (MAP) to permissionist states or at the very least those that tolerate the practice has become commonplace. Because of varying national laws of recognition of parent-child relationships among member states, the European Court of Human Rights (ECtHR) has dealt with conflicts of laws between host and receiving states relating to parentage established in host states when receiving states refuse to recognize parentage based on national laws that prohibit the practice and therefore the consequences flowing from the same. It has had the opportunity to assess obligations of states when it comes to recognition of parentage stemming out of certain MAPs, such as heterologous techniques and surrogacy arrangements.[7] The right of access to MAPs and its legal consequences to parents and children has been extensively covered by the Court under the right to respect for family life and/or right to privacy under Article 8 of the European Convention on Human Rights (ECHR).

This working paper will show how the Court's judgment in the *Paradiso and Campanelli v. Italy* case as well as the subsequent Advisory Opinion on recognition of legal parent-child relationship, have contributed to the regression of state parties' obligations towards conception infertile persons/couples who enter surrogacy agreements in connection to the right to respect for family life and privacy protected under Article 8 of

[4] The use of heterologous technique in IVF refers to having recourse to gametes external to the couple/person who desires to have a child because of inability to contribute one's own gametes. Homologous technique simply refers to in vitro fertilization of gametes belonging to the persons who want to have children. This method is less controversial as the genetic contributors seek to have their biological relationship to the child legally recognized. In heterologous techniques, the genetic and gestational roles are divided among gamete contributors and those with intentions to have parental rights over the child, referred to as intending/intended parents. In gestational surrogacy, the roles in procreation are further divided between genetic contributors, gestational carrier and intended parents.

[5] Stark, Barbara, *Transnational Surrogacy and International human rights law*, ILSA Journal of International and Comparative Law, Vol. 18, No.2, 2012, p.1.

[6] Svitnev, K., *Legal Control of Surrogacy-International Perspectives*, in Shenker, Joseph G., Gruyter, Walter (eds.), Ethical Dilemmas in Assisted Reproductive Technologies, Blackwell Publishers, 2011, p. 149.

[7] Palomares, Guillem, *Right to family life and access to medically assisted procreation in the case law of the European Court of Human Rights* in The Right to Family Life in the European Union, Edited by Maribel Gonzalez Pascual and Aida Torres Perez, Routledge, 2017, p. 103.

the ECHR. Subsequently, the case law has evolved as I discuss elsewhere.[8] However, as most have been based on the premise made in the pilot case and the first Advisory Opinion of the Court, it is important to analyse the reasoning used therein.

To achieve this, this paper will first examine the Court's established principles in relation to the applicability of Article 8 in the use of ARTs for procreation as well as obligations of receiving states to recognize parent-child relationships formed via surrogacy arrangements in host states prior to the final judgment in the *Paradiso and Campanelli v. Italy* case. It will then examine how the dynamic changed after the Grand Chamber judgment in the case as well as the Advisory Opinion to show how the distinction in the treatment of completely infertile persons/couples incapable of making genetic contribution to the child may amount to discrimination against them.

2. Applicability of Article 8 to ARTs: Widening the scope

Article 8 of the ECHR covers four principal interests; namely, private life, family life, home and correspondence.[9] In order to invoke a claim based on this provision, applicants must show that the right falls within the scope of at least one of the interests protected.[10] As the ECHR is a living instrument, the ECtHR has used its judgments to broaden the scope of the provisions in order to interpret the convention in light of present-day conditions.

Once a right has been established to fall within the ambit of a protected interest, interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of that article as being "in accordance with the law", pursuing one or more of the "legitimate aims" listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned.[11] The Court, in its case law relating to the use of ARTs for procreation in general as well as the recognition of parentage in relation to the use of surrogacy by infertile persons, has consistently

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[8] See Tesfaye, M, *What makes a Parent? Challenging the Importance of a Genetic Link for Legal Parenthood in International Surrogacy Arrangements*, International Journal of Law, Policy and the Family, Volume 36, Issue 1, 2022, ebac010, https://doi.org/10.1093/lawfam/ebac010

[9] Article 8 of the ECHR states: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[10] Applicants are persons that fulfil the victim requirement under Article 34 of the ECHR.

[11] Case of *Wagner and J.M.W.L. v. Luxemburg*, App. No. 76240/01, 28 June 2007, paras 123-4.

affirmed the applicability of Article 8 in relation to the right to respect for private life and family life.

Private life is a broad concept which cannot be exhaustively defined. The Court has determined that the provision protects the right to personal development, whether in terms of personality or personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees.[12] The notion of "family life" under Article 8 of the Convention is not confined solely to marriage-based relationships and may encompass other *de facto* "family ties" where the parties are living together outside marriage. The existence or non-existence of "family life" is essentially a question of fact depending upon the real existence in practice of close personal ties.

a. Homologous (IVF) techniques of procreation and their place

The first instance for the Court to determine the place of use of ARTs for procreation came in 2007.[13] The ECtHR recognized for the first time in the *Evans v. The United Kingdom* case that the right to respect for the decision to become a parent in the genetic sense fell within the scope of the right to respect for "private life" under Article 8 of the ECHR.[14] This case involved the claim by Ms. Evans that it is within her right to private life protected under Article 8 to utilize the gametes made from her egg and her ex-boyfriend's sperm to have a child because she could no longer produce eggs owing to an illness. The last of her eggs were used to fertilize Mr. J's (her ex-partner's) sperm in vitro and were frozen for use to have children in the future to which both parties agreed. However, two years later, their relationship dissolved, and J revoked his consent to have the gametes used to produce a child.

Both the Chamber and the Grand Chamber established that the right to be or not to be a parent falls within the scope of "private life" under Article 8 of the ECHR.[15] Although the Court passed a judgment in favour of J's right *not* to be a parent, the Court did

[12] See for instance, *Mennesson v. France*, App. No. 65192/11, ECtHR 26 June 2014, paras 77, 80, 90. See also *Paradiso and Campanelli v. Italy*, App. No. 25358/12, 27 Jan 2015, paras 67, 70, 79 for further discussion on this.

[13] *Evans v. The United Kingdom*, App. No. 6339/05 ECtHR 10 April 2007 was first introduced to the Court in 2005 and the Chamber made the first judgment in 2006 but the case was referred to the Grand Chamber that made the final judgment in 2007.

[14] *Evans v. The United Kingdom*, App. No. 6339/05 ECtHR 10 April 2007, [GC], para. 72.

[15] Id, para. 71, in connection to the scope of "private life" under Article 8, the Court reiterates the Chamber definition by stating "...incorporates the right to respect for *both the decisions to become and not to become* a parent".

further affirm the right to become a genetic parent and that the right to resort to assisted reproduction to do so falls within the scope of "private life".

In December of the same year, the Grand Chamber further widened the scope of Article 8 in the *Dickson v. The United Kingdom* case by stating that the decision of the applicants' right to become genetic parents falls within their *private and family lives*.[16] Irrespective of the final judgments in these cases, the inclusion of such rights in the scope of the provision does widen the scope of protection provided by Article 8(1). However, in both the above-mentioned cases, the procreation rights only involve situations where the gametes are contributed by the couples themselves, meaning, homologous techniques would be used to extract the gametes from the couples themselves. These are not controversial judgments as the techniques refused to the applicants were otherwise available and allowed by the United Kingdom.

b. Heterologous techniques for procreation

A more interesting case that involved the issue of using *donor* gametes for procreation was first brought before the Court in the *S.H. and others v. Austria* case.[17] Two married couples claimed that the prohibition under domestic law[18] of the use of ova in general and sperm from donors for *in vitro* fertilisation was a violation of the right to privacy protected by Article 8 and the right to found a family protected by Article 12 of the ECHR.

The case was brought by four applicants, making up two couples, three of which have some form of infertility. The first applicant is a woman who has fallopian-tube-related infertility which makes it impossible to fertilize her own egg while the second applicant, her husband, is completely infertile. They required an IVF treatment using donor sperm, which was illegal under Austrian law at the time. The third applicant cannot produce any

[16] *Dickson v. The United Kingdom*, App. no. 44362/04 ECtHR 10 April 2007, [GC], para. 66. The case concerned the refusal of the United Kingdom to allow the applicant, who was a convicted criminal serving a 15-year life sentence, access to artificial insemination facilities in order to have a child genetically related to him and his wife, the second applicant. Because of the length of his sentence, this method would be the only available option to have a child in the genetic sense. Although the practice is legal in the United Kingdom for couples, it was refused in this instance because he is a convicted criminal.

[17] *S.H. and Others v. Austria*, App. No. 57813/00, ECtHR Apr.1 2010.

[18] Section 3 of the Artificial Procreation Act states that heterologous artificial procreation techniques for in vitro fertilisation is prohibited. This law prohibits sperm donation if it is to be used to fertilize the egg of the prospective mother in vitro (outside of the womb). So, for IVF, only homologous embryo transfer is allowed wherein future parents are to provide the genetic material for the oocytes to be fertilized in vitro. Additionally, the law also prohibits ova donation of any kind. However, the law does permit sperm donation for in vivo fertilization as an exception to the homologous rule.

ova (conception infertile) but has a functioning uterus to carry a child (pregnancy fertile) and the fourth applicant, her husband, is totally fertile. They required a donor ovum to be fertilized *in vitro* with her husband's sperm. Again, this is also illegal under Austrian law. The Austrian Constitutional Court agreed that the right of the couples to conceive a child and resort to medically assisted procreation techniques fell within the sphere of their Article 8 rights.[19]

Here, the Court again acknowledged that the decision to have a child and making use of medically assisted procreation for that end comes within the ambit of Article 8, as such a choice is clearly an expression of private and family life.[20] The Court, however, did not find a violation by Austria for the ban of heterologous means of reproduction as there is no wide European consensus on allowance of such methods. It concluded that the ban falls within the wide margin of appreciation available for Austria.

c. Surrogacy arrangements - genetic link

In 2014, the Court passed its first judgment in relation to access to surrogacy arrangements abroad prohibited by national laws of receiving/home states and their obligation to recognize such relationships formed abroad.[21] The applicants in the *Mennesson v. France* case were Mr and Mrs Mennesson, who are French nationals, and the Mennesson twin girls, American nationals born in 2000. Owing to Mrs Mennesson's infertility, the applicant couple entered a surrogacy arrangement in the United States. The embryos produced using the sperm of Mr Mennesson were implanted in another woman's uterus. As a result, the Mennesson twins were born. The judgment given in Supreme Court of California in the first case ruled that Mr and Mrs Mennesson were the twins' parents.[22] The French authorities, suspecting that the case involved surrogacy arrangements, refused to enter the birth certificates in the French register of births, marriages and deaths. The birth certificates were nevertheless entered in the register on the instructions of the public prosecutor, who subsequently brought proceedings against the couple with a view to having the entries annulled. The applicants' claims were dismissed at final instance by the Court of Cassation on 6 April 2011 on the grounds

[19] *S.H. and Others v. Austria*, (n 17).

[20] Id, para. 60.

[21] *Mennesson v. France*, (n 12). The Court simultaneously conducted judgment in the case of *Labassee v. France*, App. No. 65941/11 because of the similarity of the merits. No separate discussion will be made in relation to that case here.

[22] *Mennesson v. France,* (n 12), paras 13-18.

that recording such entries in the register would give effect to a surrogacy agreement that was null and void on public-policy grounds under the French Civil Code.

This is a landmark case for several reasons; firstly, the Court had the opportunity to determine the legal consequences of travel for surrogacy arrangements and the obligation of states in that relation. Secondly, unlike cases before this, it made a post-birth determination rather than a pre-birth one as the arrangement had already been executed in a host state where the practice is legal. The first two applicants complained that, to the detriment of the children's best interests, they were unable to obtain recognition in France of the legal parent-child relationship lawfully established abroad between the first two applicants and the third and fourth applicants born abroad as the result of a surrogacy agreement. The surrogate children were also victims in this case as per Article 34 of the ECHR enabling the Court to make a determination based on, not only the obligations of France to the Intending/Intended Parents (IPs) but also to the children directly. They complained of a violation of the right to respect for their private and family life guaranteed by Article 8 of the ECHR.[23] Lastly, it should be noted that the French government did not take steps to remove the children from the custody of the IPs and so, separation was not at issue in relation to the claims of violation of Article 8 rights.

Again, the Court affirmed the applicability of Article 8 of the ECHR to the IPs and surrogate children in terms of both the right to respect for family and private life. [24] In relation to the surrogate children's private life, the Court made an analysis of the impact that the lack of legal recognition of the parent-child relationship would have a negative effect on their identity which forms part of a person's private life. The Court's analysis on the merits will be discussed in a separate section below. However, it is worth noting that the inclusion of the children as applicants and the establishment that their rights

[23] *Mennesson v. France*, (n 12), para. 43.

[24] In relation to the applicability of the protection to the surrogate children, the Court stated in para. 87-95 that the lack of recognition in French law of the parent-child relationship between the applicants affected their family life on various levels. The applicants were obliged to produce the American civil-status documents – which had not been entered in the register – accompanied by a sworn translation whenever access to a right or a service required proof of parentage. Furthermore, the applicant children had not obtained French nationality to date, a situation which affected the families' travels and caused concern regarding the children's right of residence in France once they became adults and hence regarding the stability of the family unit. There were also concerns as to the continuation of family life in the event of the death of one of the biological fathers or the separation of one of the couples.

also fall within the scope of Article 8 has had important impact on the judgment of the Court in this case. [25]

In connection to the *Mennesson v. France* case, although the application concerned the refusal of the French authorities to recognize the legal parent-child relationship between the applicants, the ECtHR took the opportunity to clarify its position on the legal status of surrogacy arrangements in CoE member states. In that relation, the Court conducted a comparative survey on the status of surrogacy in member states.[26] It concluded that no consensus existed in Europe at the time of the application, on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between IPs and children thus conceived abroad. Lack of consensus reflects the fact that recourse to a surrogacy arrangement raises sensitive ethical questions. Even so, the judgment in this case was in favour of the applicants because there was a genetic link between the applicant father and the twins. In addition, the fact that family life was said to exist between the applicants enabled the Court to view the case from the perspective of the preservation of the unit. The inclusion of the children as applicants in the case also aided this determination.

d. Surrogacy arrangements - no genetic link

The Grand Chamber of the ECtHR in 2017, passed its final judgment in the case of *Paradiso and Campanelli v. Italy*, in relation to an infertile couple that made a surrogacy arrangement with a clinic in Russia to make use of donor gametes and a surrogate mother to carry a child to birth. Again, this was new territory for the Court which did not make a determination thus far as to its stance on heterologous techniques with no genetic link to the IPs that are incapable of making a biological and gestational contribution to the birth of the child. In all the cases discussed above, the prospective child and those already born have a biological link to at least one of the IPs.

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[25] The Court stated 'The French authorities, although aware that the applicant children had been identified elsewhere as the children of the intended parents, had nevertheless denied them that status in the French legal system. This contradiction undermined their identity within French society. Furthermore, although Article 8 of the Convention did not guarantee a right to obtain a particular nationality, the fact remained that nationality was a component of individual identity. Although their biological fathers were French, the applicant children faced worrying uncertainty as to the possibility of obtaining French nationality, a situation that was liable to have negative repercussions on the definition of their own identity. Furthermore, the fact that the applicant children were not identified under French law as the children of the intended parents had implications in terms of their inheritance rights. Read *Mennesson v. France*, (n 12), paras 96-98.

[26] *Mennesson v. France*, (n 12), paras 77-79.

The Chamber's judgment in the *Paradiso and Campanelli v. Italy* case was markedly different from the final judgment in terms of both its determination of the scope of Article 8 and analysis of the merits of the case.[27] This working paper will discuss both judgments to show the implications of the reversal of the Chamber judgment.

In 2006, the applicants, who are a married couple, had obtained authorisation to adopt a child. After unsuccessfully attempting to have a child through homologous *in vitro* fertilisation they opted for a gestational surrogacy arrangement to become parents. For that purpose, they contacted a Moscow-based clinic which specialised in assisted-reproduction techniques and entered into an agreement with the clinic. After successful *in vitro* fertilisation in May 2010, supposedly carried out using the second applicant's sperm and donor eggs, two embryos "belonging to them" were implanted in the womb of a surrogate mother. A baby was born in February 2011. 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 baby's parents. In line with the provisions of the Hague Convention Abolishing the Requirement for Legalisation for Foreign Public Documents, an apostille was placed on the Russian birth certificate, which did not refer to the surrogacy arrangement.

In May 2011, having requested that the Italian authorities register the birth certificate, the applicants were placed under investigation for "altering civil status" and violation of the adoption legislation. The claim made by the authorities is that the couple had brought the child into the country in breach of Italian law against using donor gametes in ARTs and surrogacy and of the authorisation to adopt, which had ruled out the adoption of such a young child. On the same date the public prosecutor requested the opening of proceedings to release the child for adoption, since he was to be considered as abandoned. In August 2011, a DNA test was carried out at the Minors Court's request. It showed that, contrary to what the applicants had submitted, there was no genetic link between the second applicant and the child. In October 2011, the Campobasso Minors Court decided to remove the child from the applicants. Contact was forbidden between the applicants and the child. In April 2013, the court held that it was legitimate to refuse registration of the Russian birth certificate and ordered that a new birth certificate be issued, indicating that the child, T.C., had been born to unknown parents and giving him a new name. The proceedings for the child's adoption were pending. The Minor's court considered that the applicants did not have status to act in those proceedings.

This case has various similarities with the *Mennesson* case because it required the Court again, to make a post-birth determination of the relationship between the IPs and the

[27] *Paradiso and Campanelli v. Italy*, App. No. 25358/12, 27 Jan 2015.

surrogate child. It also involved travel abroad to enter an arrangement otherwise illegal in the receiving state, Italy. However, there are important differences that should not be ignored. Firstly, the IPs do not have any genetic link to the child, which gave the Court the chance to determine whether family ties exist between the IPs and the child. Another glaring difference is the fact that the child was not allowed to be an applicant in this case, owing to the fact that the IPs had lost *locus standi* in the national courts to represent the interests of the child who was removed from their custody in October 2011, nine months after his birth.[28] Also worth noting in this connection is that the Court did not rule directly on the issue of recognition of the legal relationship between the IPs and the child per se, because the claim tied to recognition was not admissible owing to non-exhaustion of local remedies.[29] Instead, the Court considered whether the removal of the child was a violation of convention-protected rights.

When it comes to the scope of Article 8, the Chamber accepted that both interests, family life and private life, of the applicants were affected.[30] The Court's analysis of the creation of family ties and the existence of "family" for the purposes of Article 8 is in line with its previous case law. The existence or non-existence of "family life" within the meaning of Article 8 is a question of fact depending upon the real existence in practice of close personal ties.[31]

Interestingly, the Chamber used the lack of genetic link between the applicants and the child to exclude the child from being a "victim" as required by Article 34 of the ECHR. The Court noted that irrespective of the question of whether the birth certificate drawn

[28] Id, para. 49.

[29] For more on the Court's analysis on this, look at *Paradiso and Campanelli v. Italy,* (n 17), paras 60-61 of Chamber judgment.

[30] The Court in its analysis of the existence of family ties and applicability of Article 8 stated in id, para. 69: "In the present case, the applicants were unable to have the particulars of the Russian birth certificate establishing the legal parent-child relationship entered in the civil status registers. As this certificate had not been recognised under Italian law, it had not given rise to a legal relationship of kinship strictly speaking, although the applicants had had, at least initially, parental responsibility for the child, as shown by the request for suspension of parental responsibility, brought by the court-appointed adviser. Accordingly, the Court must take the de facto family ties into account. In this connection, it notes that the applicants had shared with the child the first important stages of his young life: six months in Italy, from the child's third month of life. Prior to that period, the first applicant had already spent some weeks with him in Russia. Although that period was in itself relatively short, the Court considers that the applicants had acted as parents towards the child and concludes that there existed a de facto family life between the applicants and the child. It follows that Article 8 of the Convention is applicable in the present case".

[31] For further discussion, see *L. v. the Netherlands, Moretti and Benedetti v. Italy,* App. No. no. 16318/07, 10 April 2010*, Kopf and Liberda v. Austria,* App.no. 1598/06, 17 April 2012, *Wagner and J.M.W.L. v. Luxembourg*, (n 11), where the Court found the existence of family life without genetic link between the parents and the children in all instances.

up in Russia had legal effect in Italy, the child had been placed under guardianship since 20 October 2011 and had been represented by the guardian in the domestic proceedings with a new identity and a new birth certificate.[32]

However, the Chamber used the same reason in its analysis of the applicability of Article 8 to the complaint in relation to the private life of the second applicant. In this connection, the Court noted that the protection of the provision protects both family ties and respect for private life, which includes the relationship with 'others' outside of the family unit. It further stated that it is in the interest of the second applicant, who sought to determine his biological link to the surrogate child, to have his legal paternity recognized in Italy. The Chamber concluded that the IP father's establishment of this link with the child has a direct connection to his private life and falls within the scope of Article 8. This analysis is markedly different from the reasoning given for the applicability of respect for family life as it did not actually take the interpersonal relationships formed between the IPs and the child or the first applicant's need to have the legal relationship established abroad recognized in Italy.[33] Also, in the *Mennesson v. France* case, the Court

[32] The Court stated, para. 49: "In the present case, the Court notes at the outset that the applicants have no biological ties with the child. Irrespective of the question of whether the birth certificate drawn up in Russia had legal effect in Italy, and if so, what effect, the child had been placed under guardianship since 20 October 2011 and had been represented by the guardian in the domestic proceedings. The proceedings to have the parent-child relationship recognised in Italy were unsuccessful and the child has a new identity and a new birth certificate. The applicants were also unsuccessful in the proceedings to adopt the child. The procedure to have the child adopted by another family is underway and the child has already been placed in a foster family. No signed form of authority has been submitted authorising the applicants to represent the child's interests before the Court. This implies that, from a legal point of view, the applicants do not have standing to represent the minor's interests in the context of judicial proceedings".

[33] The Court stated, para. 70: "As a subsidiary consideration, the Court observes that in the context of the proceedings brought to obtain recognition of the parent-child relationship, the second applicant underwent a DNA test. It is true that no genetic link was established between the second applicant and the child (see, *a contrario, Keegan v. Ireland*, App. no. 16969/90, 26 May 1994, para. 45). The Court reiterates, however, that Article 8 protects not only "family" but also "private" life. This includes, to a certain degree, the right to establish relationships with others (see, *mutatis mutandis*, *Niemietz v. Germany*, App. No. 13710/88, 16 December 1992, para. 29, Series A no. 251-B). There seems, furthermore, to be no reason of principle why the notion of "private life" should be taken to exclude the determination of a legal or biological relationship between a child born out of wedlock and his natural father (see *Mikulić v. Croatia*, APP. No. 53176/99, 7 February 2002, para. 53, ECHR 2002 I). The Court has already held that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality (see *Gaskin v. the United Kingdom*, App. No. 10454/83, 7 July 1989, para. 39, Series A no. 160). In the present case, the second applicant sought to establish, by judicial means, whether he was the natural father. His request for recognition of the paternity that had been legally established abroad was thus coupled with a search for the biological truth, seeking to determine his links with the child. Consequently, there was a direct link between the establishment of paternity and the second applicant's private life. The facts of the case accordingly fall within the ambit of Article 8 of the Convention (see *Mikulić*, cited above, para. 55)".

focused on the best interests of the twin children and the formation of their identity to include the right to respect for private life. However, the Court chose, in the *Paradiso and Campanelli v. Italy* case, this route because the child was not an applicant in the case owing to the lack of genetic link with the first and second applicants.

The significance attached to genetic links between parents and children in surrogacy arrangements becomes more important in the Grand Chamber's analysis of this case which reversed the Chamber's judgment. It is important to note that the Chamber's judgment was not unanimous. There were two partly dissenting opinions that opposed the majority's conclusion as to the applicability of Article 8 in the context of family life because the applicants and child have no biological relationship and that the origin of the custody is based on an illegal act, in breach of public order. These arguments were later used by the Grand Chamber of the Court.

3. The (d)evolution of protection of infertile persons: Narrowing the applicability of Article 8

The *Paradiso and Campanelli v. Italy* case was referred to the Grand Chamber by the Italian government. The Grand Chamber in this instance took a different stance from the Chamber on the existence of family life by concluding that "family ties" did not exist between the IPs and the surrogate born child.[34] The termination of the applicants' relationship with the child was the consequence of the legal uncertainty that they themselves had created in respect of the ties in question, by engaging in conduct that was contrary to Italian law and by coming to settle in Italy with the child. The Italian authorities had reacted rapidly to this situation by requesting the suspension of parental authority and opening proceedings to make the child available for adoption. It is important to decipher the reasoning of the Court for the exclusion as it had a detrimental effect on the final judgment of the Grand Chamber. Each reason will be stated and discussed below.

The Grand Chamber first investigated the uncertainty of the ties from a legal perspective. Here, it acknowledged that the Italians took steps to revoke parental authority of the IPs when placing the child with a state-appointed guardian after he was removed from their custody. This, according to the Court, shows that there was a parent-child relationship acknowledged implicitly by the government. However, it noted that the situation created by the applicants was contrary to Italian law. This is despite

[34] Full legal summary can be read on http://hudoc.echr.coe.int/eng?i=002-11439

the acknowledgment that Russian law does not require there to be a biological link to grant parental rights to IPs in surrogacy arrangements. Also, the Russian birth certificates only indicate that the IPs are "parents" and not "biological parents" as the gametes were purchased by the applicants who therefore are the owners of the same. The Italian authorities had used national law to determine the parentage of the surrogate child because they believed that the birth certificate contains "untruthful" information. According to national law, the gamete donors would be the legal parents. As they remain unknown, the government named the child as parentless, as being in a "state of abandonment". The Grand Chamber agreed with the decision to remove the child because the IPs entered into a surrogacy agreement using heterologous techniques in breach of Italian law, which led Italians to resort to their own laws to determine the nature of the relationship.

This was a dangerous precedent to set because the Court seemed to agree with the designation under Italian law that an "illegitimate" family unit was formed by the IPs who did not make a genetic contribution to the child.[35] Although this was perfectly legal under Russian law, the fact that they wanted to settle in Italy, which classifies such family units as "illegitimate", led to its rejection under Italian law. The Court, by agreeing with the national authorities as to the non-existence of family ties, made a distinction between a "legitimate" and an "illegitimate" family, a distinction that was rejected by the Court years ago.[36] The Grand Chamber also took into consideration the absence of any biological tie between the child and the IPs.[37] It noted that, despite the absence of biological ties, the Court has previously found that family life existed on account of the close personal ties between them, the role played by the adults vis-à-vis the child, and the time spent together.[38]

In the *Paradiso and Campanelli* case, the time spent with the surrogate child amounted to a total of about eight months as the first applicant had travelled to Russia for the birth of the child and had spent about two months there before returning to Italy where six

[35] This argument was made by dissenting judges annexed to the judgment. For full argument of the judges, *Paradiso and Campanelli v. Italy,* App.No. 25358/12, [GC], 24 January 2017, Joint dissenting opinion of judges Lazarova, Tragovska, Bianku, Laffranque, Lemmens andGrozev, paras 2-5.

[36] *Marckx v. Belgium*, App. no. 6833/74, 13 June 1979, para. 31.

[37] For the full analysis of the Court on applicability of Art 8, read the judgment *Paradiso and Campanelli v. Italy*, (n 35) paras 142-158.

[38] *Moretti and Benedetti v. Italy*, (n 31), where the child lived with the applicants since he was one for a period of 19 months and the Court, despite there not being any biological ties, found that family life existed. Also*, Kopf and Liberda v. Austria*, (n 31), case concerned a foster family which had cared, over a period of about forty-six months, for a child who had arrived in their home at the age of two and the Court found that family life existed because of the genuine bond created and the foster parents' concern for the child's well-being.

months was spent with both the applicants. The Court also considered that although there is no set minimum time to designate the existence of family life, it concluded that this time is not sufficient, given that duration is an important factor in the determination of the "quality" of the bond created. It compared the situation with the *D. and Others v. Belgium* case, where the Court found the existence of family life only after two months of IPs living with the surrogate child after which the child was removed from their custody. However, it said that in that case, there was a biological relationship with one of the applicants and that it played a part in the designation.

The exclusion of "family life" from applicability to the *Paradiso* case will prove to be detrimental because the case did not primarily concern the refusal to recognize the legal parent-child relationship formed between the applicants and the child but rather the removal of the latter from their custody. In the *Mennesson* case, although the case fell within the ambit of family life, the Court found no violation of respect for family life because the French authorities did not take steps to remove the twins from the IPs. In this case, the interruption of the relationship between the IPs and the child based on the absence of biological ties and the short duration of the relationship seem to outweigh the *de facto* bond that the applicants proved existed.

Additionally, removal of a child from custody, which entails the severance of family ties, should only be done in instances where the family has been shown to be particularly unfit. This is required by the best interests of the child principle which dictates that the child's interests must be the paramount consideration in cases where a child is involved.[39] The absence of family ties eliminates the need to make such considerations. The Grand Chamber however, reiterated the applicability of the right to respect for private life. In this relation, it affirmed that the applicants had a genuine intention to become parents and had gone through considerable lengths to achieve it. It drew parallels to the *S.H. and others v. Austria* case, in which it concluded that the case concerned 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. However, in the *S.H.* case the applicability of Article 8 was made considering both the right to respect for family and private life.

The next section will discuss how narrowing the scope of applicability of Article 8 has impacted the rights of totally infertile persons. It discusses the merits of the *Paradiso and Campanelli* case judgment, comparing it to the Court's previous case law, to show

[39] See for instance *Kearns v. France*, App. no. 35991/04, 10 January 2008, para. 79; *R. and H. v. the United Kingdom*, App. No. 35348/06, 31 May 2011, paras 73 & 81; and *Y.C. v. the United Kingdom*, App. No. 4547/10, 13 March 2012, para. 134.

how the rights of completely infertile couples and persons are disproportionately protected.

4. Compliance with Article 8 of the Convention

Once an interest(s) has been identified as falling under Article 8 of the ECHR, the next step is to assess whether member states have complied with conditions upon which they may interfere with the enjoyment of a protected right. So, the Court, in all cases presented before it, investigates whether an interference falls within the limitations to the right prescribed under Article 8(2). Such interference will be in breach of Article 8 of the ECHR unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" to achieve the aim or aims concerned.

The Grand Chamber in the *Paradiso and Campanelli* case considered 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. However, unlike the Chamber, it did not find a violation by Italy. We will now look at all the elements considered by the Court to show how exclusion of family life caused by and coupled with the lack of genetic link between IPs and a surrogate child marginalizes a specific group of infertile persons.

a. "In accordance with the law"

To invoke violation of Article 8, there must be an interference with the protection granted. There is no question that in all cases discussed, there has been an interference by the governments. The more relevant question is to assess whether an interference is made in accordance with the law. Here, the requirement is that a measure or lack thereof must have a basis in domestic law. It 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.[40]

In the *Paradiso case*, the Italian authorities chose to apply their own national rule on conflict of laws instead of basing their decisions on the birth certificate issued and certified by the Russian authorities.[41] In accordance with the Hague Apostille

[40] *Sunday Times v. the United Kingdom*, App no. 6538/74, 26 April 1979, para. 49.

[41] For full analysis, see *Paradiso and Campanelli v. Italy*, [GC], (n 35), paras 168-174.

Convention, the only effect of the Russian birth certificate was to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears.[42] The limitation of the legal effect of the Apostille Convention is intended to preserve the right of the signatory states to apply their own choice-of-law rules when they are required to determine the probatory force to be attached to the content of the certified document.[43]

The Italian Private International Law Act provides that the legal parent-child relationship is determined by the national law governing the child at the time of his or her birth. However, as the child, T.C., had been conceived from the gametes of unknown donors, his nationality was not established in the eyes of the Italian courts. 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. Because his parents were "unknown", he was considered "abandoned". This triggered the application of the Italian adoption laws which required the Minors Court to order that the child be immediately taken into state custody.[44] Both the Chamber and the Grand Chamber in this case considered that these measures were foreseeable and accepted that the interference was in accordance with the law.

I disagree with the notion that the child was "abandoned" because the Italian adoption law define it as "being deprived of all emotional or material support from the parents or the members of his or her family responsible for providing such support".[45] In fact, the IPs provided a home for the child for a period of six months in Italy and prior to this, the first applicant lived with him for a short period in Russia. The Minors Court requested that a team of social workers present a report on the living conditions of the applicants and the child in May 2011.[46] In the report, the team indicated that the applicants were

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[42] See Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents. Hague Conference on Private International Law, Article 5.

[43] See Explanatory Report on the 1961 Hague Apostille Convention, https://www.hcch.net/en/publications-and-studies/details4/?pid=52

[44] Section 8 of *Law no. 184/1983 ("the Adoption Act")*, as amended by *Law no. 149 of 2001*, entitled "The Child's Right to a Family" provides that "the Youth Court may, even of its own motion, declare ... a minor available for adoption if he or she has been abandoned in the sense of being deprived of all emotional or material support from the parents or the members of his or her family responsible for providing such support (other than in temporary cases of force majeure)".

[45] Ibid.

[46] Details of the report was presented to the Court, see *Paradiso and Campanelli v. Italy*, [GC], (n 35), para. 25 also, the applicants asked a psychologist, Dr I., to prepare a report on the child's well-being, see para. 34.

viewed positively and respected by their fellow citizens, and that they had a comfortable income and lived in a nice house. According to the report, the child was in excellent health and his well-being was self-evident, since he was being cared for by the applicants to the highest standards. Additionally, the IPs also consulted with a psychologist who concluded that it would be in the best interests of the child to remain with the IPs as they have provided a healthy and happy home.[47]

In reaching judgment to remove the child from the custody of the applicants, the domestic courts attached great importance to the unlawful situation in which the applicants found themselves that, according to the Minors Court, resulted from a narcissistic desire on the part of the parents, or that the child was intended to resolve problems in the couple's relationship. In consequence, doubt could be cast on their emotional and child-raising capacities.[48] This argument was acceptable to both the Chamber and the Grand Chamber in this case. I believe that it is partly because the scope of applicability of Article 8 was limited and excluded the protection of the right to respect for family life element by the Court. Owing to that, the relationship between the applicants and the child was not sufficiently considered. The scope of consideration was the private life of the applicants and their development. The family life umbrella would have been a better approach, given the fact that the case involves the separation of the child and removal from the applicants rather than mere refusal to recognize legal parentage without a threat to affect *de facto* family life.

I agree with the dissenting Grand Chamber judges in that if the only reason for such a finding was that the applicants were not, legally speaking, the parents, the interpretation of family life in this instance is excessively formal, in a manner that is incompatible with the requirements stemming from Article 8 of the ECHR in such cases. In the many cases before the Court where the facts of the case were similar, the Court had found that family life existed. The main reasons for such a finding is the *de facto* existence of familial ties between adults with no biological ties and the children in their

[47] See *Paradiso and Campanelli v. Italy*, App. No. 25358/12, [GC], (n 35), para. 34 which states "The report drawn up by Dr I. on 22 September 2011, after four meetings with the child, indicates that the applicants – who were attentive to the child's needs – had developed a deep emotional bond with him. The report indicated that the grandparents and other family members also surrounded the child with affection, and that he was healthy, lively and responsive. Dr I. concluded that the applicants were suitable parents for the child, both from a psychological perspective and in terms of their ability to educate him and bring him up. She added that possible removal measures would have devastating consequences for the child, explaining that he would go through a depressive phase on account of a sense of abandonment and the loss of the key persons in his life. In her opinion, this could lead to somatic symptoms and compromise the child's psycho-physical development, and, in the long term, symptoms of psychotic pathology could emerge."

[48] To read full reasoning of national Courts, see *Paradiso and Campanelli v. Italy,* [GC] (n 35), para. 37 ff.

care. A good comparison is the case of *Wagner and J.M.W.L. v. Luxembourg,* which concerned the inability to obtain legal recognition in Luxembourg of a Peruvian judicial decision pronouncing the second applicant's full adoption by the first applicant, and in which the Court recognised the existence of family life in the absence of legal recognition of the adoption. [49] It should also be remembered that the national courts took steps to revoke the parental responsibilities of the IPs indirectly acknowledging the existence of the responsibility in the first place.

The Court has clarified that, in most cases where it determined that family life existed, the relationship between the applicants that acted as parents and the children in their care was relatively recognized and tolerated.[50] It is true that the most pertinent cases relating to surrogacy did not involve the removal by authorities of a child from the custody of the IPs. However, given that the removal of a child from the family setting is an extreme measure which should only be accepted as a very last resort, a fortiori, such measures taken by the Italian authorities should have made for a stronger argument favouring the applicants in the *Paradiso* case. This was the stance taken by the Chamber, after determining the existence of family life, which found that the removal of T.C. was not a measure necessary for the fulfilment of the legitimate aims pursued.

The Court has stated that Article 8 does not protect the mere desire to found a family, it rather protects family life that already exists or at the very least, the potential for one.[51] It has also emphasized that the existence or non-existence of "family ties" is a question of fact and not of law. However, in the same vein, it excluded the protection of the relationship between the applicants and their child with whom they had developed a bond, because of the refusal of the Italian authorities to recognize the tie legally.

b. "Legitimate aims"

The infringement on protected rights can be justified if measures taken in accordance with the law fall under one of the legitimate aims pursued in Article 8(2). It is for the respondent states to justify the steps taken and the discussion of legitimate aims in the

[49] *Wagner and J.M.W.L. v. Luxembourg,* App. no. 76240/01 28 June 2007, paras 118-123.

[50] Id, para.117. See also ECtHR, Guide on Article 8 of the European Convention on Human Rights, Right to respect for private and family life, home and correspondence, Updated 31 August 2022, para. 302.

[51] See *Nylund v. Finland (dec.),* no. 27110/95, ECHR 1999-VI, in which the Court stated that the potential relationship between a child and its natural father is protected by Article 8 because of the potential of developing bonds between the father and his child.

ECtHR is usually not an in-depth one. Both the Chamber and Grand Chamber in the *Paradiso and Campanelli v. Italy* case accepted the respondent state's justification that the measures of removal of the child were taken to protect the child's "*rights and freedoms*" and "*for the prevention of disorder*".

The Court's acceptance of these aims must also be noted here.[52] The national courts gave two different reasons for the removal; the Minors Court reasoning for the removal is the illegality of the situation created by the applicants that needed state intervention with the goal of "*prevention of disorder*". The Court of Appeal on the other hand took a completely different approach and designated the child as "abandoned" and purposefully left out the retributive aspect of the measures. I share the dissenting Grand Chamber judges' opinion that it should be primarily, if not exclusively, the reasoning of the national court in the final instance that should be considered by the ECtHR when weighing whether the measures serve a legitimate aim.

Besides this, the Italian Minors Court aimed, in essence, to penalize the applicants for undertaking in a commitment that was not illegal in Russia at the time. This indirectly implies the desire by Italy to apply Italian law extraterritorially.[53] It did not consider the lawfulness of surrogacy with no genetic link to IPs in Russia and the legality under Russian law of the arrangement. The Grand Chamber's concise acceptance of this aim is also partly attributable to its finding that family life did not exist, and the separation was not looked at from the perspective of preservation of the family unit but only from the interest of the applicants to carry on their relationship with the child as part of their private life.[54]

The second legitimate aim both the Chamber and Grand Chamber accepted is the protection of the child's rights and freedoms. From the point of view of the Italian authorities, their legislation on legal parentage is primarily based on the protection of the best interests of the child. In line with this, recognition of parentage under Italian law is only possible in the event of a biological tie, or legal adoptions. Italy, before the

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[52] See *Paradiso and Campanelli v. Italy*, App. No. 25358/12, paras 73-74 for Chamber analysis & paras 175-178 of the Grand Chamber's findings.

[53] See *Paradiso and Campanelli,* [GC], Joint dissenting opinion of judges Lazarova, Tragovska, Bianku, Laffranque, Lemmens and Grozev, (n 35), para. 11.

[54] The [GC] addressed the sufficiency of the domestic courts arguments in its judgment and stated in para. 198: "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 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."

Grand Chamber, further emphasized that the biological mother, who remains unknown, is the one that gave birth to the child.[55] They argued that states have a wide margin of appreciation in cases where there is no European consensus as a justification for the ethical and legal choices they have taken.[56]

The Court, by this time, had already ruled on the issue of recognition of parentage in international surrogacy cases and margin of appreciation in the *Mennesson v. France* case in 2014. In that judgment, the Court stated that it is within the allowed margin of appreciation for France to refuse recognition of the American birth certificates from the viewpoint of the applicants' family life.[57] At first glance, this may seem to be a consistent stance because, in that case, the Court also further affirmed that it is beyond the margin provided for states to not recognize the parentage of the applicant children with their *biological* father. However, the Court, in that case reached this conclusion because the French authorities had no intention of removing the children from the custody of the applicants. It stated that it made such a determination because the refusal to register the births of the applicant children did not bar them from living together with the first two applicants. Although there are marked differences in the merits of these cases, the Chamber and Grand Chamber should have at least given due consideration to the consequences of the permanent separation of the IPs and the child in the same manner as in the *Mennesson* case. This will be expanded on in the next section. However, it is worth noting that both the Chamber and the Grand Chamber accepted this legitimate aim where the circumstances of the children's birth have a direct bearing on their differing fates in these cases. This may be seen as a distinction that was made between "legitimate" and "illegitimate" children which the Court has rejected before.

c. "Necessary in a democratic society"

The interference by a state with the protection under Article 8 must correspond to a pressing social need and must be proportional to the legitimate aims pursued to justify measures taken.[58] The breadth of margin of appreciation left to national authorities depends on various factors. Where there is no consensus among European states on a subject matter or it raises particularly sensitive moral or ethical issues, states usually

[55] *Paradiso and Campanelli*, [GC], (n 35), para. 123.

[56] Id, para. 130.

[57] *Mennesson v. France*, (n 12), paras 93-94.

[58] *Z v. Finland*, App. No. 22009/93, 25 February 1997, para. 94.

have a wide margin of appreciation, answerable to the scrutiny of the Court.[59] However, where a particularly important facet of an individual's identity or existence is concerned, the margin becomes narrower giving member states less leeway.[60] The Court has adopted a nuanced approach in the areas of heterologous assisted fertilization and in recognition of parent-child relationships legally conceived abroad.[61]

In *S.H. and others v. Austria*, the Grand Chamber stated that 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 promote legal certainty.[62] In that case though, the Court also acknowledged that it is not contrary to Austrian law for persons/couples to go abroad where such ARTs are legal to have a child if they wished. At the same time, the Court clarified that the circumstances around technology and the law are always dynamic, and that the ECHR is to be applied in light of current circumstances.[63]

This gave the Court the opportunity, in the *Mennesson v. France* case, to narrow the state's margin of appreciation by stating that where an essential aspect of the identity of individuals is at stake and the legal parent-child relationship is concerned, the margin of appreciation afforded to the respondent state needs to be reduced.[64] In the *Paradiso and Campanelli v. Italy* case, the Chamber and the Grand Chamber took markedly different stances in conducting the proportionality test which addressed whether a fair balance has been struck between the competing public and private interests by the Italian legislative provisions based on both the right to respect for family life and privacy.

The Chamber took the best interests of the child into account as the case involved the removal of a child from the IPs and family life was said to exist and weighed this private interest against the public interests that the state was seeking to protect. The Chamber accepted that national courts did not act unreasonably by applying their laws strictly to determine parentage and ignoring legal status established abroad as their approach was to meet the need of ending an illegal situation from continuing.[65] However, it made an important comparison between the *Paradiso* case and the *Wagner and J.M.W.L.* case,

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[59] *Evans v. The United Kingdom*, (n 14), para. 77. See also Guide on Article 8 of the European Convention on Human Rights, (n 50), para. 8 for more cases.

[60] Ibid.

[61] See *S.H. and others v. Austria* (n 17), and *Mennesson v. France* (n 12), cases for discussion on the Court's approach.

[62] See *S.H. and others v. Austria,* (n 17)*,* para. 110.

[63] Id, paras 114-118.

[64] See *Mennesson v. France*, (n 12), para. 80.

[65] See *Paradiso and Campanelli v. Italy*, (n 12), paras 77-79.

where the refusal to recognize parentage of a parent with no genetic link was also involved, stating that in the latter case, the authorities had no intentions of removing the child from the applicant's care. It reiterated that removal of a child that interrupts family life is a measure of last resort that can only be taken if the child is in immediate danger.[66] The Italian Minors Court determined that the child would be able to surmount the difficulties that his removal would cause because of the short period spent with the applicants on account of his young age. The Chamber found that this did not meet the requirements of the proportionality test.[67] The Chamber took into account both the interests of the child and the applicants' private interests and gave four main reasons for its finding that Italy had acted in violation of Article 8 of the ECHR.

Firstly, it rejected the state's argument that the child would have developed closer emotional ties with his intended parents had he stayed with them for longer as an insufficient reasoning to justify removal.[68] Secondly, it also underlined the fact that there has been no judgment in the criminal proceedings brought against the applicants in relation to forgery, breach of adoptions laws and altering a civil status and the removal measures were speculative. Thirdly, it rejected the argument that the applicants, who were deemed eligible by the national authorities to adopt a child in 2006, were found to be incapable of bringing up and loving the child on the sole ground that they had circumvented the adoption legislation, without any expert report having been ordered by the courts. Lastly, it considered the situation of the surrogate child that did not receive a new identity until April 2013, more than two years after his removal from the applicants. The Chamber concluded that the national authorities did not ensure that the child is not disadvantaged on account of his birth to a surrogate mother, especially in terms of citizenship or identity, which are of crucial importance.

This was an important judgment as it would be in line with the stance of the Court in previous cases concerning surrogacy wherein the necessity test was used to determine that the measures to protect public interests did not strike a fair balance with the best interests of the child.

The Grand Chamber, however, only assessed the measures ordering the immediate and permanent removal of the child and their impact on the applicants' private life, as family life, according to the Grand Chamber, did not exist. This has impacted the analysis to the detriment of the applicants because the case was not seen from the perspective of preserving a family unit which would have been the most useful consideration in a case

[66] Id, para. 80.

[67] Id, paras 81-85.

[68] Id, paras 82-88.

involving the removal of a child from the applicants. The determination made in terms of the determination of the applicants' right to personal development through their relationship of the child limits the scope of the rights of not only the applicants but also the surrogate child whom the psychologist hired by the applicants as well as the social workers from the Minors Court determined would suffer harm from the separation.

When making a determination on the margin of appreciation of states in the case, the Court relied on the lack of genetic ties of the applicants to the child and the fact that the former also lacked *locus standi* to represent the interests of the child to challenge the failure of the state to give him an identity. On these bases, the Court affirmed that Italy enjoyed a wide margin of appreciation.[69] Italy argued that, by prohibiting surrogacy arrangements, it pursued 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.[70] The government stated that the domestic courts sought to bring an end to the illegal situation created by the applicants.[71] When considering the private interests of the child, the domestic courts referred to literature on the subject and concluded that the trauma caused by the separation of a child from caregivers would not be irreparable given that there are no other factors present. This largely ignored the reports claiming the opposite made specifically in relation to the present situation. The national courts were also less than sympathetic in considering the private interests of the applicants as they determined that the child is an instrument to fulfil their narcissistic desires to have a child or exorcise their individual or joint problem.

The Grand Chamber considered that the child is neither an applicant nor a member of the applicants' family when determining whether the domestic courts struck a fair balance of the public and private interests involved in the case. It did acknowledge that, irrespective of this, the best interests of the child should still be the primary consideration in the case. Despite this, the Grand Chamber found that the domestic courts had struck a fair balance between the private and public interests because the continuation of the relationship would amount to Italy legalizing an otherwise illegal situation created by the applicants. The Court also simply agreed that the separation of the child would not cause irreparable harm.[72]

This line of argument is a dangerous one as very little emphasis was placed on the impact of the separation on the child and too much emphasis has been placed on ending an

[69] *Paradiso and Campanelli v. Italy*, [GC], (n 35), paras 192-195.

[70] Id, para. 203.

[71] Id, para. 204.

[72] Id, paras 209-210.

illegal situation. The omission of consideration of the consequences of the separation rather than the impact was again supported by the Court as the subject matter for consideration is not the preservation of a family unit that had been deemed non-existent.

Lastly, the Grand Chamber acknowledged that the domestic courts did not take into consideration the impact of the separation on the applicants. The reason for this omission was the lack of genetic ties and the illegality of their actions. They accepted this argument as sufficient to determine that a fair balance has been stuck between their private interests and the public ones that were very weighty. Again, with respect to the illegality of the applicants' actions, the applicants resorted to a surrogacy arrangement in Russia where heterologous techniques using donor gametes were legal at the time of the arrangement. They obtained a child legally, as evidenced by the initial recognition of the Italian consulate in Russia. The Italian authorities should have relied on these facts rather than demanding that the measures taken legally in another state align with their national laws. This is because Italian law does not have extraterritorial application that would enable it to characterize the actions taken legally in another country as illegal.

The judgment by the Chamber in this case had found a violation by Italy of Article 8. However, by then, the child was already living with another family with whom he had developed close bonds. So, even with that finding, the Court did not order the return of T.C. to the applicants. However, the reversal of the judgment by the Grand Chamber and the determination that no family life existed, owing to the illegality of the applicants' actions and lack of genetic link, does not serve as a good pilot case for persons/couples that are conception infertile and unable to contribute to the genetic make-up of a surrogate child that may bring their case before the Court in the future.

5. The aftermath - Advisory Opinion of the European Court of Human Rights

In April 2019, the French Cassation Court presented two questions for the ECtHR concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.[73] The French legislation, following the *Mennesson v. France* judgment, had been amended to permit recognition of a legal parent-child relationship between an

[73] ECHR [GC], *Advisory Opinion concerning the recognition in domestic law of a legal parent–child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, Request no. P16-2018-001, 10/4/2019.

intending father and a surrogate child, given that the IP is also the genetic father of the child. This mirrored the judgment of the Court. However, there was still no possibility under French law to recognize the relationship between an intending mother and the surrogate child where the former does not have any genetic or biological relationship. The question forwarded to the ECtHR was to determine whether Article 8 also calls for the recognition of such a relationship flowing out of surrogacy agreements, and if so, whether such recognition should take the form of entry in the register of births, marriages, and deaths of the details of the birth certificate legally established abroad.

The Court answered the first question in the affirmative. In doing so, it took into consideration two issues: the best interests of the child and the margin of appreciation provided to states in this relation. Considering the first issue, it stated that the interest of France to discourage its citizens from resorting to reproductive means illegal in France is outweighed by the best interests of the child, because the lack of recognition of the parentage in France has a negative impact on several aspects of that child's right to respect for its private life. It also determined that though there is no European consensus on surrogacy arrangements, the margin of appreciation is still narrow when a particularly important facet of an individual's identity was at stake, such as when the legal parent-child relationship was concerned. Regarding the manner of recognition, the Court found that entry into the register of births, marriages and deaths is not the only means available to states but rather gives states the option to employ different means of recognition if the legal effect remains the same.

The Court took this opportunity to ascertain its stance in relation to the requirement of genetic link of IPs with surrogate children. It stated, in connection to the *Paradiso and Campanelli v. Italy* case, that it has placed some emphasis in its case-law on the existence of a biological link with at least one of the intended parents. It further stated that the child's best interests include other fundamental components that do not necessarily weigh in favour of recognition of a legal parent-child relationship with the intended mother, such as protection against the risks of abuse which surrogacy arrangements entail. In this connection again reference was made to the Italian case implying that, in the *Paradiso* case, there was abuse of surrogacy arrangements.

Following the judgment of the Grand Chamber in *Paradiso* and subsequent Advisory Opinion, the Court's case law is that, for infertile persons to have the parent-child relationship created legally in a host state recognized by their home states, one person out of a couple must be at least conception fertile in order to make a genetic contribution towards the child. This shows that the Court has moved away from its generous interpretation of Article 8 to accommodate recognition of varied forms of legal parent- child relationships formed following international surrogacy arrangements as

seen in *Mennesson* to a more conservative, traditional definition of family ties in the final judgment in *Paradiso*.

In relation to single persons, the conclusion can be made that, for the parentage to be recognized, the infertility must be only a partial one. This means that, states would have to give recognition to the parent-child relationship between women that cannot carry children (pregnancy infertile persons) but can make use of their own ova with donor sperm. No such obligation exists in relation to women who cannot produce ovum owing to them being conception infertile. Also, when it comes to single men, they must be fertile in order to enter surrogacy arrangements in states where the practice is legal and can use donor eggs to be carried by a surrogate. So, again, it excludes single men that are infertile from benefiting from a surrogacy arrangement should they seek to use donor gametes.

6. Concluding remarks

The European Court of Human Rights has made various strides since the *Evans v. The United Kingdom* case where it established the protection of persons impacted by infertility. Since then, it has made other important developments via widening the scope of Article 8 and increasing state obligation towards infertile persons. Unfortunately, the Court has changed its generous stance when it comes to the protection of persons at the worst end of infertility problems, i.e., those that are not capable of making genetic contributions to be used in the many ARTs developed to combat infertility.

The complete veering off by the Grand Chamber from the normally wide and *de facto* interpretation of family life has mainly been because of the Court's opinion that some importance is still attached to genetic link between parents and children in parentage determinations. However, this in and of itself excludes the most vulnerable of the very persons that are the supposed beneficiaries of any form of ARTs to begin with. The facts of the *Paradiso and Campanelli* case may also have contributed to the harsh and strict stance of the Court as the applicants did try to pass off the child as their own in the beginning by heavily implying that the first applicant, the IP mother was pregnant. In addition to this, they had also said that the IP father was also the genetic father of T.C. that the domestic courts found to be untrue via DNA testing. The case is yet another example of the Court taking an initially conservative approach on matters of rapid technological advancement In fact, the Court in such cases where technological

advancements rapidly change, always makes provisions that it may in the future change its stance in similar cases.[74]

Unfortunately, the Advisory Opinion of the Court discussed also makes the same conclusion in connection to genetic links between surrogate children and at least one of the IPs. Those sections of infertile persons that cannot make a genetic contribution, may face the same fate of separation from a child that was legally theirs in the jurisdiction where it was born. This pilot case was the basis for many following cases where parent-child relationships have not been given recognition before the ECtHR. Despite dynamic technological changes, which should naturally push for increased recognition of *de facto* families, the effect of the *Paradiso* case is reflected in judgments of the Court which has encouraged presence of genetic link for parentage recognition. It is unfortunate as the requirement for some form of genetic fertility defeats the *raison d'etre* of ARTs generally and surrogacy arrangements in particular.

[74] *S.H. and Others v Austria*, (n 17), para. 117.