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Cross-border surrogacy in the case law of the European Court of Human Rights: contributions and challenges

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1. Framework

In recent decades, we have witnessed the exponential growth of the practice of cross-border surrogacy. This practice is characterized by the displacement of couples or single people from their country of origin to a country which allows surrogacy arrangements, in particular contracts concluded for a valuable consideration, with the sole purpose of having a child by means of a gestational surrogate.

The divergence between the domestic laws of each State, the absence of an international instrument that can serve as a standardizing criterion, the ease of travel between countries or the unbridled desire to have a child, among others, have made cross-border surrogacy one of the most sought-after practices in reproductive tourism

The legal consequences of this practice have evidenced worrying repercussions, especially in cases where the child has no legal protection of any kind. This can happen, for instance, when the beneficiary's country of origin (as a rule, the country of their nationality or habitual residence) does not recognize the filiation relationship established in a foreign country. The non-recognition of this relationship may have repercussions on the child's personal status, the attribution of nationality, his/her right to personal and genetic identity, inheritance rights, and the exercise of parental responsibilities by the beneficiaries, among others.

In this context, the European Court of Human Rights (ECtHR) has been called upon to deliberate on some of these issues, in particular on the recognition of filiation of children born as a result of surrogacy agreements. This Court has resorted to article 8 of the European Convention on Human Rights (ECHR), which establishes the right to respect for private and family life, to assess the scope of the obligations incurred by States which, as signatories of the ECHR, do not allow surrogacy in their territories nor recognize legal effects arising from international surrogacy.

Thus, we intend to reflect on the contributions of the ECtHR to the recognition of new models of family and filial relationships arising from the practice of international surrogacy.

2. Case law of European Court of Human Rights

The ECtHR case law on cross-border surrogacy can be grouped into four groups according to their factual and legal similarity.

The court judgments included in the first group refer to cases of refusal to transcribe birth certificates issued by foreign authorities after the conclusion of international surrogacy contracts. In this group of decisions, the ECtHR discussed the respect for the private and family life of beneficiaries and children, confronting the freedom of States to legislate on this matter and the intervention of the *ordre public international* (public order) with the protection of the best interests of the child. This group includes the case of *Mennesson v. France* (2014); the case of *Labassee v. France*

(2014); the case of *Foulon and Bouvet v. France* (2016) and the case of *Laborie v. France* (2017), the cases of *C and E v. France* (2019) and the case of *D v. France* (2020).

The second group of ECtHR's judgments has a common basis which is the refusal to issue travel documents by the authorities of the country of origin of the beneficiaries of a surrogacy contract, or, in others words, the difficulties faced by the beneficiaries when leaving the child's country of birth. In this group, we highlight the case of *D and Others v. Belgium* (2014).

In the third group of judgments, we find the case of *Paradiso et Campanelli v. Italy* (2015 and 2017), one of the most controversial cases in terms of cross-border surrogacy, with two different ECtHR's judgments on the recognition of filiation established abroad when there is no genetic link between the child and the beneficiaries. Once again, the concept of private and family life, as well as the *ordre public*, were brought into discussion.

In the last and fourth group, we highlight the case of Lanzmann v. France (2019), which brought to ECtHR's discussion the issue of post-mortem surrogacy, the right to reproduction and the "right" to be a grandmother.

3. Main contributions of the European Court of Human Rights

ECtHR's judgements on issues involving the practice of international surrogacy has focused on protecting the interests of children born as a result of a cross-border surrogacy contract, especially regarding their right to identity and family life privacy.

The ECtHR has not yet judged on the admissibility or prohibition of this practice, since the Court considers that States are free to regulate this matter, despite believing that the diversity of regulations cannot be a factor of discriminatory treatment and lack of protection of the child's best interest. Therefore, the ECtHR recognizes that this is a topic on which there is no consensus, granting States a wide margin of appreciation to legislate on this matter. Furthermore, the ECtHR considers that it does not have competence to define legislative policies on behalf of national authorities[1]. Consequently, we are still unaware of the ECtHR's position on important issues involving this practice, such as the position on contracts concluded for valuable consideration, the danger and risk of selling children, the consequences in case of breach of contract, the exploitation of surrogate mothers, the exercise of the right to regret, the respect for the human dignity of surrogate mothers and children, among many other issues.

Despite the freedom of States to establish the rules regarding the admissibility or prohibition of surrogacy, the ECtHR considers that the prohibition of surrogacy practices in a particular country cannot be a suitable reason to justify the non-recognition of a contract validly concluded in a country where surrogacy is admitted, in particular with regard to the effects of filiation. In other words, this freedom does not allow States to reject the recognition of filiation legally established in a foreign country, in the light of the protection of the best interest of the child born by virtue of a surrogacy contract (in particular, his/her right to respect for private life and personal identity, enshrined in article 8 of the ECHR).

In the first cases judged by the ECtHR, this court only gave importance to the genetic link established between the beneficiary-intentional parent and the child, considering that whenever this link exists, the filiation legally constituted in a foreign country must be recognized, because the child's right to identity implies that filiation ties with whom he/she has a genetic link are recognized.

This position was also expressed in the advisory opinion issued by the ECtHR in 2019[2] [3]. In summary, the ECtHR unanimously considered that States must adopt some guidelines on the recognition of the filiation of a child born in a foreign country as a result of an international surrogacy contract, whenever the child was conceived with the beneficiary's gametes and donated eggs and if the respective paternity relationship was recognized by domestic law: (i) the child's right to privacy under the terms of art. 8 of the ECHR imposes an obligation on States to recognize validly constituted maternity in a foreign in relation to the woman (whether or not she contributed the eggs) who appears on the birth certificate as legal mother; (ii) this right does not impose the obligation of recognition to be made through birth registration; States are free to adopt another means – such as adoption – as long as it is an

[1] For example, vide point 78 of Mennesson v. France judgement or point 37 of Labassee v. France judgement.

[2] Following an application made by the French State concerning the case of Mennesson v. France.

[3] In all cases (except Paradiso and Campanelli) the child was genetically linked to the beneficiary.

adequate, prompt and effective means, in accordance with the best interests of the child. In this way, the ECtHR acknowledged the child's right to see the filiation legally established in a foreign country recognized, even if he/she only has a genetic link with the father-beneficiary, which is fundamental to guarantee the child's well-being and best interests, since, without such recognition, numerous practical difficulties can arise and place the child in a position of legal uncertainty[4].

As mentioned above, this ECtHR guideline does not oblige States to transcribe the foreign birth certificate for their civil registry or to recognize the effects of the foreign judgment regarding the legal relationship of maternity, but only to provide the means to effectuate such recognition. It is a halfway solution. On the one hand, it seeks to safeguard the interests of the child, recognizing the relationship validly established in a foreign country, and, on the other hand, it allows States (including those that prohibit surrogacy practices in their territories) some control by establishing the means for such recognition. It may not be the ideal solution, but we believe it seeks to reconcile the interests of those involved. Therefore, it should not be seen as discriminatory on the basis of gender, but interpreted in the light of the criteria for establishing maternity adopted by most States, justifying additional procedures for the recognition[5].

In this context, it should be noted that the ECtHR has not yet ruled on whether the recognition of the legal relationship of filiation, validly established in a foreign country should apply if the beneficiary (without a genetic link to the child) is a man. However, such judgement should not take long, since two applications are in course (judged together), namely in the *Schlittner-Hay v. Poland* case[6]. In this case, the beneficiaries of a surrogacy contract concluded in the United States of America are a couple of two men, of Polish and Polish-Israeli nationality, with habitual residence in Israel. As a result of the contract signed, two children were born and acquired American nationality. Mr. Schlittner is the twins' genetic father. By judgement of the California Court, parenthood was transferred to the beneficiaries, with equal rights, not granting the surrogate mother any rights. The dispute arises after the behaviour of the Polish authorities who refused to grant Polish nationality to the twins, despite having a genetic link with a Polish national (Mr Schlittner). Polish authorities also refused to transcribe the US birth certificate because it contained the names of the two men as parents. In view of the above, the couple accused the Polish authorities of discriminatory behaviour based on the homosexuality of the parents.

ECtHR's judgements/decisions have also stated that the *ordre public* an exceptional and exclusive mechanism of the Forum State, cannot be used constantly as a basis for refusing to recognize foreign judgments or the transcription of civil registration acts drawn up in a foreign country, if its application results in the lack of protection of the child's best interest. In particular, the ECtHR highlights the need to protect the right to respect for private and family life, both of the surrogacy contract's beneficiaries and of the child himself/herself. However, the ECtHR recognizes the complexity of the matter and the (legitimate) differences of States' domestic laws and positions on surrogacy[7]. Therefore, although IPPR allows States to refuse the effects of filiation established in a foreign country whenever such recognition affects fundamental principles of the Forum State's legal order, including the margin of appreciation that is granted for interference in private and family life, under the terms of art. 8, no. 2 of the ECHR (in consideration of public interests), the ECtHR considers that IPPR cannot be applied if the following three conditions are fulfilled: (i) the recognition of the legal filiation of the parent genetically related to the child; (ii) legal filiation has been validly established in the country of birth; (iii) there is no alternative through which the legal relationship between the beneficiaries and the child can be legally established in the State of destination. Hence, this position of the ECtHR constitutes an important contribution to the paradigm shift regarding the treatment of international surrogacy relations, in particular in the name of the child's human rights.

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[4] For example, difficulties in obtaining the nationality of the beneficiary's country of origin, permanence in the country of habitual residence, inheritance rights, assumption of parental responsibilities, the fate of the child in the event of death of the male parent, among others.

[5] In our view, the recognition procedure must require proof of the surrogate mother's valid consent, that is, it must be proven that the surrogate mother has not regretted it and has voluntarily and freely accepted to deliver the child to the beneficiaries.

[6] Applications nos. 56846/15 and 56849/15. [Consulted on 06.01.2021]. Available at WWW:<URL: http://media.aclj.org/pdf/Schlittner-Hay-v.-Poland,-Written-Observations,-ECLJ,-July-2019.pdf >.

[7] The ECtHR acknowledged that States may have legitimate grounds for such refusal - such as discouraging reproductive tourism, prohibiting the practice on ethical grounds and preventing beneficiaries from defrauding the laws of their State of origin - but these grounds cannot prejudice the best interest of the child.

The ECtHR jurisprudence on surrogacy has contributed to reinforcing the concept of private and family life foreseen in art. 8 of the ECHR. This jurisprudence results in the acknowledgement that contemporary families are no longer static and fixed in a State, there are cross-border problems that require the recognition of family relationships beyond the borders of a State. Consequently, the foreign character of family human relationships imposes a dynamic interpretation of the concept of private and family life in art. 8 of the ECHR, the analysis of the specific case and the primacy of the best interest of the child. From the judgements described *above*, in particular the case of *Paradiso and Campanelli*, it appears that the imposition of filiation recognition does not stem from the right to respect for family life, but from the right to respect for the child's private life. The content of the child's right to private life includes the right to identity and it is considered that there is a link between children's right to private life and the legal determination of their filiation. Therefore, in order to respect the right to privacy, it is required that all persons have the right to their identity, which includes the right to filiation duly recognized.

Finally, the jurisprudence of the ECtHR has resulted in the recognition of the right to reproduction, which is included in the scope of the right to respect for private and family life foreseen in art. 8 of the ECHR. However, from the ECHR does not result a right to reproduction or to form a family using surrogacy, only recognizing the existence of already formed families, even if such families are de facto families and regardless of the bond of marriage and genetic link. Nevertheless, this right to reproduction does not include the right to assisted reproduction or post-mortem surrogacy for the purpose of having a grandchild.

4. Conclusive synthesis

ECtHR's case law has set a precedent to be observed by States adhering to the European Convention on Human Rights. In short, the ECtHR's judgements have contributed to a paradigm shift in the treatment of issues involving cross-border surrogacy, particularly regarding the recognition of effects arising from filiation established in a foreign country. The resort to the criterion of the child's best interests – to regulate disputes that may arise within the scope of this practice – is gaining more and more importance to the detriment of States' national interests.

From ECtHR's jurisprudence results a differentiated position regarding the recognition of effects arising from filiation established in a foreign country, depending on whether the beneficiaries have a genetic link with the child or not, although the requirement for this recognition always results from the right to respect for the child's private life (in particular, his/her right to identity). Thus, in the case of a heterosexual couple of beneficiaries, it is sufficient that at least one of the members has a genetic link with the child in order to consider the prevalence of the right to respect for the child's private life (right to identity). This right was objectively recognized in relation to the genetic parent, although recognition is fictionalized in relation to the member of the couple who has no genetic link, without prejudice to the States having a margin of appreciation to determine the means to effectuate this recognition. On the contrary, in the absence of a genetic link between the beneficiaries and the child, States have a margin of appreciation to reject the recognition of the filiation relationship, including on the basis of *ordre public*, except in the event that such refusal jeopardizes the principle of the best interest of the child. It is considered that the child's right to private life must be assessed separately from the right to family life. In the latter case, the child should only be granted the possibility to live with the beneficiaries under normal conditions and without restrictions. *Ordre public* must be rejected in order to favor an already created and effective situation, whenever the non-recognition of the filiation relationship established in a foreign country implies a violation of the child's best interest.