

Case Note

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE PRACTICE OF THE ECtHR IN THE FIELD OF GESTATIONAL SURROGACY

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ABSTRACT

Background. *The article focuses on the analysis of the case law of the European Court of Human Rights regarding gestational surrogate motherhood and the development of the bioethics issue in this area. It was established that the notion of “private life,” regulated by Article 8 of the European Convention on Human Rights, guarantees everyone the ability to demand the establishment of their identity, providing for the possibility of establishing family relationships. It is highlighted that, despite the legal ban on the implementation of surrogate motherhood technology, to confirm the child’s identity, there is a need for official recognition of this kind of family relationship as indicated by other relevant relationships. In particular, the peculiarities of establishing parent-child relationships in the case of individuals applying for gestational surrogacy to exercise their reproductive rights are disclosed. The problem of legal regulation unification in the technological application of gestational surrogate motherhood is considered. A conclusion set regards the need to create an international legislative and regulatory framework useful for national governments, particularly in gradually banning the use of surrogate motherhood technologies. Attention is placed on international efforts focused to create an international legislative and regulatory framework that will provide recommendations useful to national governments, particularly in the gradual prohibition of surrogacy. The authors believe that the corresponding international agreement will constitute a legal framework for ensuring individual rights, freedoms, and health, the limitation to gestational surrogate motherhood services, and the observance of a uniform policy in this area.*

Methods: *The methodological framework of the study incorporated a range of philosophical, general, and legal methods. The worldview-dialectical method of cognition made it possible to investigate the problem’s social content and legal form, then to conduct a systematic theoretical and legal analysis of the practice by applying the judgments of the European Court of Human Rights. The diversity of legal certainty of the surrogate motherhood system’s legality in Europe, particularly in France, Italy, Iceland, Poland, and Norway, was investigated using the comparative method. With the help of a formal-legal approach, it analysed the content and peculiarities of applying the ECtHR practice.*

Results and Conclusions: *We comprehensively considered the ECtHR legal positions on gestational surrogate motherhood and the bioethics development in this area. International efforts should be concentrated on establishing an international regulatory framework that will provide recommendations practical to national governments, particularly in the gradual prohibition of surrogacy.*

1 INTRODUCTION

The development of science and medicine, the increase in infertility, changes in traditional family structures, and the presence of many single parents and same-sex couples have determined the relevance of assisted reproductive technologies. One of these methods is gestational surrogacy. According to its legal definition, the institution of surrogate motherhood belongs to a person’s reproductive system’s rights. It acts as an alternative in cases where the use of related auxiliary reproductive technologies do not produce the desired result¹. Thus, infertility is a prerequisite for an increasing number of people to seek specialized help, leading to the need to develop and establish regulations that will properly regulate the rights and obligations of all persons participating in the reproductive medicine using surrogate motherhood technology.

1 Viktor Beschastnyi and others, ‘Place of Court Precedent in the System of Law of the European Union and in the System of Law of Ukraine’ (2019) 22 (6) Journal of Legal, Ethical and Regulatory 1.

Meanwhile, the specified alternative technology raises a significant number of legal discussions, mainly due to differences in legal certainty regarding the legality of providing surrogate motherhood services in different states. The diversity of legal certainty of the institution of surrogate motherhood's legality can be resolved by recognizing the significance of identification rights as an aspect of the right to respect private and family life². Significantly, the issue of proper provision and guarantees for a person's reproductive rights, determining the limits of their legality, is increasingly reflected in the Strasbourg Court's practice, which analyses national legislation through the prism of established rights and freedoms.

Studies of the gestational surrogacy institute, by conducting a correlation between medical and legal certainty, demonstrate that despite the popularization of surrogate motherhood, the legislators in these countries currently face a challenge consisting of the need to legitimize the researched institute and develop an effective mechanism for its implementation³. The permission to conduct gestational surrogacy in several countries and the opportunity for cross-border surrogacy are grounds for drawing the attention of the international community to the effectiveness of the existing legal framework. The community then continues to search for fairness of the interests of society and people who want to use gestational surrogacy services, a just agreement between the interests of the surrogate mother and potential parents to protect their reproductive rights⁴.

Domestic legislation does not prohibit gestational surrogacy; therefore, the relevance of borrowing and analysing foreign experience in this area is of great importance for further law enforcement. In this regard, the aim of the research is to analyse the legal positions of the European Court of Human Rights regarding reproductive technologies, such as gestational surrogate motherhood, as well as the development of the bioethics issue.

The methodological framework of the study incorporated a range of philosophical, general, and legal methods. The worldview-dialectical method of cognition made it possible to investigate the problem's social content and legal form, then to conduct a systematic theoretical and legal analysis of the practice of applying the European Court of Human Rights' (hereinafter – ECtHR) judgments. Using the anthropological method, the right to respect private and family life is considered, guaranteeing every person the opportunity to demand the reality of establishing their identity. The diversity of the legal certainty of the surrogate motherhood system's legality in Europe, particularly in France, Italy, Iceland, Poland, and Norway, was investigated using the comparative method. With the help of a formal-legal approach, the content and peculiarities of applying the ECtHR practice in the unification of gestational surrogacy regulations, based on ensuring the child's best interests, were investigated. The use of all the scientific methods listed above, in their totality, provided an opportunity to comprehensively consider the ECtHR legal positions on gestational surrogate motherhood and the development of bioethics in this area.

- 2 Andrea Mulligan, 'Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements' (2018) 26 (3) *Medical Law Review* 449, doi: 10.1093/medlaw/fwx066.
- 3 SO Boldzhar, 'Surrogate Maternity: Correlation of Medical and Legal Definition' (2019) 58 (1) *Uzhhorod National University Herald, Series Law* 196, doi: 10.32782/2307-3322.58-1.41.
- 4 Sergii Antonov, 'Methods of Legal Regulation for Surrogacy in Ukraine and Abroad' (2020) 3 *Law of Ukraine* 129, doi: 10.33498/louu-2020-03-129; Oksana M Ponomarenko, Yuriy A Ponomarenko and Kateryna Yu Ponomarenko, 'Legal Regulation of Surrogacy at the International and National Levels: Optimization of Permissions, Prohibitions and Liability' (2020) 73 (12-2) *Wiadomości Lekarskie* 2877, doi: 10.36740/wlek202012229; Valeria Piersanti and others, 'Surrogacy and "Procreative Tourism": What Does the Future Hold from the Ethical and Legal Perspectives?' (2021) 57 (1) *Medicina* 47, doi: 10.3390/medicina57010047.

2 THE NOTION OF SURROGATE MOTHERHOOD WITHIN LEGAL RELATIONS

The study of the Strasbourg Court's legal positions regarding gestational surrogate motherhood and bioethics development in this area makes it possible to state the following. The notion of "private life," regulated in the Article 8 of the ECtHR, guarantees everyone the opportunity to request the establishment of their identity. Moreover, this right ensures the chance to establish family relations. The ECtHR emphasizes that legislative uncertainty has led to difficulty in recognizing a person's status.

In this context, regardless of the legal ban on the implementation of surrogate motherhood technology, the ECtHR has identified indicators that the state exceeded the limits of reasonable discretion when making decisions regarding the formed relationships. So, to confirm the child's identity, no matter what the method, and if there is any legal ban on the researched reproductive technology's use, the implementation of the relevant relationships indicates the need for official recognition of this kind of family relationship. The presence of "family life" signs between the potential parents and the child, in case there is no biological connection between them, must not entail the recognition of these relationships at the national level by a country where surrogacy is illegal⁵.

Grounds for establishing the absence of a family connection include the lack of a biological connection, a short-term relationship between the alleged parents and the child, and the ambiguity of the relationship between them from the legal point of view, despite the presence of parental care and emotional ties, the absence of severe suffering for the child as a result of separation with intended parents. The extraction of a child and the denial to recognize a parent-child relationship that was accepted abroad through the registration of a child's birth certificate belongs to people's private life in pursuing the lawful goals of avoiding disturbances and defending their rights and freedoms⁶.

The government's desire to confirm the state's exclusive competence to recognize legal relations between parents and children, only in the cases of establishing a biological connection or legal adoption, to protect the child's interests is well-founded. Refusal to enter the information from the child's birth certificate issued abroad due to gestational surrogacy into the birth registry in a country that prohibits using such technology is not an abuse of discretion. Discrimination based on "birth" is absent since the difference in behaviour regarding the means of recognizing parent-child relations has an objective basis⁷.

The presence of genetic kinship does not mean that the child's right to respect for private and family life requires the establishment of a legal relationship with the intended parents using a special entry in the birth certificate. When it is necessary to ratify the legal relationship between the child and the alleged parents, adoption has legal consequences similar to the birth registration recognized abroad. Thus, the state is not required to register information from the birth certificate of a child born via gestational surrogacy abroad to establish the

5 Igor M Kopotun and others, 'Health-Improvement Competences Formation Technique in Future Police Officers by Means of Personality-Oriented Approach to Physical Education' (2019) 18 (11) International Journal of Learning, Teaching and Educational Research 205, doi: 10.26803/ijlter.18.11.12.

6 Matteo Bertelli and others, 'Combined Use of Medically-Assisted Reproductive Techniques: A New Bioethical Issue' (2019) 90 (10-S) Acta Biomedica Atenei Parmensis 58, doi: 10.23750/abm.v90i10-S.8761.

7 Roman A Maydanyk and Kateryna V Moskalenko, 'Towards Creation of Unified Regulation on Surrogacy in Europe: Recent Trends and Future Perspectives' (2022) 73 (12-2) Wiadomosci lekarskie 2865, doi: 10.36740/WLek202012227.

legal relationship of parents and children since adoption can also function as an instrument to ratify such a legal relation⁸.

The birth of a child in another country because of the surrogacy technology's use and the intended father's gametes, with the legal parent-child relationship as recognized by national law, the child's right to respect for private and family life under Article 8 of the Convention demands that domestic legislation should provide the recognition of the legal parent-child relationship with the potential mother. However, these rights do not entail entering information into the register of birth certificate data. Establishing a connection with the intended mother can be implemented in another way, particularly by adopting the child⁹.

The state's refusal to recognize such a parent-child relationship does not intercede with the right to respect for private and family life if such a relationship is recognized by the state authorities where the child lives. This legal recognition indicates that the person was not left in a "legal vacuum" regarding their citizenship and recognition of legal relationships. The trial's duration is directly related to the state's responsibility to exercise exceptional care in such category of cases, involving prioritization of the child's best interests¹⁰. Thus, a long trial may lead to a legal issue based on whether it has already occurred. The explanation as to why the ECtHR relies to a great extent on the proper provision of the child's interests and identity in society lies within the court's competencies to interpret the legislation of countries that set restrictions on the use of gestational surrogate motherhood technologies in their territory.

3 THE ECTHR CASE LAW ON REPRODUCTIVE RIGHTS

Reproductive rights belong to individual human rights and freedoms. Significantly, these rights and freedoms belong to any person on an equal basis; they arise from solely human existence. However, recognition of reproductive rights was significantly affected by the increase in infertility, changes in traditional family structures, and the presence of many single parents and same-sex couples. These factors determined the relevance of assisted reproductive technologies (hereinafter referred to as ART), particularly gestational surrogate motherhood¹¹. The basis for a person to recognize his/her reproductive function, through the use of surrogate motherhood technology, may be the presence of medical indications, according to which carrying and/or giving birth to a child is physiologically impossible or associated with a risk to the life and health of that person and/or child¹².

The World Health Organization identifies the existence of two types of surrogate motherhood. Traditional surrogacy is an infertility treatment method involving fertilizing

8 Larysa Nalyvaiko, Olena Marchenko and Vasyl Ilkov, 'Conceptualisation of the Phenomenon of Corruption: International Practices and Ukrainian Experience' (2018) 172 (7-8) *Economic Annals-XXI* 32, doi: 10.21003/ea.V172-06.

9 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 20 February 2023.

10 Marianna Iliadou, 'Surrogacy and the ECtHR: Reflections on *Paradiso* and *Campanelli v Italy*' (2018) 27 (1) *Medical Law Review* 144, doi: 10.1093/medlaw/fwy002.

11 Effy Vayena, Patrick J Rowe and P David Griffin (eds), *Current Practices and Controversies in Assisted Reproduction: Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction", WHO Headquarters in Geneva, Switzerland, 17-21 September 2001* (WHO 2002) <<https://apps.who.int/iris/handle/10665/42576>> accessed 20 February 2023; Eleonora Skyba and Kateryna Tkachenko, 'Gender Challenges of Modern Societies' (2021) 1 (2) *Philosophy, Economics and Law Review* 18, doi: 10.31733/2786-491X-2021-2-18-24.

12 Anna-Lena Wennberg, 'Social Freezing of Oocytes: A Means to Take Control of Your Fertility' (2020) 125 (2) *Uppsala Journal of Medical Sciences* 95, doi: 10.1080/03009734.2019.1707332.

the surrogate mother's ovum from the father's or donor's biological material in-vitro. As a result, the surrogate mother has a direct biological connection with the unborn child. Gestational surrogacy is a method to treat infertility involving in-vitro fertilization of an embryo from the biological material of the parents or donor(s), after which the embryo is transferred to the uterus of the surrogate mother, and the intended parents are the persons who are the owners of the embryos as mentioned above¹³. Therefore, gestational surrogate motherhood is the right of a surrogate mother to bear and deliver a child who will not have a direct genetic connection with her (except in cases of carrying for close relatives of the future parents), who will not be regarded as the biological mother of the child born to her due to the relevant acts. The surrogate mother will no longer have rights or obligations with such a child after birth.

It is also worth noting that gestational surrogacy is based on contractual principles between the parties and involves a commercial or altruistic transaction, dependent upon whether the surrogate mother receives financial compensation for her pregnancy¹⁴. When individuals, or organizations representing them (such as agencies and clinics), enter into a gestational surrogacy agreement, the laws of the country where the agreement was signed and where the child was born may apply to the agreement. Therefore, commercial contracts for gestational surrogacy may be common in countries where national legislation does not regulate this reproductive technology.

Several international treaties on human rights and normative acts at the national level regulate the right to use assisted reproduction methods. The leading international act establishing and guaranteeing the observance of fundamental human rights is the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) ECtHR (European Convention on Human Rights, 1950). And although the Convention does not contain a direct confirmation of the right to carry out surrogate motherhood, cases related to this assisted reproduction method mostly refer to Article 8 of the Convention (the right of a person to respect for private and family life)¹⁵.

It is worth mentioning that legal certainty's diversity regarding the legality of the surrogate motherhood institution in different European countries leads to differences in the legal frameworks of the Council of Europe's member states. Thus, the latter may be prohibited at the legislative level, permitted, permitted under certain legal restrictions, or not at all regulated by law. Faced with a differentiated approach, the ECtHR tries to guarantee the rights enshrined in the Convention in the context of surrogacy. In particular, the issue of gestational surrogate motherhood was considered by the ECtHR in the demonstrative cases of "Mennesson v. France"¹⁶, "Labassee v. France"¹⁷, "Foulon and Bouvet v France"¹⁸, "Laborie

13 Maydanyk and Moskalenko (n 12).

14 Council of Europe and European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence* (CoE; ECtHR 31 August 2022) <https://www.echr.coe.int/documents/guide_art_8_eng.pdf> accessed 20 February 2023; Bertelli and others (n 12).

15 Iliadou (n 15).

16 *Mennesson v France* App no 65192/11 (ECtHR, 26 June 2014) <<https://hudoc.echr.coe.int/eng?i=001-145389>> accessed 20 February 2023.

17 *Labassee v France* App no 65941/11 (ECtHR, 26 June 2014) <<https://hudoc.echr.coe.int/eng?i=001-145180>> accessed 20 February 2023.

18 *Foulon and Bouvet v France* App nos 9063/14 and 10410/14 (ECtHR, 21 July 2016) <<https://hudoc.echr.coe.int/fre?i=001-164968>> accessed 20 February 2023.

v. France”¹⁹, “Paradiso and Campanelli v. Italy”²⁰, “C and E v. France”²¹, “D. v. France”²², “Valdís Fjölnisdóttir and Others v. Iceland”²³, “S.-H. v. Poland”²⁴, “A. L. v. France”²⁵ and “A. M. v. Norway”²⁶, etc.

It is important that cases regarding agreements on gestational surrogacy are primarily related to the provisions of Article 8 of the Convention, which controls the right of everyone to respect private and family life, home, and correspondence. Thus, state authorities must not intercede with the enjoyment of this right, except in cases protected by the law or as required in a democratic society to ensure national security, public safety, or economic well-being of the society to counteract riots or crimes, protect the health, morality, rights, and freedoms of citizens²⁷. Therefore, to establish if there is an intrusion into the private and family life of the applicants by the authorities and to maintain a fair balance of the violated interests, the Strasbourg Court determines whether such interference was lawful, whether it pursued a legitimate objective, and whether it was proportionate to the objective(s) pursued.

Combined into one proceeding, the cases of “Mennesson v. France” and “Labassee v. France” related to the denial to recognize child-parent relationships, lawfully established in the United States, between couples who resorted to surrogate motherhood and children born through this reproductive technology. In particular, the intended parents complained that they could not achieve recognition of the child-parent relationship which was legally established in another country, harming the child’s interests²⁸.

In this case, the Court assessed the notions of “family life” and “private life” found in Article 8 of the Convention. However, no violations of the right to respect for private and family life were identified. The main motives in the analysis of the right to family life’s observance are: that the French government issues a certificate based on the French citizenship of one of the parents, making it impossible to remove minor children from this country; documents issued in the U.S.A. that determine the child’s citizenship and, accordingly, regulate the duties and responsibilities of the parents concerning the child; in the event of a divorce, the court will determine the child’s place of living and the rights of the ex-spouse in relation to him/her; confirmation of a person’s status gives possibility to the applicant to inherit property based on documents issued in the U.S.A.

Instead, the Court established that Article 8 of the Convention on the right to respect for private and family life had been violated. The Strasbourg Court noted that the right to respect private life guarantees everyone the opportunity to request identification. This right

19 *Laborie v France* App no 44024/13 (ECtHR, 19 January 2017) < <https://hudoc.echr.coe.int/fre?i=001-170369>> accessed 20 February 2023.

20 *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR, 24 January 2017) <<https://hudoc.echr.coe.int/eng?i=001-170359>> accessed 20 February 2023.

21 *C and E v France* App nos 1462/18 and 17348/18 (ECtHR, 19 November 2019) <<https://hudoc.echr.coe.int/eng?i=001-199497>> accessed 20 February 2023.

22 *D v France* App no 11288/18 (ECtHR, 16 July 2020) <<https://hudoc.echr.coe.int/eng?i=001-203565>> accessed 20 February 2023.

23 *Valdís Fjölnisdóttir and Others v Iceland* App no 71552/17 (ECtHR, 18 May 2021) <<https://hudoc.echr.coe.int/eng?i=001-209992>> accessed 20 February 2023.

24 *SH v Poland* App nos 56846/15 and 56849/15 (ECtHR, 16 November 2021) <<https://hudoc.echr.coe.int/eng?i=001-214296>> accessed 20 February 2023.

25 *AL v Franc* App no 13344/20 (ECtHR, 07 April 2022) <<https://hudoc.echr.coe.int/eng?i=001-216632>> accessed 20 February 2023.

26 *AM v Norway* App no 30254/18 (ECtHR, 24 March 2022) <<https://hudoc.echr.coe.int/eng?i=001-216348>> accessed 20 February 2023.

27 ECHR (n 14) art 8.

28 *Mennesson v France* (n 21); *Labassee v France* (n 22).

includes, among other things, the possibility of establishing family relations. The ECtHR emphasized that the legal uncertainty led to the complication of recognizing the status and personality of a person. In this context, despite the legal ban on the implementation of surrogate motherhood technology in France, the ECtHR identifies grounds in the case file to indicate that the state exceeded the limits of reasonable discretion when making decisions regarding relationships that had already been established.

Therefore, even in cases where surrogate motherhood is prohibited by law, if the relevant relationship takes place, i.e., is realized, the state must recognize this family connection to ensure a person's status in society, regardless of how and where he was born. In similar cases, relying on decisions in the cases of "M. against France" and "L. v. France," the Court found no violation of Article 8 of the Convention regarding the right to respect for family life and violation of Article 8 regarding the right to respect for children's private life²⁹.

Thus, each state can independently resolve the legal regulation of the surrogate motherhood procedure on its territory. Therefore, considering that citizens and stateless persons of different countries can enter surrogacy relations, this issue is subject to regulation at the national legal level in each country, often causing conflicts. An example of this includes the case in which, in 2015, a gestational surrogate mother gave birth to a child in Ukraine after artificial insemination using the genetic material of a couple from Germany. Thus, the child's parents were indicated in the birth certificate as a married couple. However, when entering registration information in Germany under the provisions of the country's legislation, the child's mother was indicated as her surrogate mother since surrogate motherhood is prohibited in Germany³⁰.

It should be noted that the issue of foreign judgment recognition in accordance with § 109 of the German Family Code (which determines parentage of a child born by a surrogate mother in relation to the intended mother) is practically clarified by the established case law of the country's Federal Court. Thus, if a foreign court has international jurisdiction from the point of view by German law (§ 109 para. 1 para. 1 of the Family Code), the recognition of German public order (§ 109 para. 1 para. 4 of the Family Code) in principle does not exclude that future parents could fraudulently circumvent the provisions of German legislation³¹. Accordingly, the decisive factors are: the existence of a legal norm on the possibility of such recognition; the need to observe the principle to ensure the best interests of the child; ensuring compliance with public order, if one of the intended parents is genetically related to the child.

It should be noted that § 109 of the German Family Code provides that, depending on specific circumstances, decisions of foreign authorities can be recognized, not only court decisions. However, it is assumed that such bodies should be empowered by state power and functionally correspond to German courts³².

For example, in Ukraine, from the moment of the decision, German couples will not only be able to carry out the standard registration of the child according to the Family Code of Ukraine, but also receive a court decision on the genetic connection with the child, which

29 *ibid.*

30 'The German Court Passed a Landmark Decision on Surrogate Motherhood in Ukraine' (*Yevropeyska Pravda*, 23 April 2019) <<https://www.eurointegration.com.ua/news/2019/04/23/7095554>> accessed 20 February 2023.

31 Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG) vom 17 Dezember 2008 (in der fassung vom 16 Dezember 2022) § 109 Anerkennungshindernisse <https://www.gesetze-im-internet.de/famfg/_109.html> zugegriffen 20 Februar 2023.

32 *ibid.*

can then be recognized by a German court and will provide an opportunity to establish parental relations in Germany.

Regarding the problem of family relational recognition between parents and children who were born with the help of gestational surrogacy, the case of “Paradiso and Campanelli v. Italy” arises. The proceedings dealt with the custody of a nine-month-old child born in Russia as a result of a gestational surrogacy agreement between a Russian woman and an Italian couple (the applicants). However, it was revealed that the latter was not biologically related to the child. The applicants complained about the extraction of their child and the denial to recognize the relation between parents and children established abroad by recording the child’s birth certificate in Italy³³.

The Grand Chamber, by eleven votes to six, found no violation of Article 8 of the Convention. Thus, considering the lack of any genetic connection between the child and the applicants, the short length of time of their relations with the child, and the legal uncertainty of the relationship between them, despite the presence of parental care and emotional ties, the ECtHR decided that there was no family life between the applicants and the child. However, the Court established that the disputed issues belonged to the sphere of the applicants’ private life.

Significantly, the Strasbourg Court justified the Italian government’s desire to confirm the exclusive competence of the state to recognize legal relations between parents and children, only in the cases of genetic connection or legal adoption in order to defend the interests of the child. Thus, by concluding that the separation will not seriously or irreparably harm the child, the Italian courts created a balance of interests within the existing domestic legislation.

In the given decision of the ECtHR, attention is given to a few pieces of information, including that the intended parents did not confirm the use of their biological material by the clinic that applied reproductive technology, the lack of relationship between the child and potential parents, and the emotional connection of the child with the applicants; the recognition of parental relationships has not been confirmed because the applicants cannot be the legal representatives of the child. Following the balance of interests, the Court upheld the position of the national courts that the child had not suffered severe trauma due to the separation from the putative parents. The given legal position is based primarily on studying the peculiarities of family and biological relationships between parents and the child.

The case of “D. v. France,” which focused on the feasibility of a legal relation recognition between a child born abroad through gestational surrogacy and the intended mother indicated on a birth certificate legally issued abroad as the “legal mother” in situations where the child was conceived using the gametes of an outside donor, and the legal relationship between the parents and the intended father, was recognized by national law. The applicants complained about the violation of the child’s right to respect for private and family life and about “birth”-based discrimination³⁴.

In this case, the ECtHR found no violation of Article 8 of the Convention since the denial to enter information from the child’s birth certificate into the French birth registry is not an abuse of discretion. It was also established that there was no violation of Article 14 (prohibition of discrimination) of the Convention, along with the Article 8, since the difference in treatment, brought up as a complaint by the applicants regarding the recognition of the legal relationship between the child and its genetic mother, was reasonable.

33 *Paradiso and Campanelli v Italy* (n 25).

34 *D v France* (n 27).

Therefore, the Court concluded that, according to its precedent practice, the presence of genetic kinship does not involve that the child's right to respect for private life requires the establishment of a legal relationship with the parents through a special entry on the birth certificate (a similar position is laid out in the case "C. and E. v. France"³⁵). At the request of the French Court of Cassation, in an advisory opinion, the ECtHR emphasized the fact that adoption had consequences similar to the registration of data on birth abroad in dealing with the recognition of the legal relationship between the child and the intended mother. Consequently, the state did not require registration of the information from the birth certificate of a child born as a result of gestational surrogacy abroad to establish the legal relationship of children with the intended mother, since the adoption can also function as a tool for recognizing such a legal relation.

Therefore, if a child was born abroad as a result of gestational surrogacy and was conceived using the gametes of the intended father and an outside donor, and if the legal relation between the child and the intended father was recognized in national legislation, the child's right to respect for private life under Article 8 of the Convention requires that domestic legislation provides for the possibility of recognizing legal parent-child relationships with the intended mother. However, such a right must be free of recognition to enter information into the birth certificate data register. Establishing a connection with the intended mother can be implemented in another way, particularly by adopting a child.

We consider it appropriate to pay attention to the case "Valdís Fjölvisdóttir and Others v. Iceland,"³⁶ which dealt with the non-recognition of paternity between the intended parents (the applicants) and a child born to a surrogate mother in the United States of America. The applicants were not biological parents of the child. Furthermore, they were not recognized as the child's parents in Iceland where surrogacy is illegal. Thus, the applicants complained that the authorities' denial to register them as the child's parents interfered with their rights³⁷.

The ECtHR found that, despite the absence of a genetic connection between the applicants and the child, the parent-child relationship had "family life" characteristics. The decision not to recognize the applicants as the child's parents had reasonable legal grounds in domestic legislation. As a result, having regard to the efforts of the authorities to preserve this "family life," the Court held that the Icelandic authorities acted within their discretion.

Based on the above, we would like to emphasise that according to the consideration results of none of the cases analysed above, the ECtHR did not establish a violation of their provisions by recognizing the sufficiency or prohibition of the use of gestational surrogate motherhood technology. To a greater extent, the Court relies on the proper provision of the interests and identity of children in society. The explanation of this practice consists of considering individual provisions in the national legislation of France, Italy, and Iceland, which directly prohibit the use of surrogate motherhood on the state's territory³⁸.

35 *C and E v France* (n 26).

36 *Valdís Fjölvisdóttir and Others v Iceland* (n 28).

37 *SH v Poland* (n 29).

38 *Code civil des Français* (tel que modifié du 06 février 2023) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721?etatTexte=VIGUEUR&etatTexte=VIGUEUR_DIFF> accédé 20 Février 2023; *Code pénal* (France) du 22 juillet 1992 (tel que modifié du 04 février 2023) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719?etatTexte=VIGUEUR&etatTexte=VIGUEUR_DIFF> accédé 20 Février 2023; *Legge federale concernente la procreazione con assistenza medica* (Legge sulla medicina della procreazione, LPAM) del 18 dicembre 1998 (stato 01 dicembre 2022) <<https://www.fedlex.admin.ch/eli/cc/2000/554/it>> accesso 20 Febbraio 2023; *Frumvarp til laga um staðgöngumæðrun í velgjörðarskygni* (Lagt fyrir Alþingi á 144 löggjafarþingi 2014-2015) <<https://www.althingi.is/altext/144/s/1141.html>> skoðað 20 febrúar 2023.

Regarding parent-child relationship research, the case of “S.-H. v. Poland” concerned the Polish authorities’ denial to recognize the parent-child relationship between the applicants and one of their biological parents. It is crucial that they had dual citizenship in Israel and the United States, residing in Israel, and were a same-sex couple who used the services of gestational surrogacy with the gametes of one of the spouses. The applicants complained about the denial to receive Polish citizenship by the child (one of the applicants’ parents was Polish), because the parents were a same-sex couple³⁹.

The ECtHR held the applications unacceptable, establishing that there were no objective grounds for the conclusion that there had been the violation of the right to respect for private and family life. However, although not recognized by the Polish authorities, the relationship between parents and children was recognized by the state where the applicants resided. Therefore, the legal recognition of the relationship in the U.S.A. indicates that the applicants were not left in a legal vacuum concerning their citizenship, providing the recognition of the legal relationship between the children and their biological father.

Recognition of paternity within the surrogate motherhood contract was considered in the case of “A. L. v. France,” which focused on the applicant’s complaint against the domestic court’s denial to legally recognize the applicant’s paternity concerning his biological son, who was born of gestational surrogacy services in France. The applicant claimed that the rejection of the paternity application for his biological son constituted a violation of the right to respect for his private life without any legal ground⁴⁰.

The ECtHR found the violation of Article 8 of the Convention owing to the state’s failure to exercise due diligence in the case’s specific circumstances. However, the Strasbourg Court emphasized that the identified violation should not be understood as casting doubt on the Court of Appeal’s evaluation of the child’s best interests or its decision to reject the applicant’s claim, as concluded by the Court of Cassation.

In this case, the ECtHR determined the Court of Appeal, and supported by the Court of Cassation, correctly prioritized the child’s best interests, considering the applicant’s biological relationship with the child. Levelling the father’s right to respect for his private life and his son’s right to respect for his private life, the ECtHR decided that the grounds established by the national court’s decision to justify the contested intervention were appropriate and sufficient for paragraph 2 of Article 8 of the Convention.

It is important to understand that the trial took six years, which is incompatible with the responsibility to exercise special care in this category of cases. The child was about four months old when the case was brought to court, and he was six and a half years old when the internal review was completed. Thus, in cases related to the relationship between a person and his child, an extended period can cause a legal issue to be decided based on the fact that it has already occurred. The ECtHR followed a similar position when considering the case of “A. M. v. Norway.”⁴¹

The considered legal positions give grounds for asserting that the state should resolve the official recognition of paternity if individuals use the surrogate motherhood technology that, in turn, is prohibited by national legislation. Accordingly, the legal prohibition of surrogate motherhood is not an obstacle to recognizing family relations if it is realized to confirm and guarantee the child’s identity in society, irrespective of the manner and place of his birth. In turn, genetic kinship does not involve the child’s right to respect for private and family life nor requires establishing a legal relation with the intended parents using a particular entry in

39 *SH v Poland* (n 29).

40 *AL v Franc* (n 30).

41 *AM v Norway* (n 31).

the birth certificate. Thus, establishing a suitable connection with the intended mother can be implemented in another way, particularly by adopting a child.

We regard it essential to draw attention to the bioethics issue in carrying out gestational surrogacy, a complex moral and ethical issue, concerning several fundamental ethical aspects, including the individual's attitude, the public, and the state toward the practice of surrogacy, as well as the degree of state policy's influence on the adoption by private individuals' solutions in this area.

It should be noted that in its resolution, the European Parliament disapproved the practice of surrogate motherhood and the policy of the European Union on this issue. The materials emphasise the need to ban surrogacy (including gestational surrogacy) as the only way to end cross-border services that contradict the provisions of the national legislation of individual states. The European Parliament laid out the reasons for a legislative ban on surrogate motherhood, including: surrogate motherhood involves the sale of the woman's body who is acting as a surrogate mother; surrogate motherhood is actually the sale of a child⁴²; surrogate motherhood is the exploitation of reproductive abilities and the use of a woman to please other persons; surrogate motherhood is not intended to satisfy individual rights; surrogate motherhood increases existing inequality between women; regulation of surrogate motherhood creates a new form of human trafficking; surrogate motherhood violates the rights of children and women, contributing to a society that supports the policy of cruel treatment toward people related to the organization of first and second classes of people, the creation of a discriminatory unequal global order; reproductive rights can be satisfied in ways that do not involve the exploitation or transformation of women and children into commodities⁴³.

However, the legislative regulation of gestational surrogacy varies across Europe. Thus, altruistic gestational surrogacy is legal and commercial surrogacy is illegal in the United Kingdom, Ireland, Denmark, Belgium, and the Netherlands. France, Italy, Iceland, Spain, and Germany prohibit all forms of surrogate motherhood⁴⁴. We also note that concluding international agreements on surrogate motherhood is complex. Some countries require the recognition of the parent-child relation of the surrogate mother with the child born to her. In contrast, others recognize the child's legal relation only with its intended mother. This demonstrates the likelihood of legal conflicts and essential ethical disagreements.

Human rights organizations provide numerous recommendations to ensure the rights of women and children properly and focus on protecting human rights against transforming a person's exercise of their reproductive rights into commercial entrepreneurship⁴⁵. However, the heterogeneity of state policies and legal approaches to gestational surrogacy services caused the growth of the number of potential parents turning to individual DRTs abroad. The absence of regulations of cross-border surrogacy in low-income countries can threaten women's dignity and rights, as the low cost of the service leads to considerable buying

42 United Nations and Human Rights Council, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material: Note by the Secretariat* (UN 15 January 2018) <<https://digitallibrary.un.org/record/1473378>> accessed 20 February 2023.

43 European Parliament Resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015IP0470>> accessed 20 February 2023.

44 Paola Frati and others, 'Bioethical Issues and Legal Frameworks of Surrogacy: A Global Perspective about the Right to Health and Dignity' (2020) 258 *European Journal of Obstetrics & Gynecology and Reproductive Biology* 1, doi: 10.1016/j.ejogrb.2020.12.020.

45 LR Nalyvayko, IO Hrytsay and OS Dniprov, *Non-Governmental Human Rights Organizations of Ukraine* (Khai-Tek Pres 2014).

power and demand. International efforts should be focused on developing an international regulatory framework that will provide valuable guidance to national governments. Thus, a relevant international agreement would create a substantial legal basis for protecting an individual's reproductive rights. Therefore, to protect a woman's rights, freedoms, and health, limiting economic interests related to the provision of gestational surrogate motherhood services, states must adhere to a uniform policy in this area.

4 CONCLUSIONS

Summarizing the above, it seems possible to state that the unification of gestational surrogacy regulations should be carried out to ensure the best interests of the child. National legislation should also develop in this direction, regardless of whether the use of gestational surrogacy technologies is allowed or prohibited on its territory. Therefore, international efforts should be concentrated to establish an international regulatory framework that will provide practical recommendations to national governments, particularly in the gradual prohibition of surrogacy. However, supporting the opinion on the need to ban surrogate motherhood, and taking into account the complexity of implementing a unified policy in this area, we consider it expedient to conclude an international agreement aimed at ensuring the possibility of recognizing parent-child relationships in connection with the need to observe the principle that ensures the child's best interests and observes public order if one of the intended parents is genetically related to the child. An appropriate international agreement will constitute a legal basis for protecting the rights of persons applying for such reproductive technology. To protect individual rights, freedoms, and health, and limit economic interests related to the provision of gestational surrogate motherhood services, states must adhere to a uniform policy in this area.

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