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Surrogacy from the Luxembourg and Strasbourg perspectives: divergence, convergence and the chance for a future dialogue

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# Surrogacy from the Luxembourg and Strasbourg perspectives: divergence, convergence and the chance for a future dialogue

by

Ilaria Anrò \*

## Abstract

(French version below)

*Surrogacy, which raises several legal and ethical questions, imposes a delicate balancing of the different rights involved: the rights of children born from surrogacy, the rights of surrogate mothers, the rights of children waiting for adoption and the rights of intended parents. The situation becomes more complicated when it comes to cross border surrogacy, which involves serious issues of private international law relating to the recognition of foreign birth certificates or judgements, the choice of the law in establishing or contesting parentage, the question of jurisdiction and the role of the public order.*

*European countries have taken different approaches: in some countries surrogacy is legal, in others it is prohibited or simply ignored. The Court of Justice of the European Union and the European Court of Human Rights both have adjudicated cases on cross border surrogacy. On 18 March 2014, two judgments came down from Luxembourg, C.D. and Z. A few months later, The European Court of Human Rights delivered three judgements: Mennesson v. France, Labasse v. France and Paradiso and Campanelli v. Italy.*

*The two European Courts seem to take quite different approaches: while the Luxembourg Court has maintained strict adherence to the question at issue and the literal interpretation of the European legal instruments invoked, the Strasbourg Court has relied on the best interests of the child principle and on an evolutionary interpretation of the European Convention on Human Rights.*

*The present paper asks whether there is a current dialogue between the European courts, like it was developed in the past in the field of fundamental rights, and if it may be developed in future, in order to reach a common standard of protection of the fundamental rights involved and to develop a system of shared principles and values which may be used as point of reference for national judges and legislators as well as for negotiators of international conventions on surrogacy.*

**Keywords:** Surrogacy, cross border surrogacy, margin of appreciation, child's best interests, dialogue between judges

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## Résumé

*La maternité de substitution, qui soulève plusieurs questions juridiques et éthiques, impose un équilibre délicat entre les différents droits impliqués: les droits des enfants nés de mères porteuses, les droits des mères porteuses, les droits des enfants en attente d'adoption et les droits des parents d'intention. La situation devient plus compliquée en cas de maternité de substitution transfrontalière, car elle pose de graves questions de droit international privé relatives à la reconnaissance à l'étranger des certificats de naissance ou des jugements, le choix de la loi dans l'établissement, la contestation de filiation, la question de la compétence aussi bien que le rôle de l'ordre public.*

*Les Etats européens ont adopté des approches différentes: dans certains pays, la maternité de substitution est légale; dans d'autres, elle est interdite ou simplement ignorée. La Cour de justice de l'Union européenne et la Cour européenne des droits de l'homme se sont prononcées récemment sur la maternité de substitution dans les cas transfrontaliers. Le 18 mars 2014, deux jugements ont été prononcés à Luxembourg : C.D. et Z. Quelques mois plus tard, la Cour européenne des droits de l'homme (Cour EDH) a rendu trois arrêts: Mennesson c. France, Labasse c. France, et Paradiso et Campanelli c. Italie.*

*Les deux juridictions européennes semblent avoir adopté des approches très différentes: alors que la Cour de justice a maintenu le strict respect de la question en cause et l'interprétation littérale des instruments juridiques européens invoqués, la Cour EDH s'est appuyée sur le meilleur intérêt de l'enfant aussi bien que sur une interprétation évolutive de la Convention européenne des droits de l'homme.*

*Le présent « paper » s'interroge sur l'existence d'un dialogue dans le contexte des droits fondamentaux, et s'il pourra être développé à l'avenir pour atteindre un niveau commun de protection des droits fondamentaux et développer un système de principes et de valeurs partagées qui pourra être utilisé comme point de référence pour les juges nationaux et les législateurs ainsi que pour les négociateurs de conventions internationales sur la maternité de substitution.*

**Mots-clés :** Maternité de substitution, maternité de substitution transfrontalière, marge d'interprétation, intérêts supérieurs de l'enfant, dialogue des juges

# Surrogacy from the Luxembourg and Strasbourg perspectives: divergence, convergence and the chance for a future dialogue\*

## I. Surrogacy before the Strasbourg and Luxembourg Courts

Surrogacy has become a more and more frequent practice in the European States, despite the lack of a clear national and international legal framework, and has drawn the attention of major international organizations and bodies, such as the Council of Europe<sup>1</sup>, the UN Committee on the Rights of the Child<sup>2</sup>, the Hague Conference on Private International Law (HCCH)<sup>3</sup>, as well as the International Commission on Civil Status (ICCS)<sup>4</sup>. A recent study of the European Parliament shows that the European Union countries approach the issue differently: in some States surrogacy is prohibited; in others it is legal or partially restricted (especially with the aim to prevent commercial exploitation or illicit practices in fertility clinics<sup>5</sup>); in others it is simply ignored. As Advocate General Wahl recently said, “surrogacy, an increasingly common form of medically assisted reproduction, constitutes a sensitive political and social issue in a number of Member States”<sup>6</sup>.

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\* I am very grateful to Professor Isabelle Bosse-Platière for her valuable comments and suggestions. All mistakes remain mine.

<sup>1</sup> See Committee of Experts of the Council of Europe on Progress in the Biomedical Sciences (CAHBI), “Rapport sur la procréation artificielle humaine”, 1989, [http://www.coe.int/t/dg3/healthbioethic/Texts\\_and\\_documents/INF\\_2014\\_5\\_vol\\_II\\_textes\\_%20CoE\\_%20bio%C3%A9thique\\_F%20\(2\).pdf](http://www.coe.int/t/dg3/healthbioethic/Texts_and_documents/INF_2014_5_vol_II_textes_%20CoE_%20bio%C3%A9thique_F%20(2).pdf) (especially par. 15, p. 121) and recently Secretary General’s speech, 6 July 2015, available at [http://www.coe.int/en/web/secretary-general/speeches/-/asset\\_publisher/gFMvI0SKOUrv/content/46th-annual-study-session-of-the-iiidh-children-and-international-human-rights-law-](http://www.coe.int/en/web/secretary-general/speeches/-/asset_publisher/gFMvI0SKOUrv/content/46th-annual-study-session-of-the-iiidh-children-and-international-human-rights-law-) (consulted on 25 January 2016).

<sup>2</sup> See, *inter alia*, the UN Committee on the Rights of the Child, “Committee on rights of child examines reports of India under the convention and protocols on children in armed conflict, sale of children”, 3 June 2014, available at: [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear\\_en\)/93981E0D1237614AC1257CEC005C6BE6?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/93981E0D1237614AC1257CEC005C6BE6?OpenDocument) (consulted on 25 January 2016).

<sup>3</sup> The Permanent Bureau of the HCCH is currently studying the private international law issues being encountered in relation to the legal parentage (or “filiation”) of children, as well as in relation to international surrogacy arrangements more specifically. See “The desirability and feasibility of further work on the Parentage / Surrogacy Project” (Prel. Doc. No 3 B of March 2014) and its accompanying “Study of Legal Parentage and the issues arising from International Surrogacy Arrangements” (Prel. Doc. No 3 C of March 2014), available at [http://www.hcch.net/index\\_en.php?act=text.display&tid=178](http://www.hcch.net/index_en.php?act=text.display&tid=178); “The parentage/Surrogacy project: an updating note” (Prel. Doc. No 3 A of February 2015), February 2015, available at [http://www.hcch.net/upload/wop/gap2015pd03a\\_en.pdf](http://www.hcch.net/upload/wop/gap2015pd03a_en.pdf) (consulted on 26 January 2016).

<sup>4</sup> International Commission on Civil Status, “Surrogacy and the civil status of the child in ICCS member States”, 2013, available at <http://www.cicci.org> (consulted on 26 January 2016).

<sup>5</sup> European Parliament, “A comparative study on the regime of surrogacy in EU Member States”, 2013, [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOLJURI\\_ET%282013%29474403\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOLJURI_ET%282013%29474403_EN.pdf). The data from Croatia are missing as this State joined the European Union on 1<sup>st</sup> July 2013, (consulted on 26 January 2016).

<sup>6</sup> Opinion of Advocate General Wahl, delivered on 26 September 2013, ECJ, case 363/12, Z. [2014], ECLI:EU:C:2014:159.

As underlined by the European Parliament, surrogacy may take different forms. In fact, it is possible to distinguish “traditional surrogacy”, where surrogates (women who help commissioning persons to become parents by carrying a child for them) become pregnant using the commissioning father’s gametes and their own ova, from “gestational surrogacy”, which involves in vitro fertilization treatment (IVF) whereby either the commissioning<sup>7</sup> mother or a donor provides the ova employed in the fertilization process<sup>8</sup>. In the latter case, the surrogate mother is not genetically related to the child she carries. It is also possible that the child born from surrogacy has no genetic link with a commissioning father in cases where both the gametes come from donors.

The issue of surrogacy involves extremely difficult questions of private international law: in fact, it raises problems concerning, among others things: (i) birth registration and the establishment of legal parentage; (ii) the possible recognition of legal parentage already established abroad; and, (iii) the application of rules concerning the contestation of legal parentage<sup>9</sup>. It also poses delicate questions of civil law, such as the qualification of the surrogacy arrangement, in particular whether it should be considered a proper and enforceable agreement, even if it provides for commercial treatment of some delicate aspects of human life.

The issue of surrogacy recently reached the European Court of Human Rights (ECtHR) and the Court of justice of the European Union (ECJ). Last year, two judgments came down from Luxembourg, both rendered by the Great Chamber on 18 March 2014, *C.D.*<sup>10</sup> and *Z.*<sup>11</sup> The cases involved applicants, intended mothers, who had claimed for paid surrogacy leave to be granted by their employers and the questions raised by the national judges concerned the interpretation and validity of Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding<sup>12</sup>, Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation<sup>13</sup>, and Directive 2000/78, establishing a

<sup>7</sup> The European Parliament (EP) suggests to use the word “intended parents” instead of “commissioning parent” because the term “commissioning” implies a commercial connotation which does not always characterizes surrogacy (see, EP, “A comparative study on the regime of surrogacy in EU Member State”, cit., p. 12). However, due to the fact that the remunerated surrogacy appear to be the vast majority of the cases, in the present paper it will be preferred the term “commissioning”, even if also “intended” will be used.

<sup>8</sup> See EP, “A comparative study on the regime of surrogacy in EU Member States”, cit., p. 12 and Opinion of Advocate General Wahl, cit., par. 31.

<sup>9</sup> See Permanent Bureau of HCCH, “Study of legal parentage and the issue arising from international surrogacy arrangements”, March 2014, cit.

<sup>10</sup> ECJ, case C-167/12, *C.D.* [2014], ECLI:EU:C:2014:169.

<sup>11</sup> ECJ, case C-363/12, *Z.* [2014], ECLI:EU:C:2014:159.

<sup>12</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 348, 28 November 1992, p. 1.

<sup>13</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26 July 2006, p. 23.



general framework for equal treatment in employment and occupation<sup>14</sup>, in order to establish if the existing legal framework currently recognizes such a right for the commissioning mothers.

A few months later, three judgements and a decision on surrogacy were delivered by Strasbourg: *Mennesson v. France*<sup>15</sup>, *Labasse v. France*<sup>16</sup>, *Paradiso and Campanelli v. Italy*<sup>17</sup> and *D. v. Belgium*<sup>18</sup>.

Before analyzing the legal reasoning and delicate balancing struck by the European courts, it bears noting that they never ruled on the compatibility of surrogacy with, respectively, the European Convention of Human Rights (ECHR)<sup>19</sup> and the Charter of Fundamental Rights of the European Union (CFR)<sup>20</sup>.

The first time that the question of surrogacy was brought to Strasbourg was in 1991, but there the question was limited to certain aspects, and the decision was rendered by the Human Rights Commission<sup>21</sup>. The case was started by one of the founders of “Les Cigogne”, an association of women willing to act as surrogate mothers. The association’s enrollment in the Strasbourg’s *Tribunal d’instance* registry of associations was rejected on the basis of Art. 353-1 of the Criminal Code, which criminalized the instigation of the abandonment of minors. The Human Rights Commission then evaluated if the refusal could be considered a limitation of the freedom of association protected by ECHR Art. 11. In its decision, the Commission stated that, even if such a limitation was deemed to interfere with the exercise of that freedom, it was justified according to art. 11, par. 2, of the ECHR as necessary in a democratic society due to the wide margin of appreciation of the State.

<sup>14</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, p. 16.

<sup>15</sup> ECtHR, *Mennesson v. France*, 26 Juin 2014.

<sup>16</sup> ECtHR, *Labasse v. France*, 26 Juin 2014. For a commentary see ACHMAD Claire, “Children’s Rights to the Fore in the European Court of Human Rights’ First International Commercial Surrogacy Judgements”, EHRLR 2014, pp. 638 – 646 ; BEAUMONT Paul, TRIMMINGS Katarina, “Recent jurisprudence of the European Court of Human Rights in the area of cross-border surrogacy: is there still a need for global regulation of surrogacy?”, available at <http://conflictoflaws.net/2015/beauumont-and-trimmings-on-human-rights-and-cross-border-surrogacy/> (consulted on 25 January 2016); PUPPINKC Grégor, DE LA HOUGUE Claire, “ECHR: Towards the liberalization of surrogacy”, *Revue Lamy de Droit Civil* 2014, p. 78 ss.; TRINCERA Tommaso, “Viola l’art. 8 della CEDU lo Stato che non riconosce il rapporto di filiazione costituito all’estero ricorrendo alla surrogazione di maternità”, available at : <http://www.penalecontemporaneo.it> (consulted on 25 January 2016).

<sup>17</sup> ECtHR, *Paradiso and Campanelli v. Italy*, 27 January 2015. For a commentary see WINKLER Matteo, “Senza identità: il caso Paradiso e Campanelli c. Italia”, GenIUS, 2015, pp. 243 – 257; VIVIANI Alessandra, “Il caso Paradiso e Campanelli ovvero la Corte europea contro i “pregiudizi” dei giudici nazionali”, available at <http://www.sidiblog.org> (consulted on 10 August 2015); BEAUMONT Paul, TRIMMINGS Katarina, “Recent jurisprudence of the European Court of Human Rights in the area of cross-border surrogacy: is there still a need for global regulation of surrogacy?” cit.

<sup>18</sup> ECtHR, *D. e a. v. Belgium*, 8 July 2014.

<sup>19</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953.

<sup>20</sup> The EU Charter of fundamental rights, in OJ C 364, 18 December 2000, p. 1 ss. On 12 December 2007, the EU Charter was proclaimed again by the presidents of the EU Commission, the EP and the Council at Strasbourg and adapted for the signature of the Lisbon Treaty. The new text has been published in OJ C 303, 14 December 2007, p. 1.

<sup>21</sup> HR Commission, dec. 5 June 1991, *Lavisse v. France*, in *Décision et Rapports*, 70, p. 218.

In the 2014 and 2015 above mentioned cases, instead, the Strasbourg Court offered the first interpretation of ECHR Art. 8<sup>22</sup> in surrogacy cases, drawing some guidelines which may help national judges (and even legislators), even if they present the limits of the search for a compromise between the clashing rights and interests involved, as we will see below.

Three more cases on surrogacy are now pending: *Laborie and Others v. France*<sup>23</sup>, *Foulon v. France*<sup>24</sup> and *Bouvet v. France*<sup>25</sup>, all communicated to the French Government on 16 January 2015. Moreover, the *Paradiso and Campanelli* case has now been referred to the Grand Chamber, as the five-judge panel accepted the Italian Government's request on 1<sup>o</sup> June 2015<sup>26</sup>. Therefore, further evolutions in the Strasbourg case law may be expected.

Also the ECJ did not say anything on the compatibility of the practice of surrogacy with the CFR, even if it is understandable due to the scope of the competence of the Luxembourg's judge in the context of the preliminary ruling: it is to be remembered, in fact, that the requests of the national judges were only about the interpretation and the validity of Directive 92/85, 2006/54 and (in Z. case) 2000/78.

Under a preliminary analysis, the approach of the two European Courts seems quite different, and convergence on a common standard seems implausible. While the Luxembourg Court maintained strict adherence to the questions presented and to the literal interpretation of the European legal instruments invoked, the Strasbourg Court, which has a different scope and method, decided the cases by relying on the child's best interests principle and on an evolutionary interpretation of the ECHR.

<sup>22</sup> Art. 8 ECHR: "Right to respect for private and family life . 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". For a commentary see PITEA Cesare and TOMASI Laura, *Art. 8*, in BARTOLE Sergio, DE SENA Pasquale, ZAGREBELSKY Vladimiro (a cura di), *Commentario breve alla Convenzione dei diritti dell'uomo*, Padova, 2012, pp. 297 – 369.

<sup>23</sup> Application no. 44024/13.

<sup>24</sup> Application no. 9063/14.

<sup>25</sup> Application no. 10410/14.

<sup>26</sup> The hearing has been held on 9<sup>th</sup> December 2015. The webcast of the hearing is available on the site of the ECtHR at: [http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2535812\\_09122015&language=lang](http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2535812_09122015&language=lang) (consulted on 25 January 2016).

The case law of the Strasbourg court has already had huge impact in several European countries, such as Germany<sup>27</sup>, Switzerland<sup>28</sup>, France (for obvious reasons)<sup>29</sup>, Spain<sup>30</sup>, and England<sup>31</sup>, where some judgments have overruled previous decisions relying on the *Mennesson* and *Labasee* cases. In others, like Ireland<sup>32</sup> and Italy<sup>33</sup>, even if the previous case law was not completely overruled, the national judges addressed pending cases using the Strasbourg Court's case law.

It is to be underlined that national case law does not treat the ECJ judgments in the same way as the Strasbourg ones, but it should be noted that national judges sought out the ECJ's intervention to resolve cases, even if they were matters of first instance, and one of the case (*C. D.*) was completely domestic. Therefore, it is possible to imagine that national judges will refer again to the ECJ to decide surrogacy cases<sup>34</sup>, which are to be considered as "hard cases"<sup>35</sup>.

The present paper does not cover private international law issues, which have already been investigated by the best scholars, even if, in the lack of a clear and consistent legal framework, the debate is still open<sup>36</sup>. Instead, it focuses on the difficult balancing made by the

<sup>27</sup> Bundesgerichtshof, decision of 10 December 2014 (n. XII ZB 463/13), reported by "The parentage/Surrogacy project: an updating note", cit., Annex I, par. 1.

<sup>28</sup> Higher Cantonal Administrative Court of St. Gallen, 19 August 2014, reported by "The parentage/Surrogacy project: an updating note", cit., Annex I, par. 2.

<sup>29</sup> As reported by the ECtHR in the document "Impact of the European Convention on Human Rights in States Parties: selected examples", 8 January 2016: "A revision of the Court of Cassation's jurisprudence came about as a result of two judgments issued on 26 June 2014 – *Mennesson v. France* (Application No. 65192/11) and *Labassée v. France* (Application No. 65941/11), in which the Strasbourg Court decided that the French authorities' refusal to grant legal recognition to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy treatment and the intended parents who had the treatment had amounted to a violation of the children's right to respect for their private life (Article 8 of the Convention). By way of delivering two precedent cases on 3 July 2015, the Court of Cassation's Plenary Assembly established that a refusal to transcribe a foreign birth certificate of a child born abroad to a French national on the sole ground that this birth was the result of surrogacy can no longer be justified by the mere existence of a surrogacy agreement containing the names of the actual biological parents. (See Cass., ass. plén., 3 juill. 2015, P+B+R+I, n° 14-21.323 and Cass., ass. plén., 3 juill. 2015, P+B+R+I, n° 15-50.002) », <http://website-pace.net/documents/19838/419003/AS-JUR-INF-2016-04-EN.pdf/12d802b0-5f09-463f-8145-b084a095e895> (consulted on 25 January 2016).

<sup>30</sup> Dirección General de los Registros y del Notariado, Circular 11 July 2014, reported by "The parentage/Surrogacy project: an updating note", cit., Annex I, par. 3.

<sup>31</sup> RE X (A child) (Surrogacy: Time limit) [2014] EWH 3135, reported by "The parentage/Surrogacy project: an updating note", cit., Annex I, par. 6.

<sup>32</sup> Supreme Court, M.R. and D.R. & ors – v- An t- Ard- Chláraitheoir & ors [2014]IESC 60, 7 November 2014, reported by "The parentage/Surrogacy project: an updating note", cit., Annex I, par. 5.

<sup>33</sup> Corte di Cassazione, sez. I, 11 November 2014, n. 24001, P.D. e P.A. c. R.M., in *Il Corriere giuridico*, 2015, p. 471-473, with the commentary of RENDA Andrea, "La surrogazione di maternità tra principi costituzionali ed interesse del minore", *Ibidem*, pp. 474 – 488.

<sup>34</sup> As far as Strasbourg is concerned, the Council of Europe General Secretary has recently stated that "As medical science continues to develop, we can expect more of these kinds of questions, which are a challenge for any legal mind". See Secretary General's speech, 6 July 2015, cit. See also CARACCILO DI TORELLA Eugenia, FOUBERT Petra, "Surrogacy, Pregnancy and Maternity Rights: A Missed Opportunity for a More Coherent Regime of Parental Rights in the EU", in *ELR*, 2015, pp. 52- 69, spec. p. 69.

<sup>35</sup> About "hard cases" see: DWORKIN Ronald, *Taking rights seriously*, Cambridge, 1977, p. 105 ss.

<sup>36</sup> See on this topic: MEILHAC-PERRI Marion, "National Regulation and Cross-Border Surrogacy in France", *Yearbook of Private International Law* 2015, pp. 275-288 ; ROKAS Konstantinos, "National Regulation and Cross-Border Surrogacy in European Union Countries and Possible Solutions for Problematic Situations", pp. 289- 314, *ibidem* ; WELLS-GRECO MICHAEL e DAWSON HENRY, "Inter-Country Surrogacy and Public Policy: Lessons from the European Court of Human Rights", *ibidem*, pp. 315-341 ; DI STEFANO Marcella, "Maternità surrogata ed interesse superiore del minore: una lettura internazionalprivatistica su un difficile puzzle da ricomporre", *GenIUS*, 2015, pp. 160 -173; SINDRES David, "Le tourisme procréatif et le droit international privé", *JDI*, 2015, pp. p. 429-504; PRETELLI Ilaria, "Les défis posés au droit intrnational privé par la reproduction technologiquement assistée", *Rev. Crit. DIP*, 2015, pp. 559 – 578; VALLAR Giulia, TRINCHERA Tommaso, "La surrogazione di maternità all'estero: trascrizione dell'atto di nascita e profili di responsabilità penale" in CASONATO Carlo, SCHUSTER Alexander (edited by), *Rights On The Move - Rainbow Families in Europe. Proceedings of the Conference, Trento, 16-17 October 2014*, Università degli studi di Trento, 2014, pp. 241-253, available at <http://eprints.biblio.unitn.it>; TONOLO Sara, "La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interessi del minore", *RDIPP* 2014, pp. 81 ss.; BEAUMONT Paul, TRIMMINGS Katarina, *International Surrogacy Arrangements. Legal Regulation at the International Level*, Oxford, Portland, 2013; BOELE- WOELKI Katharina, "(Cross-Border) surrogate motherhood: we need to take action now!", in *The Permanent Bureau of the Hague Conference on*

ECJ and ECtHR between the clashing rights and interests involved, arguing whether inter-court dialogue would be possible and feasible, in order to serve as point of reference for national judges and legislators in dealing with this delicate topic as well as, ultimately, to help in the elaboration of an international convention to establish cooperation on the issue.

## II. The rights and interests to be balanced in cross border surrogacy

Surrogacy (and especially, cross border surrogacy) involves several rights that may be opposite and even clashing: the rights of children born from surrogacy, the rights of surrogate mothers, the rights of children waiting for adoption, and the rights of intended parents<sup>37</sup>. It is possible to debate whether the above-mentioned rights are to be classified as civil rights, human rights, expectations, or mere desires or if they are core rights or rights that may be subject to restrictions.

Among the rights of surrogate mothers, there are *in primis* the rights to health and to life, as these women need to be protected from unhealthy and dangerous treatments that could cause serious illness or even death, as the Permanent Bureau of the HCCH has reported<sup>38</sup>. In gestational surrogacy, it is necessary also to protect donors from dangerous treatment in the extraction of ova, which may provoke infertility, diseases and, in some cases, death<sup>39</sup>.

Concerning children born from surrogacy, several rights may be jeopardized: the right to their identity<sup>40</sup>, the right not to suffer adverse discrimination on the basis of birth parental status<sup>41</sup>, the right to have their interests regarded as a primary consideration in all actions concerning them<sup>42</sup>, the right to trace their genetic and birth origins<sup>43</sup>, the right to grow up in a family and to receive care<sup>44</sup>, and the right to be protected from abandonment<sup>45</sup>. The children also have to be protected from illegal trafficking and bad treatment: while adoption

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Private International Law, *A Commitment to Private International Law, Essays in honour of Hans Van Loon*, Cambridge, Antwerp, Portland, Intersentia, 2013, pp. 47-58; CAMPIGLIO Cristina, “Lo stato di figlio nato da contratto internazionale di maternità”, RDIPP 2009, pp. 589-604.

<sup>37</sup> On the discourse about human rights involved in surrogacy matters see: ECLJ report, “Surrogate motherhood: a violation of human rights”, 26 April 2012, available at <http://www.eclj.org>; Permanent Bureau of HCCH, “A preliminary report on the issues arising from international surrogacy arrangements”, march 2012, p. 26. Among scholars, see STARK Barbara, “Transnational surrogacy and international human rights law”, ILSA Journal of International & Comparative Law, Vol. 18, No. 2, 2012, pp. 1 – 18; POLI Ludovica, “Maternità surrogata e diritti umani: una pratica controversa che necessita di una regolamentazione internazionale”, BioLaw Journal 2015, pp. 7 – 28.

<sup>38</sup> See Permanent Bureau of HCCH, “The parentage/Surrogacy project: an updating note”, cit., Annex II, par. 4.

<sup>39</sup> The documentary “Eggsploitation” produced by The Center for Bioethics and Culture (California) spotlights the booming business of human eggs told through the tragic and revealing stories of women who became involved <http://www.eggsploitation.com/index.htm>.

<sup>40</sup> UN Convention on the Rights of the Child (UNCRC), G.A. Res. 44/25, 61st plen. mtg., U.N. Doc. A/Res/44/25 (Nov. 20, 1980), entered into force Sept. 2, 1990, art. 8.

<sup>41</sup> UNCRC, art. 2.

<sup>42</sup> UNCRC, art. 3.

<sup>43</sup> UNCRC, art. 7.

<sup>44</sup> UNCRC, art. 7.

<sup>45</sup> In Thailand and India several cases of child abandonment following surrogacy arrangements have been reported in 2014. In that cases, the commissioning parents refused to receive the children because they were born with the Down’s Syndrome. See Permanent Bureau of HCCH, “The parentage/Surrogacy project: an updating note”, cit., Annex II, par. 1.

procedures allow authorities to exercise a serious degree of control concerning the suitability of adoptive parents, surrogacy procedures do not provide for any control on parental suitability to care for children<sup>46</sup>.

Although the argument is sometimes made that there is a right to become a parent<sup>47</sup>, there is currently no international treaty or convention establishing a human “right to a child”<sup>48</sup>. This is the case notwithstanding an increasing trend toward recognizing reproductive rights with the aim to assist couples and individuals to achieve their reproductive goals and fully exercise the right to have children by choice<sup>49</sup>. The current absence of any such human right must be considered when evaluating the rights of commissioning parents.

In addition to the rights of individuals, there are also several State interests to be protected. First of all, States assert their freedom to rule on surrogacy: compelling States to accept the effects of cross-border commercial surrogacy arrangements, by requiring them to recognize the legal parent-child relationship established through surrogacy abroad, may instead result in nullifying the legislative power of the State. The freedom of the States to regulate surrogacy should be maintained, as long as it properly respects the human rights of the individuals involved, including on public policy grounds<sup>50</sup>. It should be born in mind that regulations on surrogacy can vary from criminal sanctions for deceitful intermediaries<sup>51</sup> to the sharing of the remunerated maternity leave between a surrogate mother and a commissioning one (in case of domestic surrogacy). Secondly, States have the duty to enforce their laws on adoption: an indiscriminate admission of surrogacy may lead people to consider adoption “an option of last resort or a second-best choice”<sup>52</sup>.

<sup>46</sup> See Permanent Bureau of HCCH, march 2011, “Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements” available at <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf> (consulted on 25 January 2016), par. 31 – 32. The document also reports the case *Huddleston v. Infertility Clinic of America Inc.* (20 August 1997), Superior Court of Pennsylvania. A twenty-six year old male was able to enter into a surrogacy arrangement as a sole intending parent with a surrogate mother in Pennsylvania, through a fertility clinic. The surrogate mother, inseminated with the young man sperm, gave birth to a child who was handed into his care a day after birth. The child died six weeks later as a result of repeated physical abuse.

<sup>47</sup> See, for example, VIVIANI Alessandra, “Il caso Paradiso e Campanelli ovvero la Corte europea contro i “pregiudizi” dei giudici nazionali”, cit.

<sup>48</sup> It is also possible to argue if there may be a right to surrogacy. On this point see STRAEHLE Christine, “Is There a Right to Surrogacy?”, in *Journal of Applied Philosophy*, 2015, pp. 1- 14, where the author argue that, while it is not possible to conceive the rights to surrogacy as a right to assisted procreation, because States can’t legislate the disposal of individual bodies (as it remains for the surrogates to give their consent) it may be understood as a contractual right (and then, the surrogacy agreement may be enforceable).

<sup>49</sup> See STARK Barbara, “Transnational surrogacy and international human rights law”, *ILSA Journal of International & Comparative Law*, cit.

<sup>50</sup> The notion of public policy is main controversial, but it is frequently invoked by the State to reject the recognition or enforcement of a foreign act or judgement which states the parentage between a child and his commissioning parents or the applicability of a foreign law which leads to the same result. See FUMAGALLI Luigi, “Considerazioni sulla unità del concetto di ordine pubblico”, *Comunicazioni e Studi*, 1985, pp. 593 – 648.

<sup>51</sup> The Permanent Bureau of the HCCH reported that there have been several denounces about unhelpful and unresponsive clinics, where surrogate mothers are not properly treated or “gamete mix-ups” occur: see “The parentage/Surrogacy project: an updating note”, cit., Annex II, par. 5.

<sup>52</sup> See BOELE- WOELKI Katharina, “(Cross-Border) surrogate motherhood : we need to take action now !”, in *The Permanent Bureau of the HCCH, A Commitment to Private International Law, Essays in honour of Hans Van Loon*, Cambridge, Antwerp, Portland, Intersentia, 2013, pp. 47-58, 48.



### III. The parents' rights at issue

The first question to be investigated through the analysis of the European Court's case law is how they considered the parents' rights: in particular, whether the Courts identified any fundamental rights to be protected and whether they were entitled to social and economic rights (and to what extent of protection thereof), such as the right to a paid leave for commissioning parents.

#### A. The Strasbourg perspective: the right to respect of family and private life

In all the three judgments rendered between 2014 and 2015 by the Strasbourg Court, parents' expectations and rights seem to have been partially recognized and partially frustrated, as described in the following.

The *Mennesson* and *Labassee* deal with France's refusal to grant legal recognition to parent-child relationships lawfully established in the United States as a result of commercial surrogacy agreements. The applications were lodged with the ECtHR by the intended parents, personally and on behalf of the children born as the result of the surrogacy arrangements. The Strasbourg Court did not formally join the two cases, but it developed the same legal reasoning and decided them simultaneously.

The facts are very similar. In 2000, the Mennessons, a French married couple, went to California to obtain two daughters through a commercial surrogacy arrangement. In 2001 the Labassees, another married couple, obtained a daughter in Minnesota in the same way. In both cases, the children were conceived using the intended fathers' sperm and an anonymous donor's eggs. In both the American States, the authorities had issued birth certificates stating that the newborns were the children of the Mennesson and Labasee couples. However, French authorities refused to enter the birth certificates in the national register. The couples therefore appealed against the refusals and the case was decided in the final instance by the French Court of Cassation, which deemed that such entries in the register were contrary to the principle of inalienability of civil status, one of the fundamental principles of French law, and that granting recognition to such birth certificates would give effect to surrogacy agreements that were null and void under the national Civil Code, on the basis of public order. Both couples then took the case to the Strasbourg Court, acting also in the name of their children, claiming violations of their rights to respect of family and private life under ECHR Art. 8.

A few months later, the Strasbourg Court issued the *Paradiso and Campanelli v. Italy* judgment. The case shows some differences from *Mennesson* and *Labasee*, and therefore it is possible to observe some divergences in the Court's legal reasoning.

The application was lodged by Mrs. Paradiso and Mr. Campanelli, a married couple that entered into a commercial surrogacy agreement with a clinic in Moscow. On 27 February 2011, the appointed surrogate mother (who received a compensation of € 50,000.00) gave birth in Russia to a child with no genetic links with the commissioning parents. Russian authorities issued a birth certificate that indicated Mrs. Paradiso and Mr. Campanelli as parents of the child, without mentioning the surrogacy. Like in the *Mennesson* and *Labasee* cases, the couple then had troubles in the recognition in Italy of such birth certificate. In addition to that, they finally suffered the removal of the child, who was given at first to a children's home and then to a foster family<sup>53</sup>. On 3 April 2013, the Court of Appeal of Campobasso, which had gained jurisdiction of the case in the interim, decided that the Russian birth certificate was false and could not be registered in Italy, because of the lack of a genetic link between the parents and the child. In the same period, the minors' court declared that the intended parents could not adopt the child since they were neither parents nor relatives of the child. Mrs. Paradiso and Mr. Campanelli then lodged an application before the Strasbourg Court, complaining that the Italian authorities had violated their right to respect for private and family life under ECHR Art. 8 and their right to a fair trial under ECHR Art. 6, also in coordination with ECHR Art. 14, by the refusal to recognize the legal parent-child relationship established through the Russian birth documents and the removal of the child through an unfair procedure. The Court then dismissed the complaint regarding the refusal by Italian authorities to register the child's birth certificate on admissibility grounds, because the applicants had not exhausted available domestic remedies since they had not appealed to the Italian Corte di Cassazione, and examined the application only in the light of ECHR Art. 8, for the prong concerning family life.

The parents also acted on behalf of the child, but the Court rejected this part of the application, because they did not have standing to represent the minor's interests in the context of judicial proceeding, for the lack of biological or adoptive ties to the child.<sup>54</sup>

First of all, it has to be highlighted that, in all the three judgments, before deciding on the merits, the Court clarified, in its ruling on admissibility, that in such cases ECHR Art. 8, which presupposes the existence of a family, was applicable. The Court, in fact, relying on

<sup>53</sup> Specifically, Mrs. Paradiso, who had gone to Russia to take the child, obtained from the Italian Consulate the necessary travel documents and went back to Italy on 30 April 2011, where she requested the transcription of the Russian birth certificate in the Italian registry. The request was, however, rejected, on the grounds that the birth documents issued in Russia contained false information, since they did not disclose that the child was born through surrogacy. Mrs. Paradiso and Mr. Campanelli were then charged with misrepresentation of civil status and of having violated adoption legislation because they were not authorized by the Italian authorities to adopt such a young child: in fact, in 2006 they had been deemed suitable for adopting older children, not newborns. A DNA test then revealed that Mr. Campanelli was not the genetic father of the child, as he had previously reported. The child was consequently removed from the commissioning parents, because there was no genetic link with them, and they had acted contrary to the law. He was then given up for adoption, because his biological parents were unknown, and his surrogate mother had expressly renounced to her link to the baby. He was at first placed in a children's home and then, two years later, on 26 January 2013, entrusted to foster parents, without recognition of a formal identity. He received a new identity only in 2013, upon the request of his guardian.

<sup>54</sup> See ECtHR, *Paradiso and Campanelli*, cit., par. 50.

its previous case law<sup>55</sup>, recognized the existence of «liens familiaux *de facto*» because the commissioning parents had taken care of the children since their birth and they lived together as a commonly understood family. It is worthwhile to underline that in *Paradiso and Campanelli* the Court recognized that this familiar link had been established even if parent and child lived together for only few months (six months in Italy, since the third month of life of the child, and some weeks in Russia)<sup>56</sup>. Therefore, ECHR Art. 8, as far as the “family life” prong was concerned, was deemed safely applicable<sup>57</sup>.

In *Mennesson, Labassee* and *Paradiso and Campanelli*, the Court then moved forward to consider whether the prong of ECHR Art. 8 concerning “private life” could also be applicable. In the opinion of the Court, this latter is relevant for certain aspects of identity, not only in a physical sense, but also in a social one, among which must be included the legal parent-child relationship, and thus ECHR Art. 8 was deemed applicable also with regard to the private life prong<sup>58</sup>. In particular, in the *Paradiso and Campanelli* case, the Court, “as a subsidiary consideration”, observed that in the context of the proceedings brought to obtain recognition of the parent-child relationship, the second applicant underwent a DNA test, so that, concerning Mr. Campanelli, also the private life prong was applicable, because “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 biological relationship between a child born out of wedlock and his natural father”<sup>59</sup>.

In *Mennesson* and *Labassee*, the Court determined (as the French Government admitted also) that the refusal to grant legal recognition in France of the parent-child relationships lawfully established abroad was an interference in the applicants’ family and private life, under ECHR Art. 8<sup>60</sup>. The question was then to examine whether such interference could be deemed justified under Art. 8, paragraph 2 of the ECHR as (i) being “in accordance with the law”, (ii) pursuing one or more of the legitimate aims listed therein, and (iii) being “necessary in a democratic society” in order to achieve the aim (or aims) concerned.

In both cases, the Court recognized that such interference was established by the law<sup>61</sup>. Concerning point (ii), the Court refused to accept that “prevention of crimes” was the aim of the interference, because the applicants had acted in US territory, where surrogacy was legal, and, therefore, their acts did not constitute punishable offences in France. However,

<sup>55</sup> ECtHR, *X, Y, Z v. United Kingdom*, 22 April 1997 and *Wagner and J.M.W.L. v. Luxembourg*, 28 June 2007. In the *Paradiso and Campanelli* case, was also crucial the consideration of the judgement *Moretti and Benedetti v. Italy*, 27 April 2010.

<sup>56</sup> ECtHR, *Paradiso and Campanelli v. Italy*, par. 68-69.

<sup>57</sup> ECtHR, *Labassee v. France*, par. 37 and *Mennesson v. France*, par. 45. The same conclusion was reached by the Court in ECtHR, *D. v. Belgium*, cit., par. 50.

<sup>58</sup> ECtHR, *Labassee v. France*, par. 38 and *Mennesson v. France*, par. 46.

<sup>59</sup> See ECtHR, *Paradiso and Campanelli*, cit., par. 70.

<sup>60</sup> ECtHR, *Labassee v. France*, par. 50 and *Mennesson v. France*, par. 48.

<sup>61</sup> While in the *Labassee* case the applicants did not contest this point, in the *Mennesson* one they alleged that there was an insufficient legal basis for the interference in question: the Court, however, underlined that, even if no provision of domestic law explicitly prohibited recognition of a legal parent-child relationship between the intended parents and the children, Articles 16-7 and 16-9 of the French Civil Code expressly stated that surrogacy arrangements were null and void on the grounds of public policy.



the Court recognized that French authorities had acted in order to deter their nationals from having recourse to methods of assisted reproduction outside the national territory that are prohibited in France, with the aim to protect children and surrogate mothers. Therefore, the Court recognized that the French Government had acted according to legitimate aims listed in the second paragraph of ECHR Art. 8: the “protection of health” and “the protection of the rights and freedoms of others”<sup>62</sup>.

Concerning point (iii), the Court determined that the State had acted within its margin of appreciation, due to the fact that there was no consensus among the Council of Europe States on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children conceived abroad, because such issues raise sensitive ethical questions<sup>63</sup>. Therefore, in a passage that may appear quite unclear, the Court stated, on the one hand, that, “States must in principle be afforded a wide margin of appreciation, regarding the decision not only whether or not to authorize this method of assisted reproduction but also whether or not to recognize a legal parent-child relationship between children legally conceived as the result of a surrogacy arrangement abroad and the intended parents”<sup>64</sup>. On the other hand, however, the Court underlined that regard should also be had for the fact that an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned so that the State’s margin of appreciation needs to be reduced<sup>65</sup>. The Court went on to declare that it falls to the Court to examine carefully whether the national authorities have struck a fair balance between the competing interests of the State and the rights of the individuals directly involved, within the limits of the State’s margin of appreciation. In tackling this task, the Court has to have regard for the essential principle according to which, whenever the situation of a child is at issue, the best interests of that child are paramount<sup>66</sup>. The Court then determined that the approach of the French authorities revealed “an objection on grounds of international public policy, which is specific to private international law” but declared that it was not its duty to assess this position, focusing on the question of whether domestic courts took into account the applicants’ interest in fully enjoying their rights to respect for their private and family life acting in the paramount best interests of the child.

At this point, the Strasbourg Court’s analysis distinguished the position of the parents from that of the child.

Concerning the intended parents, the Court concluded that French authorities had struck a fair balance between their interests and the State’s: in fact, the Court noted that they were

<sup>62</sup> ECtHR, *Labassee v. France*, cit., par. 54 and *Mennesson v. France*, cit., par. 62.

<sup>63</sup> ECtHR, *Labassee v. France*, cit., par. 57-58 and *Mennesson v. France*, cit., par. 78-79.

<sup>64</sup> ECtHR, *Labassee v. France*, cit., par. 58 and *Mennesson v. France*, cit., par. 79.

<sup>65</sup> ECtHR, *Labassee v. France*, cit., par. 59 and *Mennesson v. France*, cit., par. 80.

<sup>66</sup> ECtHR, *Labassee v. France*, cit., par. 60 and *Mennesson v. France*, cit., par. 81.

able to settle with the children in France, living their family life peacefully, without any serious practical obstacles. Therefore, the Court concluded that there was no violation of Art. 8 concerning the applicants' right to respect for their family life<sup>67</sup>.

In *Paradiso and Campanelli*, even if the Court rejected the complaint concerning the impossibility of having the particulars of the child's birth certificate entered in the civil status register, for the lack of exhaustion of domestic remedies<sup>68</sup>, it found that the national courts did not act unreasonably in applying the national law strictly to determine paternity and in ignoring the legal status established abroad<sup>69</sup>. Then it focused on the measures taken in respect of the child (the removal and the placement under guardianship), to examine if they were to be deemed proportionate and, therefore, if the child's interests were taken into account sufficiently by the Italian authorities.

The Court then found that the removal of the child was an interference with the family and private life of the applicants, unnecessary in a democratic society, even if authorities had acted in accordance with law and with the legitimate aim of "preventing disorder". In the reasoning of the Court, in fact, the removal of the child from the intended parents was to be deemed an extreme measure, which could be justified only in the event of immediate danger to the child. In the end, the Court held that the Italian authorities had failed to strike the correct balance between the interests and rights involved, disregarding the child's best interests principle, and violating ECHR Art. 8<sup>70</sup>.

Also in the subsequent *D. and others v. Belgium* decision<sup>71</sup>, the Court found that the State acted in its margin of appreciation, remembering that where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin has to be wider<sup>72</sup>. The Court found that the separation of the child from the applicants was an interference, but in accordance with the

<sup>67</sup> It is to be cleared that the application of the *Mennessons* and *Labasees* was lodged also in the name of their children: as a consequence, also the application concerning the right of the children to the respect of their family life was implicitly dismissed.

<sup>68</sup> ECtHR, *Paradiso and Campanelli v. Italy*, cit., par. 62.

<sup>69</sup> ECtHR, *Paradiso and Campanelli v. Italy*, cit., par. 77. The Permanent Bureau of HCCH regrets that, in this way, the ECtHR did not directly determine the issue if it is a violation of Art. 8 ECHR to deny the child's ability to have his/her legal parentage, established abroad, recognized or established with a non-genetically related intending parent. However, it underlines an important *obiter* comment of the Court, that stated that, in relation to the Italian authorities' approach to the child legal status, in applying national law strictly to determine legal parentage and ignoring the legal status created abroad, they had not, in the circumstances of the case, acted "unreasonably". See Permanent Bureau of HCCH, "The Parentage/Surrogacy project: an updating note", cit.

<sup>70</sup> For further analysis on the legal reasoning of the ECtHR on this point see par. IV, A.

<sup>71</sup> This decision comes from the application of a Belgian married couple who had a baby, A., through traditional surrogacy in Ukraine, born on 26 February 2013. The Belgian consular authorities refused to grant them the necessary travel document to leave Ukraine, because the baby birth's certificate did not mention surrogacy and the parents were not able to present the necessary documents to confirm their relationship with the child. The applicants appealed against such refusal but on 25 April 2013 but they were obliged to return to Belgium without the child, because of the expiry of their residence permit in Ukraine. On 31 July 2013 the Brussels Court of Appeal, in second instance, upheld the applicants' appeal, considering that they had sufficiently established that the D. was A.'s biological father and that the public-order concerns previously expressed had been lifted. The Court then ordered the Belgian State to issue the father with an appropriate document bearing A.'s name, in order to enable him to travel to Belgium, where they arrived on 6 August 2013. The applicants then took the matter to the ECtHR, relying on Art. 8 ECHR, claiming, *inter alia*, that their effective separation from the child on account of the Belgian authorities' refusal to issue a travel document had jeopardized the relationship between the baby and his parents.

<sup>72</sup> ECtHR (dec.), *D. v. Belgium*, cit., par. 54.

law, proportionate and necessary in a democratic society. Moreover, it underlined that Belgian authorities acted with the legitimate aim to prevent humans trafficking as well as to protect the rights of the surrogate mother and of the child<sup>73</sup>.

In light of the above, it seems that in the *Mennesson* and *Labasee* cases, the parents' rights and expectations were disregarded, while in the *Paradiso and Campanelli* case they were protected. In fact, in the former cases the Court found that the State had acted within its margin of appreciation, striking a fair balance, so that it did not violate the right to respect of the family life of the applicants under ECHR Art. 8 (as it concluded also in the *D. and others v. Belgium* decision), while in the latter that it had exceeded this limit, violating ECHR Art. 8. However, the analysis of the application of the child's best interests principle in the following paragraphs will show that it leads to reverse the applicants' positions.

## B. The Luxembourg perspective: maternity leave and disability discrimination

Curiously, also the Luxembourg Court issued twin judgments on the same day, the *C.D.* and the *Z.* case<sup>74</sup>. For the ECJ, this was the first time that the question of surrogacy, either domestic or cross border, came up, even if the Court had decided on IVF in the past and drew some principles from that case law<sup>75</sup>.

The Luxembourg Court's twin judgements, concerning, respectively, a domestic and a cross border surrogacy, deal mainly with the question of whether a commissioning mother has the right to paid maternity leave under the current EU legal framework provided, in particular under Directives 92/85, 2006/54, and 2000/78. The Court applied the same legal reasoning in both cases, while the General Advocates' opinions (Kokott and Wahl) are diametrically opposed.

In the *C.D.* case the English judge, by the first and second question, asked if Directive 92/85 should be interpreted as giving the right to paid maternity leave to a commissioning mother, particularly if she is breastfeeding<sup>76</sup>.

<sup>73</sup> ECtHR (dec.), *D. v. Belgium*, cit., par. 52.

<sup>74</sup> See notes 10 and 11.

<sup>75</sup> ECJ, case C-506/06, *Mayr*, ECLI:EU:C:2008:119.

<sup>76</sup> The judgment originated from the referral of the UK Employment Tribunal of Newcastle upon Tyne in the trial involving Mrs. C.D., a commissioning mother who had a baby through a surrogacy arrangement in UK, and her employer, the National Health Service. In spring 2011, Mrs. C.D. asked her employer for paid leave to take care of the child, who would be born in August, first on the basis of the employer's policy on adoption and then invoking her right to maternity. In both cases, the request was rejected because she did not fulfill the conditions required, such as the deposit of an adoption certificate or a medical certificate assessing the pregnancy. She then took the matter to the Employment Tribunal of Newcastle upon Tyne. In the meantime, on 29 June 2011, the National Health Service decided, discretionally and without changing its policy on the issue, to grant her a paid leave on the basis of the employer's policy on adoption. On 26 August 2011, the child born to the surrogate mother and Mrs. C.D. started breastfeeding him from his first hour after birth. Then, Mrs. C.D. and her companion were declared to be the parents of the child by a parental order. In order to decide the case, the Employment Tribunal of Newcastle upon Tyne referred to the Court of Justice raising several questions.

The ECJ, choosing not to follow the opinion of General Advocate Kokott<sup>77</sup>, recalled the rationale of Directive 92/85, which is “to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breast-feeding”<sup>78</sup>. Then, it underlined that the workers covered by the directive are in an especially vulnerable situation which makes it necessary for the right to maternity leave to be granted to them, but which, particularly during that leave, cannot be compared to that of a man or a woman on sick leave. In fact, the maternity leave granted by Art. 8 of the Directive is aimed at protecting the biological condition of a woman during and after pregnancy and “the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment”<sup>79</sup>.

Subsequently, relying on a literal interpretation of the directive, the Court observed that maternity leave, even if it may be intended, *inter alia*, to protect the child-mother relationship (which could be in the child’s best interests, but the Court doesn’t mention this principle), in Directive 92/85 only concerns the period after “pregnancy and childbirth”<sup>80</sup>. This is consistent with ECJ case law on IVF treatment, which recognized the right to protection from dismissal for women that start such treatment only if a pregnancy has started<sup>81</sup>.

Therefore, the protection granted by Directive 92/85 presupposes that a worker entitled to such leave has been pregnant and has given birth to a child<sup>82</sup>.

Applying such considerations to the case, the Court underlined that Mrs. D. had never been pregnant: therefore, Directive 92/85 was not applicable to a commissioning mother, even if she is breastfeeding. Consequently, the Directive does not oblige States to recognize paid maternity leave for a commissioning mother, even if they remain free to establish rules more favorable to commissioning mothers<sup>83</sup>.

By the third and fourth questions, the judge asked if the refusal to grant paid leave to a commissioning mother constitutes discrimination on the basis of sex, in contrast with Directive 2006/54. Also in this case, the Court determined that there was not any direct discrimination because a commissioning mother is treated in the same way as a commissioning father<sup>84</sup>. Similarly, the Court determined that there was no indirect discrimination, because the refusal of paid leave was not deemed to be less favorable for women compared to men<sup>85</sup>.

<sup>77</sup> On Kokott’s position see par. IV, B.

<sup>78</sup> ECJ, *C.D.*, cit., point 29.

<sup>79</sup> ECJ, *C.D.*, cit., point 34.

<sup>80</sup> ECJ, *C.D.*, cit., point 36.

<sup>81</sup> Reference is made to the ECJ, *Mayr*, cit.

<sup>82</sup> ECJ, *C.D.*, cit., point 37.

<sup>83</sup> ECJ, *C.D.*, cit., point 40.

<sup>84</sup> ECJ, *C.D.*, cit., point 47.

<sup>85</sup> ECJ, *C.D.*, cit., point 49.

At the end, the Court also excluded allegations of less favorable treatment due to pregnancy, as the applicant had never been pregnant.

Consequently, the Court declined to judge on the last two questions, concerning the status of the commissioning mother and the direct effects of Directives 92/85 and 2006/54.

It is interesting to note that Court could have rejected the referral on the grounds that the Court's reply would not be useful for the national judge, given that, as reported by the judgment, paid leave was ultimately obtained by the applicant<sup>86</sup>. However, the Court did not even mention the question of admissibility, and the General Advocate stated that it is up to the referring court to determine, pursuant to its national law, whether or not there continues to be an interest in bringing an action in the main proceedings<sup>87</sup>. It is possible, then, to infer that the Court was willing to decide on this delicate topic, which, in fact was conferred upon the Grand Chamber, and which provoked the participation of the Irish, Greek, Spanish and Portuguese and (obviously) UK Governments and that of the European Commission.

In the "twin" judgment, *Z.*, the Court used the same approach and legal reasoning developed in *C.D.*, this time sharing the Opinion of General Advocate Wahl.

Mrs. *Z.*, resident in Ireland with her husband, was affected by a rare condition: although she had healthy ovaries and was fertile, she had no uterus and could not support a pregnancy. In 2010 she went to California to obtain, through a surrogacy arrangement, a child who was genetically linked to her and her husband. Due to the fact that in Ireland surrogacy is completely unregulated, she asked for paid leave on the grounds of the Law on adoption<sup>88</sup>. Her employer, a public school, rejected the request as she did not fill the conditions required, so she took the case to Irish Equality Tribunal, claiming discrimination on the basis of sex. She also alleged that she was discriminated against on the basis of her disability. The Irish Tribunal then raised several questions before the ECJ.

The Irish Tribunal asked the ECJ if, under the interpretations of Art. 3 of the TEU, which states the EU aims, Art. 8, concerning the elimination of inequalities and the promotion of equality between men and women, Art. 157 of the TFEU, related to the principle of equal pay for male and female workers, Art. 21, 23, 33, 34 of the Charter of Fundamental Rights of the European Union, concerning, respectively, non-discrimination, equality between women and men, family and professional life, social and security assistance, and Directive

<sup>86</sup> See RECOMMENDATIONS to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:338:0001:0006:EN:PDF>, points 11 and 14 (consulted on 25 January 2016). See also ECJ, case C-379/98, *PreussenElektra* [2001] ECR I-2099, par. 39; ECJ, case C-544/07, *Rüffler* [2009] ECR I-3389, par. 37; ECJ, case C-314/08 *Filipiak* [2009] ECR I-11049, par. 41; ECJ, case C-310/10, *Agafitei and Others* [2011] ECR I-5989, par. 26; and ECJ, case C-416/10, *Križan and Others* [2013] ECR, par. 54.

<sup>87</sup> See Opinion, point 26.

<sup>88</sup> Adoptive Leave Act, 1995.



2006/54, Mrs. Z. had been discriminated against on the basis of sex and, in case of a negative reply to that question, if Directive 2006/54 was in contrast with the above-mentioned norms of primary EU Law. Thirdly, the judge asked the ECJ if the denial of paid leave would have to be considered discrimination on the basis of disability according to Directive 2000/78, in the light of TFEU Art. 10<sup>89</sup> and Art. 21, 26<sup>90</sup> and 34 of the Charter. He also questioned whether, in case of a negative reply to the first question, Directive 2000/78 was in contrast with primary law and with the UN Convention on Disability<sup>91</sup>.

The Court shared the thesis of General Advocate Wahl and denied that Mrs. Z. was discriminated against, either directly or indirectly, on the basis of sex, because a male commissioning parent would have been treated equally to a female one<sup>92</sup>. Relying on the twin judgment issued on the same day (*C.D.*), the Court also underlined that the applicant could not have been discriminated because of pregnancy, as she had never been pregnant<sup>93</sup>. The Court refused then to adjudicate on the validity of Directive 2006/54, as the case at issue fell outside its scope.

Concerning the question of disability, the ECJ started from the consideration that the notion of “disability” is not defined in Directive 2000/78<sup>94</sup>: the European Union, however, has to comply with the UN Convention on Disability, to which it had adhered, according to TFEU Art. 216, so that Directive 2000/78 must be interpreted in light of that Convention<sup>95</sup>. According to the Court’s previous case law, disability “must be understood as referring not only to the impossibility of exercising a professional activity, but also to a hindrance to the exercise of such an activity. Any other interpretation would be incompatible with the objective of that directive, which aims in particular to enable a person with a disability to have access to or participate in employment”<sup>96</sup>. Again sharing the opinion of General Advocate Wahl, the Court stated that Mrs. Z.’s condition did not constitute a hindrance to her ability to exercise professional activity or accede to employment, and could not be considered a “handicap” under Directive 2000/78. Therefore, the Court also refused to analyze the validity of the Directive, as it was irrelevant for the resolution of the case.

The Court then analyzed whether Directive 2000/78 was in contrast with the UN Convention, which provides for the Party States to adopt all appropriate legislative, administrative,

<sup>89</sup> Art. 10 TFEU: “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

<sup>90</sup> Art. 26 of the Charter: “Integration of persons with disabilities. The Union recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”.

<sup>91</sup> The United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35).

<sup>92</sup> ECJ, *Z.*, cit., points 52- 55.

<sup>93</sup> ECJ, *Z.*, cit., point 58.

<sup>94</sup> ECJ, *Z.*, cit., point 70.

<sup>95</sup> ECJ, *Z.*, cit., point 75.

<sup>96</sup> ECJ, *Z.*, cit., point 77.

and other measures for the implementation of the rights recognized in that Convention. As stated in its previous case law<sup>97</sup>, European Union law may be reviewed in the light of international agreements to which it has adhered only if the provisions of the treaty that are relied on for the purpose of examining the validity of the act of European Union law appear, as regards their content, to be unconditional and sufficiently precise. The Court, as also expressed by General Advocate Wahl, stressed that the UN Convention does not meet the conditions set by EU case law for the review of Directive validity, because the provisions are programmatic<sup>98</sup>. Therefore, it concluded that the validity of that directive cannot be assessed in light of the UN Convention, but that the directive must, as far as possible, be interpreted in a manner consistent with that instrument.

In the end, in the view of the Luxembourg Court, commissioning parents may not derive fundamental rights from the existent legal framework, neither primary nor secondary European Law, or a right to a paid leave.

#### IV. The best interests of the child

The child's best interests principle is recognized by several international and regional legal instruments<sup>99</sup>. First of all, it is enshrined in the UN CRC, at Art. 3, which states, at par. 1, that, "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"<sup>100</sup>. The concept of "all actions concerning children" implies that the best interests principle is applied not only where a decision directly affects a child, but also when he is indirectly affected, as in cases where a child's parent is at risk of being removed<sup>101</sup>. In its General comment n. 14, the UNCRC has pointed out that the best interests principle operates as both a substantive right and an interpretative device<sup>102</sup>.

Even if the best interests of the child's principle is not expressly used in the International Covenant on Civil and Political Rights, the Human Rights Committee has referred in two of its General Comments, to the "paramount interest of the children" in cases involving

<sup>97</sup> ECJ, case 181/73, *Haegemann* [1974], ECR 449; ECJ, case C-265/03, *Simutenkov* [2005], ECR I-2596; ECJ, case C-344/04, *LATA* [2006], ECR I-403.

<sup>98</sup> ECJ, Z., cit., point 88.

<sup>99</sup> On the best interest of the child see, inter alia : POBJOY M. Jason, "The best interests of the child principle as an independent source of international protection", ICLQ, 2015, pp. 327 – 363; BREEN Claire, *The Standard of the best interest of the child*, The Hague, London, New York 2002; ALSTON Philip (ed.), *The best interests of the child*, New York, 1994.

<sup>100</sup> As underlined by POBJOY M. Jason, *The best interests of the child principle as an independent source of international protection*, cit., even if the core provision is art. 3, "the 'best interests language' appears on several occasions in the CRC (Arts. 9, 18, 20, 21, 37, 40)".

<sup>101</sup> Ibidem, p. 330.

<sup>102</sup> UNCRC, General Comment n. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, par.1), 62<sup>nd</sup> sess., UN Doc CRC/C/GC/14 (2013).

the dissolution of marriage<sup>103</sup>. It is also included in the African Charter on the Rights and Welfare of the Child, at art. IV, which provides that “in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration”<sup>104</sup>.

The UNCRC, ratified by all the Member States (but not by the EU itself), is also the source of Art. 24 of the Charter, as disclosed by the Explanations, which inscribes the child’s best interests principle among the fundamental rights of the European Union<sup>105</sup>. While the EU institutions lack of direct competences over the general promotion of children’s rights in the TFUE, several aspects of EU law significantly affect children, as in the asylum and immigration policy or in the context of cross border criminal law. Therefore, despite its intrinsic limits, due to the restricted field of application of the Charter according to art. 51, this provision may have a significant impact on the development and interpretation of a wide range of EU measures<sup>106</sup>. In fact, the ECJ’s recent case law also shows increasing attention to this principle in the context of family matters<sup>107</sup>.

In the context of ECHR, the best interests of the child has been inserted through the case law of the ECtHR in the interests that may justify a restriction to the family and private life of the individuals according to ECHR art. 8, despite the lack of any reference in this article, especially in cases concerning adoption, foster care and child abduction<sup>108</sup>. It is, then, expressly mentioned in Protocol 7, art. 5, in the context of the marriage relationship, as a reason to limit the principle of equality between spouses<sup>109</sup>.

Also in the case law on surrogacy addressed in the present paper, the child’s best interests played (or may play, in the case of the ECJ) a fundamental role.

<sup>103</sup> See ALSTON Philip, The best interests principle: towards a reconciliation of culture and human rights, in Id., (ed.), *The best LAROUT Ruth, Article 24, in PEERS Steve, HERVEY Tamara, KENNER Jeff, WARD Angela, The EU Charter of fundamental rights*, Oxford, Portland, Oregon, 2014, pp. 661 – 671 interests of the child, cit., p. 4.

<sup>104</sup> *Ibidem*.

<sup>105</sup> For a comment of article 24 of the Charter, see GOUTTENOIRE Adeline, Article II-84, Droits de l’enfant, in BOURGOURGE – LARSEN Laurence, LEVADE Anne, PICOD Fabrice (eds.), *Traité établissant une constitution pour l’Europe, La Charte des droits fondamentaux de l’Union, Bruxelles*, 2005, pp. 332 – 341.

<sup>106</sup> LAROUT Ruth, Article 24, in PEERS Steve, HERVEY Tamara, KENNER Jeff, WARD Angela, *The EU Charter of fundamental rights*, Oxford, Portland, Oregon, 2014, pp. 661 – 671, spec. p. 662.

<sup>107</sup> ECJ, case C 498/14 PPU, *Bradbrooke*, ECLI:EU:C:2015:3, points 42 and 52; ECJ, case C-400/10 PPU, *McB*, ECLI:EU:C:2010:582, point 60.

<sup>108</sup> See PITEA Cesare and TOMASI Laura, Art. 8, in BARTOLE Sergio, DE SENA Pasquale, ZAGREBELSKY Vladimiro, “Commentario Breve alla Convenzione europea dei diritti dell’uomo”, 2012, pp. 297 – 369, spec. p. 340. For the recent case law on the application of the best interests of the child principle in the context of foster care and adoption see, as example: ECtHR, 16 July 2015, *Nazarenko v. Russia*, par. 63; ECtHR, 25 January 2011, *Plaza v. Poland*, par. 71; ECtHR *Wagner and J.M.W.L. v. Luxembourg*, cit.; ECtHR, *Sabin v. Germany* [GC], par. 66. This approach of the ECtHR has been criticized, because it failed to articulate a conception of “the best interests of the child”, leaving signatory states a large margin of appreciation in identifying what is the best interest of the child. On this point see LAROUT Ruth, Article 24, in PEERS Steve, HERVEY Tamara, KENNER Jeff, WARD Angela, *The EU Charter of fundamental rights*, Oxford, Portland, Oregon, 2014, pp. 661 – 671. Concerning the application of the child’s best interests principle in case of abduction see BEAUMONT Paul R., “The art. 8 jurisprudence of the European Court of Human Rights on the Hague Convention on International Child Abduction in relation to delays in enforcing the return of a child”, in VENTURINI Gabriella, BARIATTI Stefania (eds.), *Nuovi strumenti del diritto internazionale privato, Liber Fausto Pocar*, Milano, 2012, pp. 75 – 94.

<sup>109</sup> See COZZI Alessandra Ottavia, Art. 5, Prot. 7, in BARTOLE Sergio, DE SENA Pasquale, ZAGREBELSKY Vladimiro, “Commentario Breve alla Convenzione europea dei diritti dell’uomo”, 2012, pp. 905 – 908, spec. p. 907.



A. The Strasbourg perspective: a key principle (but which may lead to controversial solutions)

In the *Mennesson* and *Labassee* cases, the reasoning about children's right to private life led to a different conclusion from the one reached concerning the commissioning parents. The Court stated that protection of private life implies "that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship [...]; an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned"<sup>110</sup>; therefore, the lack of recognition in France of the parent-child relationship created a situation of "legal uncertainty" that "undermines the children's identity within French society". The Court then underlined that the situation of legal uncertainty concerning the parent-child relationship of the children born from surrogacy particularly impacted the recognition of their nationality and inheritance rights, and then crucial aspects of their identity. Therefore, the Court concluded that, even if it is conceivable that the French Government may wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited in its own territory, in the case of the children the State had failed to strike a fair balance within its margin of appreciation, because it disregarded the child's best interests, which should have guided any decision<sup>111</sup>.

This conclusion of the Court was emphasized by the fact that, in both cases, the French Government disregarded the biological link between the children and the father: as a consequence the Court held, unanimously, that the "State overstepped the permissible limits of its margin of appreciation"<sup>112</sup> in assigning importance to the child's interests when weighing the competing interests at stake, and thus the children's right to respect for their private life had been infringed.

Also, in the *Paradiso and Campanelli* case, even if the Court did not separate the position of the child from that of the parents (and rejected the application brought by the parents in the name of the child for lack of representation)<sup>113</sup>, the child's best interests principle played a fundamental role in assessing the violation of the parent's right to the respect of their family and private life.

As remembered above, in the *Paradiso and Campanelli* case, the Court found that the removal of the child was an interference with the family and private life of the applicants, unnecessary in a democratic society, which could be justified only in the event of immediate danger to the child. In assessing the violation of ECHR art. 8, in fact, the Court remembered that

<sup>110</sup> ECtHR, *Mennesson v. France*, cit., par. 96 and *Labassee v. France*, cit., par. 75.

<sup>111</sup> ECtHR, *Mennesson v. France*, cit., par. 99 and *Labassee v. France*, cit., par. 78.

<sup>112</sup> ECtHR, *Mennesson v. France*, cit., par. 100 and *Labassee v. France*, cit., par. 79.

<sup>113</sup> See ECtHR, *Paradiso and Campanelli*, cit., par. 50.

“in sensitive and complex cases, the margin of appreciation to be accorded to the competent national authorities varies in the light of the nature of the issues and the seriousness of the interests at stake” but while States enjoy a wide margin of appreciation in the area of adoption or in deciding on the necessity of taking a child into care, concerning the removal this margin is narrowed<sup>114</sup>. Therefore, in assessing whether the legislative provisions as applied in the present case struck a fair balance between the competing public and private interests involved “it must have regard to the essential principle according to which whenever the situation of a child is at issue, the best interests of that child are paramount”<sup>115</sup>. In evaluating the compatibility of a measure of removal, the Court remembered that the “threshold set in the case-law is very high”<sup>116</sup> and that the conditions justifying the use of the impugned measures were not met.

At first, the ECtHR considered that the fact that the child would have developed “closer emotional ties with his intended parents had he stayed with them for longer” was not sufficient to justify his removal<sup>117</sup>.

The Court then criticized the approach of the Italian Courts, which had deemed the applicants unsuitable for adoption because they were suspected of having violated the law on adoption while the criminal proceeding was still pending. Moreover, the Court underlined a contradiction in the reasoning of Italian authorities because, while the applicants were judged able to adopt in 2006, during the trial they were deemed unable to take care of the child because they tried to breach the law on adoption, without a specific evaluation. Quite surprisingly, however, the Court seems to forget that in 2006 the Italian authority found the couple suitable for adoption but only for older children, in consideration of the applicant’s age<sup>118</sup>.

The Court also underlined that the child, after removal, did not receive a new identity until April 2013 and stated that a child should not be disadvantaged because of the fact of being born from surrogacy and that this infringed Art. 7 of the UN CRC.

Therefore, the Court held that the Italian authorities had failed to strike the correct balance between the interests and rights involved, disregarding the child’s best interest principle, and violating ECHR Art. 8.

Moreover, it is to be highlighted that the strict application of this principle led the Court to state that the present judgement should not be understood as binding Italy to return the

<sup>114</sup> ECtHR, *Paradiso and Campanelli*, cit., par. 74.

<sup>115</sup> ECtHR, *Paradiso and Campanelli*, cit., par. 75.

<sup>116</sup> ECtHR, *Paradiso and Campanelli*, cit., par. 80.

<sup>117</sup> ECtHR, *Paradiso and Campanelli*, cit., par. 82.

<sup>118</sup> ECtHR, *Paradiso and Campanelli v. Italy*, cit., par. 12.

child to the applicants, considering that, in the meantime, the child had built a new familiar link with the family where he was placed since 2013.

It is worthwhile noting that in the *D. and others v. Belgium* decision, with a different approach, the ECtHR did not restrict the State's margin of appreciation, in consideration of the best interests of the child, but, in contrast, it deemed that the State had acted also with the aim to protect the child.

Therefore, the application of the child's best interests principle provoked the reversing of the positions: while, in the end, the parents of the *Mennesson* and *Labassee* cases were satisfied through the application of this principle, even if their personal application was dismissed, the *Paradiso and Campanelli* parents, whose right to family life was deemed violated by the Court's judgement, ultimately lost the child<sup>119</sup>. In the *D. and others v. Belgium* decision, instead, the Court, even if it did not rely expressly on the child's best interests, recognized that the interference of the State, who refused to issue a travel document for the commissioning parents, was enacted in compliance with the aim to protect the child.

#### B. The Luxembourg perspective: a principle almost ignored by the Court (but not by the General Advocate)

In the *C.D.* case, General Advocate Kokott, relying on the child's best interests principle, reached a strongly different conclusion from the Court's.

The General Advocate, in fact, starting from the consideration that Directive 92/85 was written relying on a biological and monistic concept of motherhood, moved to analyze whether it could be extended to commissioning mothers, reasoning on the broader logic and purpose of the directive. First, she argued that a breastfeeding commissioning mother is in the same situation as a breastfeeding biological mother, so that it falls in the scope of the Directive<sup>120</sup>. Going further, she developed the idea that maternity leave should also be considered protective of the special mother-child relationship, and not only of the female worker, according to Art. 24, par. 2, which inscribes the child's best interests, and 7, concerning the right to respect for private and family life,<sup>121</sup> of the CFR<sup>122</sup>. Therefore, the aim to protect this special relationship (according to the child's best interests principle) should lead to the interpretation of the directive as applying to commissioning mothers, even if they are not breastfeeding. It is interesting to note that, to draw her conclusion, Kokott

<sup>119</sup> The *Paradiso and Campanelli* parents also obtained a quite low sum for damages: € 20,000.00 plus € 10,000.00 for costs and expenses.

<sup>120</sup> It has to be remembered that Mrs D. breastfed the child, for a procedure of breastfeeding induction.

<sup>121</sup> Art. 7 of the Charter: "Respect for private and family life. Everyone has the right to respect for his or her private and family life, home and communications". According to art. 52, par. 3, of the Charter (and the relevant explanations) this right has the same meaning and scope of art. 8 ECHR.

<sup>122</sup> See Opinion, point 45.

relied on the same rights and principles applied by the Strasbourg Court, even if the *Menson* and *Labassee* cases had not been issued yet.

Kokott then questioned whether the protection of surrogacy could be granted only when it is legal in the Member State concerned, evoking the problematic issue of cross border surrogacy and the different approach of EU Member States, which may be faced in future. However, she did not develop this point, as the case at issue was a domestic one<sup>123</sup>.

Kokott then maintained that the national legislation should have to rule on the division of maternity leave between a surrogate and a commissioning mother, given the fact that the directive did not provide any indication. She suggested that the minimum period of two weeks provided for by Art. 8 par. 2 of the Directive should have been granted to both mothers, and then the maternity leave should have to be shared between the women.

Concerning the question of discrimination on the basis of sex, the General Advocate found that there wasn't any direct or indirect discrimination, because the commissioning mother was not subject to a less favourable treatment compared to her male colleagues.

Finally, regarding the last request of the national judge, Kokott raised some doubts on the direct effects of Directive 92/85 because of its wording, which prevented deduction of the precise content of the right and the division thereof between the surrogate and the intended mother. However, she concluded that Directive 92/85 may have direct effects only in cases of precise determination of the period of maternity leave<sup>124</sup>.

It is to be underlined that, in both the twin judgments of the ECJ, the best interests of the child was not even mentioned and did not play any role, even if it was maintained that maternity leave was required by EU law in order to protect the child-mother relationship. The Court simply relied on a literal interpretation of the EU instruments invoked by the applicant, including a consideration of their rationale, which was rooted in a society where the only conception of motherhood was the biological one, and concluded that there was no legal basis for maternity leave.

The Court then showed a great self-restraint and avoided giving direction to the Member States, leaving the national legislature free to outlaw surrogacy and rule on the question of the maternity leave<sup>125</sup>. This conclusion is to be appreciated, considering that the solution offered by the General Advocate Kokott were not completely satisfactory, despite her commendable effort to rely on the child's best interests principle. In fact, as already stressed, if

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<sup>123</sup> *Ibidem*, points 64 -66.

<sup>124</sup> *Ibidem*, point 77.

<sup>125</sup> It has been frequently pointed out how the EU institutions are more cautious in intervening in family matters than in any other field of private law. See MARELLA Maria Rosaria, "The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law", *ELJ*, 2006, pp. 78 - 105. See also MATTEI Alberto, TOMASI Marta, "Corte di giustizia UE e maternità surrogate: congedo lavorativo restituito fra margine di apprezzamento, coerenza e non discriminazione", in DPCE 2014, pp. 1409-1417.

the ECJ had derived a right to a paid maternity leave from the Pregnant Workers Directive, as suggested by Kokott, this would have resulted in a sort of discrimination for commissioning fathers, especially in cases of same sex couples<sup>126</sup>, even if it is arguable that such a problem could later be solved in subsequent case law and at a national level.

## V. The European Courts case law in the context of the works of the HCCH for the drafting of international instruments

### A. The impact of the European Courts case law on the works of the HCCH for the drafting of international instruments

It has been argued by several scholars that the issue of cross border surrogacy should be regulated at an international level, in order to protect the different rights and interests involved in a coordinated way and establish shared rules. In particular, it has been suggested that guidelines to rule on surrogacy should be sought in some international conventions, which already provide protection for several of the rights described in the previous paragraph, even if they do not include surrogacy<sup>127</sup>. These include the International Covenant on Economic, Social and Cultural Rights<sup>128</sup>; the Convention on the Elimination of All Forms of Discrimination Against Women<sup>129</sup> and, of course, the UN CRC<sup>130</sup>.

Another suggested course of action is to draft an international convention drawing inspiration from the 1993 Hague Adoption Convention<sup>131</sup>, “which is also based on the principle of cooperation between the country of origin and the receiving country and on the need to regulate international adoptions to protect the people involved, especially the children”<sup>132</sup>.

In 2010 the Council on General Affairs and the Policy of the HCCH discussed the growing problems of international surrogacy arrangements and acknowledged the related complex issues of private international law and child protection. It then agreed that the Permanent Bureau should have kept under review such issues. The following year, the Permanent Bureau presented a document that summarized the main problems arising from surrogacy concerning private international law and child protection issues, arguing on the way that

<sup>126</sup> See FINCK Michèle, KAS Betül, “Surrogacy leave as a matter of EU law: CD and Z”, CMLR 2015, pp. 281-198.

<sup>127</sup> See STARK Barbara, “Transnational surrogacy and international human rights law”, ILSA Journal of International & Comparative Law 2012, pp. 1 – 18.

<sup>128</sup> G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, at 49 (Jan. 3, 1976), available at <http://www1.umn.edu/humanrts/instree/b2esc.htm>.

<sup>129</sup> Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res 34/180, art. 1, U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46, at 193 (Sept. 3, 1981).

<sup>130</sup> Convention on the Rights of the Child, G.A. Res. 44/25, 61st plen. mtg., U.N. Doc. A/Res/44/25 (Nov. 20, 1980) (entered into force Sept. 2, 1990).

<sup>131</sup> Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69).

<sup>132</sup> BEAUMONT Paul, TRIMMINGS Katarina, “Recent jurisprudence of the European Court of Human Rights in the area of cross-border surrogacy: is there still a need for global regulation of surrogacy?”, cit., p. 17.

the HCCH may assist in this field. It then explained that, while a uniform set of rules concerning applicable law, jurisdiction and enforcement was in theory desirable, it should have to consider carefully the practical need of such rules and the prospects of achieving consensus on such a broad set of principles<sup>133</sup>.

In 2012, the Permanent Bureau of the HCCH drew a Preliminary report on the issues arising from international surrogacy arrangements, which underlined that, in consideration of the transnational nature of the problems arising as a result of international surrogacy arrangements, “it is difficult, if not impossible, to envisage how such difficulties can be fully resolved by individual State action”<sup>134</sup>. The Permanent Bureau then described two different approaches to the multilateral regulation: (i) an approach focused on a harmonization of private international law rules relating to the establishment and contestation of legal parentage, including provision on cooperation and (ii) another setting a framework for cooperation drawing inspiration by the 1993 Convention on adoption, instead of a traditional private international law approach, attempting to harmonize the rules regarding jurisdiction, recognition and applicable law. Subsequently, in 2014, the Permanent Bureau published an important study concerning issues arising from international surrogacy agreements, after a wide consultation process, which involved States, legal practitioners in this field, expert health professionals, surrogacy agencies<sup>135</sup>. This study served as a basis for a document on the desirability and feasibility of further work on the parentage, which maintained the need of a further international work on the issue of surrogacy, with the aim to ensure that children born from surrogacy have certain and secure legal status, recognized in all States involved with the family and beyond and that surrogacy is conducted in a manner which respects the human rights and welfare of all those involved with the arrangements<sup>136</sup>. The Permanent Bureau, in fact, recommended that it should have been formed an expert group, who, whilst having as primary goal further exploring the feasibility of binding multilateral options, should also have in mind the scope for various degrees of action by the HCCH. As far as the second aim is concerned, the Permanent Bureau recommended that the broader concerns which arise from surrogacy agreements should be considered only once discussions have progressed concerning the legal status questions<sup>137</sup>.

The HCCH Council on General Affairs and Policy decided in 2015 that an Experts’ Group should be convened to explore the feasibility of advancing work on private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements, which may lead to the chance to draw up a multilateral instrument

<sup>133</sup> Permanent Bureau of HCCH, “Private international law surrounding the status of children, including issues arising from international surrogacy arrangements”, march 2011, cit.

<sup>134</sup> Permanent Bureau of HCCH, “A Preliminary report on the issues arising from international surrogacy arrangements”, March 2012, available at <http://www.hcch.net/upload/wop/gap2012pd10en.pdf>.

<sup>135</sup> Permanent Bureau HCCH, “A study of legal parentage and the issues arising from international surrogacy arrangements”, cit.

<sup>136</sup> Permanent Bureau of HCCH, “The desirability and feasibility of further work on the parentage/ Surrogacy Project”, cit.

<sup>137</sup> *Ibidem*, point 71.



to regulate surrogacy. The Council decided that the Experts' Group should meet in early 2016 and report to the 2016 Council meeting, and that the Group should be geographically representative and be composed in consultation with Members<sup>138</sup>.

In the same year, the Permanent Bureau published an updating note, considering some key international and regional developments in 2014, which confirmed the need of the recommended future work<sup>139</sup>. Among these key events, it has been included the *Mennesson* and *Labasse* judgements of the Strasbourg court, so that it appeared clear the role that such case law may have in future work in drafting multilateral instruments, setting guidelines for balancing the fundamental rights involved and clarifying the standard to be maintained. Although the Permanent Bureau strongly underlined the importance of such judgements, it pointed out that they left several questions unanswered, in particular concerning the requirements of Article 8 ECHR as regards the legal parentage of children in cases with different key facts to *Mennesson/Labasse* (that is, when there is not a genetic link between parents and child) and what to do about the broader concerns which arise in the context of surrogacy<sup>140</sup>, for example whether providing any method for the establishment of legal parentage (in particular adoption) will satisfy Art. 8 ECHR. Again, such concern shows how the Strasbourg case law may impact on the future works of the HCCH helping in answering to difficult questions. Even if the ECJ has a different role and competence in the field of human rights<sup>141</sup>, also its case law may impact on future negotiations, as all Member States will be bound to its judgments.

The Permanent Bureau concluded that the current situation may be considered as highly unsatisfactory for families and States and it “highlights ever more starkly the need for the international community to come together to consider whether a multilateral framework might be agreed upon which could create legal certainty for everyone in these cross-border situations and enable States to work together to uphold the human rights of all concerned. Only a holistic analysis by the global community can begin to determine whether international legislation can achieve these aims”<sup>142</sup>.

Indeed, the “desirability and feasibility” of an international instrument is highly controversial. While the need for legal certainty is undoubtedly clear and present, the drafting of such instrument may require several years of negotiations and it may be suffer hindrances for public order objections by States that do not accept surrogacy in their legal order. Moreover, the scope to attain at first the certainty concerning the status of children born from

<sup>138</sup> See note 2 and the Conclusions and Recommendations of the 2015 Council available at [http://www.hcch.net/upload/wop/gap2015concl\\_en.pdf](http://www.hcch.net/upload/wop/gap2015concl_en.pdf).

<sup>139</sup> Permanent Bureau of HCCH, “The parentage/surrogacy project: an updating note”, cit. point 2, letter (iii).

<sup>140</sup> Permanent Bureau of HCCH, “The parentage/surrogacy project: an updating note”, cit. points 7 - 8.

<sup>141</sup> On the competence and role of the ECJ see, *ex multis*, TIZZANO Antonio, “The role of the ECJ in the Protection of Fundamental Rights”, in ARNULL Antony (ed.), *Continuity and change in EU Law: essays in honour of Francis Jacob*, Oxford, 2008 p. 125 - 138.

<sup>142</sup> Permanent Bureau of HCCH, “The parentage/surrogacy project: an updating note”, cit., point 12.

surrogacy, may leave behind the crucial questions of human rights which are instead present and urgent<sup>143</sup>.

The multilateral approach to the issue may instead find the way of an international cooperation, building progressively a set of principle which could serve as a point of reference, also with the indications coming from the international courts. For example, in 2010 the Consuls Generals of eight European States wrote a joint letter to several IVF clinics in India to request that they cease providing surrogacy options to their nationals unless the intended parents had consulted with their embassy first<sup>144</sup>: this episode shows the need for administrative and concrete international cooperation to deal with such a delicate issue.

In this context, the international courts, like the ECJ and the ECtHR, may help, at least at a regional level, providing guidelines and indications, as, for example, what is to be considered as “best interests of the child” and which are the standards to be applied in fundamental rights protection<sup>145</sup>.

## B. The impact of a multilateral convention on surrogacy on the future case law of the European Courts

After having explored the impact that the European Court case law may have (and, currently, has) on the works for the drafting of international instruments, it should also be argued what may be the impact of a multilateral convention on surrogacy, as it may result from the works of the HCCH, on their future case law. Indeed, both the ECJ and the ECtHR could not ignore such an instrument, even if it may have a different impact.

Concerning the ECJ, the force and the use of such an instrument may vary depending on the chance for the EU itself to conclude or adhere to such a convention<sup>146</sup>, by its features and by the characteristic of its norms.

According to art. 216 TFEU, par. 1, states that “The Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is

<sup>143</sup> Focus on human rights protection should be maintained also in the opinion of POLI Ludovica, “Maternità surrogata e diritti umani: una pratica controversa che necessita di una regolamentazione internazionale”, *BioLaw Journal* 2015, pp. 7 – 28, spec. p. 28.

<sup>144</sup> See Permanent Bureau of HCCH, “A preliminary report on the issues arising from international surrogacy arrangements”, cit. point 45. The European States involved were: Belgium, France, Germany, Spain, Italy, the Netherlands, Poland and the Czech Republic.

<sup>145</sup> In the European Union legal order, also the question of the recognition of the birth certificates issued by other Member States is currently under examination in the context of the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012, COM (2013) 228, available at [http://eur-lex.europa.eu/procedure/EN/2013\\_119](http://eur-lex.europa.eu/procedure/EN/2013_119).

<sup>146</sup> On the competence of the EU to conclude international agreements: MENGIOZZI Paolo, “The Innovations brought about by the Lisbon Treaty to the European Union Treaty-Making Power Regime Resulting from the Case Law of the Court of Justice”, in *Today’s Multilayered Legal Order: Current Issues and Perspectives*, Paris, 2011, p. 93 ss.; MIGNOLLI Alessandra, “Art. 216, 217, 218”, in TIZZANO Antonio (a cura di), *Trattati dell’Unione europea*, Milano, Giuffrè, 2014, pp. 1766 – 1807; BOSSE-PLATTIERE Isabelle, *L’article 3 du traité UE: Recherche sur une exigence de cohérence de l’action extérieure de l’Union européenne*, Bruxelles, Bruylant, 2009, p. 73 ss.



provided for in a legally binding Union act or is likely to affect common rules or alter their scope”: therefore, it should be investigated if there may be a legal basis in the Treaties or in a legally binding act or if the conclusion is necessary to preserve the common rules of EU law.

This agreement may be an instrument for the protection of fundamental rights and, consequently, it is conceivable the possibility to adhere for the EU. The convention may instead result in an instrument establishing common rules of private international law or administrative cooperation, so there may be more doubts on the competence for the EU to adhere to such an instrument, in the lack of common rules on this specific rules<sup>147</sup>.

Should the EU be in the position to conclude the future convention, it will have the nature and the value of an international agreement according to Article 216, par. 2, TFEU. By virtue of this norm, where international agreements are concluded by the European Union, they are binding on its institutions and, consequently, they prevail over acts of the European Union<sup>148</sup>. The primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements<sup>149</sup>. The agreement may serve for the purpose of examining the validity, if its provisions are unconditional and sufficiently precise<sup>150</sup>: such a condition is fulfilled where the provision relied on contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure<sup>151</sup>. For example, the UN Convention of disability is the first international convention on human rights ratified by the EU itself<sup>152</sup>, but the Court considered that its norms are programmatic in nature: in fact, the Court underlined that, according to UN Convention, it is, in particular, for the States Parties to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in that Convention<sup>153</sup>.

It is to be said that the hypothesis of the EU adhering to such a treaty seems to be very unlikely, as it is difficult to imagine a convenient legal basis: Art. 81 TFEU, in fact, which states that the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions

<sup>147</sup> See Opinion 1/03 of the Court (Full Court) of 7 February 2006, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, ECR I-01145.

<sup>148</sup> ECJ, case C-366/10, *Air Transport Association of America and Others* [2011], ECR I-13755, para. 50, and joined cases C-335/11 and C-337/11, *HK Danmark* [2013], ECLI:EU:C:2013:222, para 28.

<sup>149</sup> ECJ, joined cases C-320/11, C-330/11, C-382/11 and C-383/11 *Digitalnet and Others* [2012] ECLI:EU:C:2012:745, para. 39, and *HK Danmark*, cit., para. 29.

<sup>150</sup> ECJ, case C-308/06, *Intertanko and Others* [2008], ECR I-4057, para. 43, and *Air Transport Association of America and Others*, cit., para. 51.

<sup>151</sup> ECJ, case 12/86, *Demirel* [1987], ECR 3719, para. 14; case C-213/03, *Pêcheurs de l'étang de Berre* [2004], ECR I-7357, para. 39; and *Air Transport Association of America and Others*, cit., para. 55.

<sup>152</sup> The United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35). See [http://europa.eu/rapid/press-release\\_IP-11-4\\_en.htm](http://europa.eu/rapid/press-release_IP-11-4_en.htm)

<sup>153</sup> See ECJ, *Z.*, cit., para. 87.

in extrajudicial cases and that such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States, enabling the EU Parliament and Council to adopt measures accordingly, seems to be insufficient to establish such a competence. It appears also to be unsatisfying to look at the accession of the European Union to the UN Convention on disability<sup>154</sup> to find a precedent, because accession to such convention was anticipated by the adoption of several acts by the EU institutions and founded on art. 13 TCE (now art. 19 TFEU) about the non-discrimination principle, according to the theory of implicit external competences<sup>155</sup>. The scenario could be different if people who asks for surrogacy may be considered as people with disability as suggested by the applicant in the Z. case, but this may imply a strong evolution of the relevant case law.

If, in contrast, as it is more likely to be, the EU will not be in the position to join the future international instrument of cooperation, it may have only an indirect effect, as far as it will be ratified by all Member States, to testify the existence of a common tradition on human rights or common rules of private international law.

Turning to the ECtHR, it may acknowledge the existence and the value of such an instrument, in the context of the interpretation of the ECHR and in the assessment of the specific case. For example, in *Paradiso and Campanelli*, the ECtHR recalled the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, assessing the violation of art. 8 ECHR and in particular whether this interference was “in accordance with the law”<sup>156</sup> or in *Neulinger and Shuruk* assessed whether the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 constituted a sufficient legal basis for the removal of the child and underlined that the concept of custody rights, within the meaning of the Hague Convention, has an autonomous meaning. Therefore, it is to be deemed that in future, the ECtHR may refer to the international instrument in the context of cases concerning surrogacy in the light of art. 8 ECHR.

Moreover, this instrument may testify the existence of a consensus on certain aspects of surrogacy and, consequently, reduce State’s margin of appreciation, leading the ECtHR to a more strict scrutiny on the violation of the ECHR, especially art. 8, by the States in surrogacy matters<sup>157</sup>.

<sup>154</sup> See the United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35). See [http://europa.eu/rapid/press-release\\_IP-11-4\\_en.htm](http://europa.eu/rapid/press-release_IP-11-4_en.htm).

<sup>155</sup> ECJ, case 22/70, *Commission v. Council (AETS)* [1971], ECR 263, para 16/19; *Opinion 1/76* [1976], 741, para 4..

<sup>156</sup> See ECtHR, *Paradiso and Campanelli*, para. 72.

<sup>157</sup> On the margin of appreciation doctrine see : ARAI-TAKAHASHI Yutaka, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*, Antwerp, Intersentia, 2002; SPIELMANN Dean, “Allowing the right margin: the European Court of Human Rights and the national margin of appreciation doctrine : waiver or subsidiarity of European review?”, Cambridge yearbook of European legal studies 2011/2012 (2012), v. 14, p. 381-418.

## VI. The present and the future of a dialogue about surrogacy

After having analyzed the European Courts case law above reported and their approach to the issue, it is possible to reply to the question on the existence of a current dialogue about surrogacy and about its future evolution. In the analysis of the convergences and divergences, it is to be remembered that the history shows that they are accustomed to developing constructive dialogue and, consequently, common standards in protecting human rights<sup>158</sup>, so one can imagine that this could happen for surrogacy as well in the future.

### A. The convergence of the European Courts case law

Currently, it appears that there is not any explicit dialogue, because there is not any reference to the reciprocal case law or legal order by the Courts. The reasons for that may be mainly the timing of the above mentioned judgments and decision, because the judgments of the Luxembourg's Court came down in March 2014 and the Strasbourg's ones followed the next months<sup>159</sup>.

This does not impede that explicit references will come in future. By now, it is anyway possible to observe some similarities in the position of the two different courts and some limited patterns of convergence.

Firstly, it bears noting that neither the ECtHR nor the ECJ answered to the crucial question if the practice of surrogacy is compatible with the fundamental rights listed, respectively, in the ECHR and in the EU Charter of Fundamental Rights. It is clear that it depended by the requests of the applicants, that did not asked for a clarification on this point, but it may

<sup>158</sup> On the dialogue see, *inter alia*, cfr. CANOR Iris, "Primus inter pares. Who is the ultimate guardian of fundamental rights in Europe?", ELR 2000, p. 3 -21; SIMON Denis, "Des influences réciproques entre CJCE et CEDH: «Je t'aime, moi non plus» ?", *Pourvoi*, 2001/1; KRÜGER Hans Kristian, POLAKIEWICZ Jörg, "Proposal for a coherent human rights protection system in Europe", HRLJ 2001, p.1 ss.; CALLEWART John, TULKENS François, "La Cour de justice, la Cour européenne des droits de l'homme et la protection des droits fondamentaux", in DONY Marianne, BRIBOSIA Emanuelle, *L'avenir du système juridictionnel de l'Union européenne*, Bruxelles, 2002, p. 177 ss.; FALZEA Paolo, SPADARO Antonio, VENTURA Luigi (a cura di), *La Corte Costituzionale e le corti d'Europa*, Torino, 2003; JACOBS Francis, "Judicial dialogue and the cross-fertilisation of legal systems: the European Court of Justice", *Texas International Law Journal*, 2003, p. 547 ss.; LENAERTS Koen, "The Court of Justice of the European Communities and the European Court of Human Rights – An old couple in a new setting", in AA.VV., *La Cour de Justice des Communautés européennes 1952 – 2002: bilan et perspectives*, Bruxelles, 2004, p. 84 ss.; LICHÈRE François, POTVIN-SOLIS Laurence, RAYNOUARD Arnaud (dirs.), *Le dialogue entre les juges européens et nationaux: incantation ou réalité?*, Bruxelles, 2004; PANUNZIO Sergio (a cura di), *I diritti fondamentali e le Corti in Europa*, Napoli, 2005; FERRARI Giuseppe Franco (a cura di), *Corti nazionali e corti europee*, Napoli, 2006; DOUGLAS-SCOTT Sionaidh, "A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis", CMLR 2006, p. 629- 665; BRONCKERS Marco, "The relationship of the EC courts with other international tribunals: non committal, respectful or submissive?", CMLR, 2007, p. 601-627.; M. CARTABIA, "«Taking dialogue seriously». The renewed need for a judicial dialogue at the time of Constitutional Activism in the European Union", Jean Monnet Working Paper 12/07, available at [www.JeanMonnetProgram.org](http://www.JeanMonnetProgram.org); ROSAS Allan, *The European Court of Justice in Context: forms and patterns of judicial dialogue*, in *European Journal of Legal Studies*, 2007; GARLICKI Lech, "Cooperation of courts: the role of supranational jurisdiction in Europe", *International journal of constitutional law*, 2008, p. 509 ss.; POLLICINO Oreste, "Corti europee e allargamento dell'Europa: evoluzioni giurisprudenziali e riflessi ordinamentali", DUE 2009, p. 3 ss.; TIZZANO Antonio, "Quelques réflexions sur les rapports entre le cours européennes dans la perspective de l'adhésion de l'Union à la Convention EDH", RTDE 2011, p. 9 ss.; DERO-BUGNY Dauphine, *Les rapports entre la Cour de justice de l'Union européenne et la Cour européenne des droits de l'homme*, Bruxelles, Bruylant, 2015 ; MORANO-FOADI Sonia, VICKERS Lucy, *Fundamental Rights in the EU: A Matter for Two Courts*, Oxford, Hart Publishing, 2015.

<sup>159</sup> Even if the case law shows many examples of references from the Strasbourg court to the ECJ case law and to the European Charter of Fundamental Rights, the references from the ECJ to the ECHR and to the ECtHR case law are historically more frequent. On this point see A. BULTRINI, *La pluralità dei meccanismi di tutela dei diritti dell'uomo in Europa*, Torino, 2004.

be possible to imagine future developments on this question, in the case law of the European Courts, also considering that in both legal orders there are norms and instruments that may serve to answer to such question.

As far as the ECtHR is concerned, it is to be reminded that the Committee of Experts of the Council of Europe on Progress in the Biomedical Sciences has already strongly condemned such practice, considered contrary to human dignity<sup>160</sup> so that it would be significant that the Court state its position on this point. In case the Court will continue avoiding to answer such question, it should necessary refrain for going further in the legal reasoning on surrogacy and leaving a wider margin of appreciation to the signatory States.

Turning to the ECJ, it is possible to argue that surrogacy is contrary to art. 3 of the EU Charter of Fundamental Rights, Right to the integrity of the person, which states, at par. 2, that it has to be respected “the free and informed consent of the person concerned according to the procedures laid down by law” and “ the prohibition on making the human body and its parts as such a source of financial gain”. Therefore, as far as the free consent of the surrogate mother is not guaranteed or surrogacy end up in a commercial exploitation of the human body, the ECJ may be called to rule on this point. Such an intervention may be provoked both by the national judge and by the European Commission, which has clearly stated that it is her duty to assure the enforcement of the EU Charter of Fundamental Rights, also through the infringement procedure according to art. 258 TFEU<sup>161</sup>. It is also to be remembered that the European Parliament has recently strongly condemned the practice of surrogacy, considering that it undermines the dignity of the woman<sup>162</sup>.

Secondly, an important point of convergence may be represented in future by the child’s best interest principle, as it was anticipated by General Advocate Kokott. In fact, it is possible to rely on this principle to offer an evolutionary interpretation of the existing legal framework, in order to reach solutions more protective for children. If the Court had followed Kokott’s interpretation, it will have interpreted Directive 92/58 as giving the right to a maternity paid leave also to the commissioning mother, in order to protect the mother-child relationship. This would also have been coherent with art. 7 of the EU Charter of fundamental Rights, also mentioned by Kokott, which will have to be interpreted in line with ECHR art. 8, having the same meaning and scope, according to art. 52, par. 3 of the

<sup>160</sup> See Comité ad hoc d’experts sur les progrès des sciences biomédicales, “Rapport sur la procréation artificielle humaine”, 1989, cit., section 15. On this point see also PUPPINKC Grégor, DE LA HOUGUE Claire, “ECHR: Towards the liberalization of surrogacy” cit.

<sup>161</sup> See the interventions of the European Commission in the case of Hungary reported in 2012 Report on the application of EU Charter of fundamental Rights, p. 15 ss., available at [http://ec.europa.eu/justice/fundamental-rights/files/charter\\_report\\_2012\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/charter_report_2012_en.pdf), and the subsequent ECJ judgements, case C- 288/12, *Commission v. Hungary* [2014], ECLI:EU:C:2014:237 and C- 286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687.

<sup>162</sup> See 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), point 115: [ the EP] “Condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments”.

EU Charter of Fundamental Rights<sup>163</sup>. The ECJ has already recognized that the EU Charter, likewise the ECHR, recognizes, in Article 7, the right to respect for private or family life and that this provision must be read in conjunction with the obligation to have regard to the child's best interests, which are recognized in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents<sup>164</sup>.

It has been already pointed out that the protection of the children's rights is "an area where dialogue between the ECJ and the ECHR is likely, particularly in the protection of children's rights in the context of the right to respect for private and family life, which is expressed in both the ECHR and the Charter"<sup>165</sup>.

Moreover, there is a dialogue at institutional level: the Council of Europe has developed Guidelines on Child-Friendly Justice<sup>166</sup> which the Commission has identified as a key aspect of its Agenda for the Rights of the Child<sup>167</sup>.

Therefore, if there will be a road to convergence between the two European Courts, it will pass through the child's best interests principle and to the interpretation of the right to protect the family and private life.

## B. The profiles of divergence

At present, the profiles of divergence are undoubtedly more evident. In fact, from the analysis of recent cases in the previous paragraphs, it has to be concluded that the current positions of the Strasbourg and Luxembourg Courts on surrogacy differ significantly.

The first divergence is about the interpretation method: while the ECtHR adopted an evolutionary interpretation of the ECHR, the ECJ relied on the literal (and conservative) interpretation of the relevant EU legal framework. In fact, the ECtHR adopted ECHR art. 8 in cases of surrogacy, considering existent a "family life" even in the absence of any genetic link and when cohabitation only amounted at few months, also disregarding the illegal origin of such link<sup>168</sup>. In analyzing such divergences, it has to be bear in mind the different

<sup>163</sup> ECJ, case C-279/09, *DEB*, C-279/09, ECR I-3849, para. 35.

<sup>164</sup> ECJ, case C-540/03, *EP v. Council*, ECR I-5769, para. 59. See also conclusions of General Advocate Bot, 27 September 2012, joined cases C-356/11 e C-357/11, and C-356/11), *Maabannuuttovirasto and others*, para. 76 – 79.

<sup>165</sup> It has been already pointed out that the protection of the children's rights is "an area where dialogue between the ECJ and the ECHR is likely, particularly in the protection of children's rights in the context of the right to respect for private and family life, which is expressed in both the ECHR and the Charter", LAROUT Ruth, *Article 24*, cit., p. 690.

<sup>166</sup> Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, [https://wcd.coe.int/View-Doc.jsp?Ref=CM/Del/Dec\(2010\)1098/10.2abc&Language=lanEnglish&Ver=app6&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/View-Doc.jsp?Ref=CM/Del/Dec(2010)1098/10.2abc&Language=lanEnglish&Ver=app6&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383).

<sup>167</sup> EU Agenda for the Rights of the Child /\* COM/2011/0060 final, p. 6. <http://eur-lex.europa.eu/legal-content/EN/TEXT/HTML/?uri=CELEX:52011DC0060&from=en>.

<sup>168</sup> The ECtHR progressively extended the notion of family and family life, relying on the "de facto link": see ECtHR, 13 June 1979, *Marckx v. Belgium*; 18 December 1986, *Johnston and others v. Ireland*; 28 September 2007, *Wagner and J.M.W. L. v. Luxembourg*; 3 May 2011, *Négyontis-Giannis v. Greece*.



role of the two Courts. The ECJ has the duty to verify the respect of fundamental rights by the EU institutions and by Member States when they act in the scope of EU law<sup>169</sup>. Moreover, the ECJ has to respect the principle of “*ne ultra petita*” so that it cannot sentence beyond the requests made by the parties<sup>170</sup>. In the specific cases of *C.D.* and *Z.* then, the ECJ had to reply to specific questions concerning the interpretation of the invoked directives, so that it had to comply with the limits of its jurisdiction and of the applications of the parties. The ECtHR, instead, has the duty to solve the specific case concerning a violation of the ECHR that could not have been redressed with internal remedies, but, at the same time, it worth remember that the ECHR lives in the case law of the Strasbourg’s Court, so that its role in interpreting such instruments exceeds the limits of the specific case.

Secondly, the ECtHR relied on the best interests of the child principle, while the ECJ did not even mention it. For the ECtHR, in consideration of the child’s best interests principle, the notion of family life is to be understood very loosely: there is no need for a genetic link between parents and child, and the illegal origin of the parentage (which may result from conduct contrary to the public order) is irrelevant, with the consequent application of ECHR Art. 8 in such cases. Moreover, the best interests of the child is considered to be a principle capable of reducing the margin of appreciation of the State, even if this may lead to a controversial compromise solution, where the same conduct of the State may assume different connotations. As a consequence: (i) the State’s margin of appreciation can vary on the same issue, even if there is huge lack of consensus among the European States and the topic involves delicate values, depending on whether children are involved or not and on whether the child’s best interest is considered; (ii) the State conduct may be deemed not in violation of ECHR Art. 8 as far as parents are concerned, but, at the same time, to strongly jeopardize the private life of individuals under Art. 8 if children are involved.

Thirdly, the ECtHR strongly limited in substance the State margin of appreciation, while the ECJ showed great self-restraint. In fact, while the ECtHR seems to leave room for the State’s margin of appreciation, as Judges Raimondi and Spano’s opinion pointed out, the Court ultimately eliminates the freedom of the State to rule on surrogacy because it imposes to recognize the legal parentage established, even illegally, abroad : “ S’il suffit de créer illégalement un lien avec l’enfant à l’étranger pour que les autorités nationales soient obliges de reconnaître l’existence d’une «vie familiale», il est évident que la liberté des états de ne pas reconnaître d’effets juridique à la gestation pour autrui, liberté pourtant reconnue par la jurisprudence de la Cour ”.

<sup>169</sup> ECJ, case 5/88 *Wachauf* [1989], ECR 2609; case C-260/89 *ERT* [1991], ECR I-2925; case C-309/96 *Annibaldi* [1997], ECR I-7493.

<sup>170</sup> ECJ, C-185/11, *Commission v. Slovenia*, ECLI:EU:C:2012:43, para. 29; C-141/10, *Commission v. The Netherlands*, ECLI:EU:C:2012:214, para. 15, case C-34/11, *Commission v. Portugal*, ECLI:EU:C:2012:712, para. 44.

The ECJ, instead, showed great self-restraint, avoiding to give a direction to the Member States, leaving national legislatures free to outlaw surrogacy and regulate the question of maternity leave. Therefore, it has to be concluded that in the Luxembourg Court's case law, the principle of subsidiarity played the major role, leading the EU legislator to step back in front of the national one.

## VII. Final considerations

Despite the efforts in balancing the fundamental rights involved and to reach reasonable solutions, the recent case law of both courts appears to be unsatisfactory for several aspects.

First of all, concerning the child's best interests, it appears that the ECtHR did not consider certain elements, that may have been analyzed in the legal reasoning.

In fact, adults who turn to surrogacy are not subjected to any control concerning their suitability to take care of a child. The Permanent Bureau of HCCH reported that, in some cases, the commissioning father had been previously convicted for offences against children or that surrogacy lead to children's trafficking<sup>171</sup>. But the ECtHR gave a preference to the "de facto familiar link" without considering this aspect, even despite of the evaluation on adoption suitability of the intended parents<sup>172</sup>. Moreover, as highlighted by the joint partly dissenting opinion of judges Raimondi and Spano in *Paradiso and Campanelli*, the notion of "familiar life", in the absence of any genetic link between parents and child, where it has been established through an illegal act in contrast with the public order, is an over-extension, and results in also extending the scope of application of the ECHR. As already suggested by the first commentators<sup>173</sup>, the Court may (and should) take the chance to restrict this notion, as *Paradiso and Campanelli* was referred to the Grand Chamber: this would be in compliance with the principle of subsidiarity, which should rule the mechanism of the ECHR.

Secondly, in the case of surrogacy without any genetic link with the child, it should also be considered that the child will not be able to trace his genetic origins and birth, in contrast with the UN convention on the rights of the children. This aspect, too, was ignored by the Court.

Thirdly, a child born from surrogacy is always subject to transfer or removal, which may impact his or her growth and development: for example, in the *Paradiso and Campanelli* case, the child stayed three months in Russia with the surrogate mother and then was taken to Italy where he started living with the Italian couple. Scientific studies show that the first

<sup>171</sup> See Permanent Bureau of HCCH, "The parentage/Surrogacy project: an updating note", cit., Annex II, para. 1.

<sup>172</sup> See *Paradiso and Campanelli*, para. 12 and 84.

<sup>173</sup> BEAUMONT Paul, TRIMMINGS Katarina, "Recent jurisprudence of the European Court of Human Rights in the area of cross-border surrogacy: is there still a need for global regulation of surrogacy?", cit., p. 9.

months after birth (and, it seems, also the months before the birth) are of paramount importance for a baby, and this should be investigated more to find out the best solution for the child.

Lastly, approaching the child's best interests from a wider point of view, it has to be considered that a newborn from surrogacy is not the only child whose interests have to be protected. There are also the children waiting for adoption<sup>174</sup> and the young women who, in poor countries, act as surrogate mothers and die daily as a result of unhealthy treatment<sup>175</sup>. This means that the legitimate aims of the State in protecting the health, rights, and freedom of others and preventing crimes should not be ascribed to the ground of public policy, but should be considered a State's action directed to protect the best interests of the various children involved.

Also the ECJ's completely lack of consideration of the child's best interests is quite unsatisfactory, as it could have at least remembered the need to interpret the EU existing legal framework in the light of such principle.

Unfortunately, the Court did not take the chance to say something more on the principles that may guide national legislators, leaving the latter to deal with the Charter and the UN Convention on disability. Moreover, the ECJ ignored surrogate mothers' rights, although it could have pronounced on their position, at least recalling the need to protect these individuals as well.

In the light of the above, it is possible to conclude that while there is not a present dialogue about surrogacy between the two European Courts, this may be built in the next months or years, considering that more case law on this issue is expected. A dialogue is desirable to create a common standard of protection of human rights, moreover with regard to the protection of the right to respect for family and private life, included in art. 8 ECHR as well as art. 7 of the EU Charter, that have the same meaning and scope by definition. Moreover, coherence and convergence on such a delicate issues, at least as far as protection of fundamental rights in concerned, may help national judges to deal with such hard cases.

Such a dialogue is, despite the present divergences, feasible in particular as far as the child's best interest principle and the protection of the right to respect for family and private life are concerned.

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<sup>174</sup> The estimate number of abandoned children worldwide is increasing constantly <http://www.sos-usa.org/our-impact/childrens-statistics>

<sup>175</sup> See, among others, <http://www.reuters.com/article/2015/03/02/us-surrogate-mothers-india-idUSKBN0LY1J720150302>; <http://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impoverished-die>; <http://www.hindustantimes.com/india-news/outourcing-motherhood-india-s-reproductive-dystopia/article1-1373360.aspx>; Centre for Child Rights, Still Out of Focus: Status of India's Children, 2008, p. 211 available at <http://www.hqccrc.org/status-children>.



In the end, the ECJ should learn more from the ECtHR in developing guidance on the child's best interests and the ECtHR should learn from the Luxembourg Court's self-restraint. It is, therefore, desirable that, with the European Courts drawing inspiration from each other, the child's best interests should be approached in a broader sense, including all the aspects involved, and in coordination with the principle of subsidiarity.

Should both Courts succeed in developing a common framework of principles to reach a fair and satisfactory balance between the several rights and interests involved, national judges may refer to this common basis while work to draft an international convention is ongoing.

\* \* \*

**List of abbreviations**

CMLR	Common Market Law Review
DUE	Il Diritto dell' Unione europea
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EHRLR	European Human Rights Law Review
ELJ	European Law Journal
EP	European Parliament
HCCH	Hague Conference on Private International Law
ICCS	International Commission on Civil Status
IVF	In vitro fertilization treatment
RDIPP	Rivista di diritto internazionale privato e processuale
RTDE	Revue Trimestrielle de Droit Européen
TEU	Treaty on the European Union
TFEU	Treaty on the functioning of the European Union
UNCRC	UN Convention on the Rights of the Child
JDI	Journal de Droit International

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