



**The European Court of Human Rights delivers its first advisory opinion.
States are not required to register the details of the birth certificate
of a child born through gestational surrogacy abroad in order to establish
the legal parent-child relationship with the intended mother:
adoption may also serve as a means of recognising that relationship**

In response to the request for an advisory opinion made by the French Court of Cassation, the Court delivered, unanimously, the following [opinion](#):

In a situation where a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father has been recognised in domestic law,

1. the child's right to respect for private life within the meaning of Article 8 of the European Convention on Human Rights requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother";
2. the child's right to respect for private life does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used.

[The background to the case and the domestic proceedings](#)

In the case of [Mennesson v. France](#) (no. 65192/11, 26 June 2014) two children born in California through a gestational surrogacy arrangement, and their intended parents, complained of their inability to obtain recognition in France of the parent-child relationship legally established between them in the United States. The Court held that there had been no violation of the right of the children and the intended parents to respect for their family life, but that there had been a violation of the children's right to respect for their private life.

In its request for an advisory opinion the Court of Cassation pointed out that its case-law had evolved in the wake of the *Mennesson* judgment. Registration of the details of the birth certificate of a child born through surrogacy abroad was now possible in so far as the certificate designated the intended father as the child's father where he was the biological father. It continued to be impossible with regard to the intended mother.

On 16 February 2018 the French Civil Judgments Review Court granted a request for re-examination of the appeal on points of law against the Paris Court of Appeal judgment of 18 March 2010 annulling the entry in the French register of births, marriages and deaths of the details of the Mennesson children's US birth certificates. The Court of Cassation's request for an advisory opinion from the Court was made in the context of re-examination of that appeal.

[Procedure and composition of the Court](#)

In a letter of 12 October 2018 sent to the Registrar of the European Court of Human Rights, the French Court of Cassation requested the Court to give an advisory opinion on the questions set out below.

On 3 December 2018 the panel of five judges of the Grand Chamber of the Court decided to accept the request.

Written observations were submitted jointly by Dominique Mennesson, Fiorella Mennesson, Sylvie Mennesson and Valentina Mennesson. The French Government submitted written observations under Article 3 of Protocol No. 16.

Written observations were also received from the Governments of the United Kingdom, the Czech Republic and Ireland, the French Ombudsman's Office and the Center of Interdisciplinary Gender Studies at the Department of Sociology and Social Research of the University of Trento, and from the non-governmental organisations the AIRE Centre, the Helsinki Foundation for Human Rights, ADF International, the International Coalition for the Abolition of Surrogate Motherhood, and the Association of Catholic Doctors of Bucharest, all of which had been given leave by the President to intervene (Article 3 of Protocol No. 16). The non-governmental organisation Child Rights International Network, which had also been given leave to intervene, did not submit any observations.

The opinion was delivered by the Grand Chamber of 17 judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
Angelika **Nußberger** (Germany),
Linos-Alexandre **Sicilianos** (Greece),
Robert **Spano** (Iceland),
Vincent A. **De Gaetano** (Malta),
Jon Fridrik **Kjølbro** (Denmark),
André **Potocki** (France),
Faris **Vehabović** (Bosnia and Herzegovina),
Iulia Antoanella **Motoc** (Romania),
Branko **Lubarda** (Serbia),
Yonko **Grozev** (Bulgaria),
Carlo **Ranzoni** (Liechtenstein),
Georges **Ravarani** (Luxembourg),
Pauliine **Koskelo** (Finland),
Tim **Eicke** (United Kingdom),
Péter **Paczolay** (Hungary),
Lado **Chanturia** (Georgia), *judges*,

and also Roderick **Liddell**, *Registrar*.

[The questions asked](#)

The Court of Cassation put the following questions to the Court:

“1. By refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the ‘intended mother’ as the ‘legal mother’, while accepting registration in so far as the certificate designates the ‘intended father’, who is the child’s biological father, is a State Party overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the ‘intended mother’?”

2. In the event of an answer in the affirmative to either of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?”

The Court's opinion

The first issue

The Court referred to the essential principle according to which, whenever the situation of a child was in issue, the best interests of that child were paramount.

The Court noted that the lack of recognition of a legal relationship between a child born through surrogacy abroad and the intended mother had a negative impact on several aspects of that child's right to respect for private life. It was mindful of the fact that, in the context of surrogacy arrangements, the child's best interests did not merely involve respect for these aspects of his or her right to private life. They included other fundamental components that did not necessarily weigh in favour of recognition of a legal parent-child relationship with the intended mother, such as protection against the risks of abuse which surrogacy arrangements entailed, and the possibility of knowing one's origins. Nevertheless, in view of the negative impact on the child's right to respect for private life and the fact that the child's best interests also entailed the legal identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare, as well as the possibility for the child to live and develop in a stable environment, the Court considered that the general and absolute impossibility of obtaining recognition of the relationship between a child born through surrogacy abroad and the intended mother was incompatible with the child's best interests, which required at a minimum that each situation be examined in the light of the particular circumstances of the case.

In the *Mennesson* judgment the Court had reiterated that the scope of the States' margin of appreciation varied according to the circumstances. Thus, where, as in the present case, there was no consensus within the member States of the Council of Europe, and where the case raised sensitive moral or ethical issues, the margin of appreciation was wide. However, the Court had observed in that judgment that where a particularly important facet of an individual's identity was at stake, such as when the legal parent-child relationship was concerned, the margin allowed to the State was normally restricted. It had inferred from this that the margin of appreciation afforded to the respondent State needed to be reduced.

Given the requirements of the child's best interests and the reduced margin of appreciation, the Court was of the opinion that, in a situation such as that referred to by the Court of Cassation in its questions, the right to respect for private life of a child born abroad through a gestational surrogacy arrangement required that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother".

The second issue

It was in the interests of a child born through surrogacy abroad and conceived using the eggs of a third-party donor for the uncertainty surrounding the legal relationship with his or her intended mother to be as short-lived as possible. However, it could not be inferred from this that the States Parties were obliged to opt for registration of the details of the birth certificate legally established abroad. The Court noted that there was no consensus in Europe on this issue and observed that an individual's identity was less directly at stake where the issue was the means to be implemented in order to obtain recognition of his or her parentage. The Court therefore considered that the choice of means by which to permit recognition of the legal relationship between the child and the intended parents fell within the States' margin of appreciation.

The Court further considered that Article 8 of the Convention did not impose a general obligation on States to recognise *ab initio* a parent-child relationship between the child and the intended mother. What the child's best interests required was for recognition of that relationship, legally established abroad, to be possible at the latest when it had become a practical reality. It was not for the Court

but first and foremost for the national authorities to assess whether and when, in the concrete circumstances of the case, the said relationship had become a practical reality.

The child's best interests could not be taken to mean that recognition of the legal parent-child relationship between the child and the intended mother entailed an obligation for States to register the details of the foreign birth certificate in so far as it designated the intended mother as the legal mother. Other means might also serve those best interests in a suitable manner, including adoption, which, with regard to the recognition of the relationship, produced similar effects to registration of the foreign birth certificate. It was important, however, for the procedure laid down by domestic law to ensure that those means could be implemented promptly and effectively, in accordance with the child's best interests.

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Press contacts

echrpess@echr.coe.int | tel: +33 3 90 21 42 08

Denis Lambert (tel: + 33 3 90 21 41 09)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Inci Ertekin (tel: + 33 3 90 21 58 77)

Patrick Lannin (tel: + 33 3 90 21 44 18)

Somi Nikol (tel: +33 3 90 21 64 25)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.