



Children's interests not given enough weight in paid-surrogacy adoption ban

The case [K.K. and Others v. Denmark](#) (application no. 25212/21) concerned the refusal to allow the applicant K.K. to adopt the applicants C1 and C2 (twins) as a “stepmother” in Denmark. The twins were born to a surrogate mother in Ukraine who was paid for her service under a contract concluded with K.K. and her partner, the biological father of the children. Under Danish law, adoption was not permitted in cases where payment had been made to the person who had to consent to the adoption.

In today's **Chamber** judgment¹ in the case the European Court of Human Rights held that there had been:

unanimously, **no violation of Article 8 (right to respect for family life)** of the European Convention on Human Rights., finding in particular that there had been no damage to the family life of the applicants, who lived together with the children's father unproblematically;

unanimously, **no violation of Article 8 as regards the mother's right to respect for her private life** as the domestic authorities had been correct in ruling so, in order to protect the public interest in controlling paid surrogacy, over K.K.'s Article 8 rights; and

by 4 votes to 3, **a violation of Article 8 as regards the right to respect for the private lives of the two applicant children**. The Danish authorities had failed to strike a balance between the interests of the children and the societal interests in limiting the negative effects of commercial surrogacy, in particular as regards their legal situation and legal relationship to K.K.

A legal summary of this case will be available in the Court's database HUDOC ([link](#))

Principal facts

The applicants, K.K., C1 and C2, are Danish nationals who were born in 1967, 2013 and 2013 respectively and live in Copenhagen. K.K. is the mother of the other two applicants, who are twins.

In December 2013 a surrogate mother in Ukraine gave birth to C1 and C2 following a surrogacy agreement with the intended parents of the children, K.K. and her husband, who was the biological father. The birth certificates registered K.K. and her husband as the parents. In February 2014 the children were brought to Denmark.

Although K.K. was not recognised as the mother under Danish law, she was given joint custody of the children. The children were given Danish citizenship through their father.

K.K. also applied to adopt the children. That application was refused in February 2014 for the reason that she had lived in Denmark with the children only for four days. That decision was upheld in 2016 by the National Social Appeals Board. K.K. took a case before the courts against that decision.

In November 2020 the Supreme Court found against K.K. in a 4-3 split decision. It noted the payment of 32,265 euros to the clinic in Ukraine and the surrogate mother's consent to the adoption, and therefore held that the adoption ran counter to section 15 of the Adoption Act (that provision

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

banned adoption in cases where consent had to be given by someone who had been paid). It furthermore held – with reference to the Court’s case-law – that the refusal did not run counter to Article 8 of the Convention. It referred to the Court’s finding acceptable a similar ban in France that was intended on deterring its nationals from going abroad to make use of assisted reproductive methods that were forbidden in that State. Among many other things, it observed that the Court had asserted that “the best interests of the child do not merely involve respect for the child’s right to private life, but also other components that do not necessarily weigh in favour of recognition of a legal parent-child relationship between the child and the intended mother ... [including] protection against risks of abuse entailed by surrogacy arrangements”.

The dissenting opinion in the case stated that “children being barred from obtaining recognition that the person whom they have regarded as their mother for their entire life [was] also their mother from a legal point of view” would infringe the children’s rights under Article 8.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicants complained that the Supreme Court’s judgment had infringed their rights.

The application was lodged with the European Court of Human Rights on 11 May 2021.

Judgment was given by a Chamber of seven judges, composed as follows:

Carlo **Ranzoni** (Liechtenstein), *President*,
Jon Fridrik **Kjølbro** (Denmark),
Egidijus **Kūris** (Lithuania),
Pauliine **Koskelo** (Finland),
Jovan **Ilievski** (North Macedonia),
Saadet **Yüksel** (Türkiye),
Diana **Sârcu** (the Republic of Moldova),

and also Hasan **Bakırcı**, *Section Registrar*.

Decision of the Court

Article 8 concerning family life

It was clear that the three applicants and the children’s father had lived together since coming to Denmark and they are Danish citizens. As such, they had had no practical difficulties in enjoying family life together, and there had been no violation of Article 8 in that regard. .

Article 8 concerning right to respect for private life of K.K.

In its judgment the Supreme Court concentrated on the right to respect for private life in respect of C1 and C2. The Supreme Court appears to have taken it for granted that K.K.’s right to respect for her private life –her right to personal development through her relationship with the children, and continuing that relationship with them – was outweighed by the public interests at stake. That had been in line with the Court’s reasoning in the relevant [Advisory opinion](#) (P16-2018-001) and in [Menesson v. France](#) (no. 65192/11). The Court therefore saw no reason to hold otherwise.

Accordingly, there had been no violation of Article 8 of the Convention with regard to K.K.’s right to respect for her private life.

Article 8 concerning right to respect for private life of the child applicants

The Court observed that the Supreme Court had held that a ban on adoption in which payment to the person consenting to it existed under section 15 of the Adoption Act. The intention had been to stop children becoming a commodity.

It acknowledged the treaty requirements on and good faith of the Danish legislature when enacting the relevant legislation. However, it restated that respect for the child's private life, although it may not require registration of the mother on the birth certificate, might call for some other measure enabling legal recognition, such as adoption, to be permitted.

In the present case, the authorities had refused to allow the adoption, only shared custody. There was thus no legally recognised parent-child relationship. This had placed the children in an uncertain legal position as regards, for example, inheritance. The measures taken by the Danish authorities had not compensated for this.

Reiterating that the interests of the child were paramount in such cases, the Court found that the Danish authorities had failed to strike a balance between the interests of the children in this case and the societal interests in limiting the negative effects of commercial surrogacy. There had therefore been a violation of Article 8 as regards the respect for the private lives of C1 and C2.

Just satisfaction (Article 41)

The Court held, by 4 votes to 3, that Denmark was to pay the second and third applicants 5,000 euros (EUR) each in respect of non-pecuniary damage.

Separate opinions

Judges Kjølbro, Koskelo and Yüksel expressed a joint dissenting opinion, which is annexed to the judgment.

The judgment is available only in English.

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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.