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CROSS-BORDER SURROGACY AND THE RIGHT TO RESPECT FOR FAMILY LIFE

Abstract

Surrogacy is indisputably connected with the right to respect for family life guaranteed by Article 8 of the European Convention on Human Rights and Fundamental Freedoms. In the practice of the European Court of Human Rights (ECHR), many issues are open as disputable, among other things also in the context of the connection between cross-border surrogacy and the right to respect for family life. Taking into account the circumstances of each specific case, ECHR considered, first of all, the question of the (non) existence of a genetic link between the intended parents and the child born by the surrogate mother, the duration of cohabitation between them and the legal uncertainty that surrogacy creates, i.e., their possible impact on the violation of the right to respect for family life.

Keywords: *practice of the European Court of Human Rights, cross-border surrogacy, right to respect for family life.*

1. Introduction

A unique instrument for the protection of human rights dedicated to reproductive rights doesn't exist. Different international and regional documents related to human rights protect different elements of reproductive rights. Among them, for the purposes of this paper, the European Convention on Human Rights and Freedoms (hereinafter: the Convention) stands out as important (Jović-Prlainović, 2021, p. 49). Although the Convention was created to ensure the general recognition of rights and freedoms, reproductive rights are not specifically mentioned. That is, the Convention does not define them and they are not specifically guaranteed by it, but it is still possible to establish a direct connection between the provisions of the Convention and the violation of reproductive rights. Reproductive rights are a part of human rights and constitute a corpus of rights and freedoms of individuals in the sphere of human reproduction which ensure the

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possibility of a human being to accomplish his own wishes and intentions regarding children (free parenthood) (Petrušić, 2007, p. 319). Their holder is every individual, and their application is based on the principles of human dignity and equality. As in the case of other human rights, countries have an obligation to recognize and promote reproductive rights, but they also have a duty to refrain from intervention - based on the right to non-harassment (Živojinović, 2007, p. 378). Before the European Court of Human Rights (hereinafter: ECHR), there was a whole series of cases concerning the violation of reproductive rights and related to: abortion, *i.e.* the right to terminate a pregnancy, embryo donation, home birth, medically assisted reproduction, precautionary measures for health protection of a newborn, prenatal medical tests-prenatal diagnosis, sterilization, surrogacy, use of surgical symphysiotomy, anonymous birth. Analyzing all reproductive rights from the rich practice of the ECHR is not possible in a paper of this scope, so in the following text only the attitudes on cross-border surrogacy in the context of the right to respect for family life from Art. 8 of the Convention are presented.

2. About Surrogacy in General

Family planning represents one of the freedoms of parents protected by conventions and constitutions (Stjepanović & Stjepanović, 2018, p. 476). Surrogacy (from the Latin word *surrogatus*, which means a substitute, *i.e.* a person who is appointed to act on behalf of another person)[1] is a procedure of biomedically assisted fertilization, in which the surrogate mother is contractually obligated to carry and give birth to a child, who after birth will be handed over to the couple with who she entered into a contractual relationship. The development of biomedicine has therefore made it possible for couples, who didn't consciously choose not to have children, to become parents (Bordaš, 2012, p. 98). This procedure conditions serious theoretical dilemmas regarding ethical, moral and legal justification.

National legislations in the signatory states of the Convention (and beyond) relate differently to this issue. While some European legislations recognize this institute, in others it is not legally regulated. From a comparative point of view, the legislatures that allow surrogate motherhood are, for example, Greece, Great Britain, Israel, Ukraine, Georgia (Kovaček Stanić, 2013, p. 5).[2] Some countries, *e.g.*

[1] The terms used to denote this form of reproduction with the help of medicine are, in addition to surrogate motherhood, also: surrogate pregnancy, surrogate gestation, surrogate parenting, and in domestic literature "birth from a service" (Kovaček Stanić, 2013, p. 2).

[2] Some countries that do not belong to the European circle of countries, such as India and Thailand, have become the center of "reproductive tourism" or "birth tourism", as evidenced by the data of the World Health Organization (Župan, Puljko & Sukačić, 2013, p. 11).

The Netherlands and Russia, do not have special legislation on surrogacy, but this practice is considered permissible, while in contrast, in a number of European countries surrogacy is not allowed (Germany, Austria, France, Italy, Spain, Switzerland, Sweden) (Kovaček Stanić, 2013, p. 11).

Serbia is one of the countries where surrogate motherhood is prohibited by law. In the Family Act (2005) there is an explicit provision that the mother of a child conceived with biomedical assistance is the woman who gave birth to it (Art. 57, para. 1). In this way, the legislator gives primacy to carrying and giving birth to a child, and not to the genetic origin. Besides that, there is a prohibition of determination of maternity of a woman who donated an egg cell (Art. 57, para. 2). In addition to the Family Act, the Act on Biomedically Assisted Fertilization (2017) regulates the framework and organisation of this process, as well as the types of procedures, but according to the letter of the law, surrogacy is not allowed (Art. 49, para.1, item 18 and Art. 66).

3. The Right to Respect for Family Life in Art. 8 of the Convention

In the catalog of rights guaranteed by the Convention, family life is recognized as a special value. There is general accordance that this is a widely recognized need of every human being, and that is why it is an integral part of the idea of human rights. This right is guaranteed by Art. 8 of the Convention. Unique in its way of regulation, this article primarily indicates that it must protect, *i.e.,* must ensure respect for, both the family life that has already been established and the one that has yet to be created, and this implies the obligation of the contracting states to enable everyone to establish and organize a family life, as well as to enjoy an established one undisturbed (Palačković & Ćorac, 2016, p. 74). Basically, the right to family life implies the right of individuals to live together and develop mutual relationships (Draškić, 2006, p. 97). Even though the right to family life is an individual right, it actually protects the relationship between at least two people, so this right gains its meaning only in such a relationship. By guaranteeing this right, protection is provided to a certain type of emotional relationship between two beings with the desire for such a relationship to last, that is, to maintain its continuity. Therefore, the key determinant and connective tissue of family life are close personal ties and the right to respect them. This type of family relationship, *i.e.*, its existence in a specific case and its quality, is at the same time a condition for realization of protection, *i.e.*, rights to protection. However, this subject of legal regulation is quite generally set. More precisely, the relationships that fall within the scope of the term "family life" are not defined, and the

absence of specifying these relationships by the enumerative method also caused the absence of a definitive determination of the situations that can determine an individual to seek protection within the framework of this right. In theory, an attitude was stated that the recognition of the right to respect for family life is not accompanied by efforts to define its content and that, without a doubt, in such an approach there is a certain audacity of the creators of the Convention, even a lot of risk, to leave one right whose control and respect is left to international bodies undefined (Ponjavić, 2003, p. 827).

4. Child Born Abroad through a Gestational Surrogacy Arrangement and the Right to Respect for Family Life

Surrogacy in most cases causes problems when it comes to cross-border surrogacy (Samardžić, 2018, p. 214). Namely, couples (or individuals), in an effort to have a child at any cost, go to countries where surrogacy is allowed and, in that way, bypass the regulations of the country they come from, but bypassing restrictive domestic laws creates particular problems precisely in the case of surrogacy (Samardžić, 2018, p. 214). European courts are frequently confronted with the question of how to deal with international surrogacy *ex post facto* (Thomale, 2017, p. 464). The legal problems usually begin when the individual or couple returns to their country with the surrogate-conceived child and try to be recognized as the child's parent(s) (González, 2020, p. 917). Issues can also start before travelling back to their country, for instance, a passport needs to be obtained for the infant, and their own embassy may not issue the needed documents because they may have evidence that the child was born from an arguably legal fraud (González, 2020, p. 917).

Surrogacy is undoubtedly related to the right to respect for family life. In Europe, as already stated, there is no consensus on the legality of surrogacy,[3] but also on the legal recognition of the relationship between parents and a child obtained in that way abroad. This was the reason for the ECHR to declare itself on this issue in the case of *Mennesson v. France*, in the context of a possible violation of the right to respect for family life. The applicants are spouses who have French citizenship and American-citizen twins born by a surrogate mother in California. The children are biologically related only to the father, the first applicant. The

[3] The ECHR in the judgment *SH and Others v. Austria*, (No. 57813/00 of November 3, 2011) stated that "concerns based on moral considerations or on social acceptability are not in themselves a sufficient reason for the complete prohibition of certain artificial birth techniques (para. 74), and that countries should not hesitate to allow new types of "unusual family relationships" that "do not follow the typical parent-child relationship based on a direct biological connection" and which have "the purpose of supplementing or replacing biological family relations" (para. 81).

relevant circumstance is that the Supreme Court of California, at the joint request of the first and second applicants, issued a decision specifying the data that must be entered in the birth register after the birth of the twins. The decision states that the first applicant will be registered as the "genetic father" of the children born by the surrogate mother, and the second applicant as the "legal mother", that is, they will be registered as parents. Then the *Mennesson* couple filed a request in France for the recognition of this decision of the American court. The French court first recognized this decision and the applicants were entered in the birth register as parents of twins, only to have this entry annulled by the court of second instance with the argument that such entry is contrary to the public order of France.[4]

Due to the refusal of the national authorities to register them in the birth register as parents of the children, the applicants felt that their right to respect for family life was violated. They stated that, although there was an "effective family life" and a *de facto* family relationship, it was not recognized in the country they live in, so similar to a domino effect, it caused a number of other consequences. Thus, according to the applicants, the children could not obtain French citizenship and do not have a French passport, or even a valid residence permit (although they are protected from deportation as minors), and they could, when they come of age, face the impossibility of legal residence on French territory, as well as the impossibility of acquiring and exercising the right to vote. Other than that, there are a number of administrative obstacles when it comes to the use of social services and education. In addition, the consequence could be the impossibility of inheriting from the parents. Also, in case of death of the first applicant (biological father) or in case of divorce, the second applicant could be deprived of all rights towards the children. Therefore, according to the allegations in the application to the ECHR, the legal status of the children was extremely uncertain.

According to the ECHR, the decision of the national authorities not to allow legal recognition of the relationship between the applicants undoubtedly affects their family life. The ECHR thereby emphasized that it does not consider as relevant potential or future risks for family life, but only concrete obstacles and limitations. However, regardless of the importance of the possible risks that threaten the family life of the applicants, the ECHR believes that it is necessary to determine what are the concrete obstacles that stand in their way. It also points out that the refusal of the French national authorities to legally recognize the family relationship of the

[4] According to the opinion of the ECHR in the case of *Mennesson v. France*, the impossibility to recognize the applicants' legal relationship with the children in French law is a consequence of the choice of the French legislator to prohibit surrogacy (para. 68), with which France actually tries to discourage its citizens from resorting to a method of procreation abroad that it prohibits on its territory (paras. 62 and 99).

applicants is an issue that should be viewed from the aspect of negative obligations, *i.e.*, the non-interference of the defendant state with the rights from Art. 8, and not from the aspect of positive obligations, *i.e.*, its action (para. 48).

Considering the specific effects on the family life of the applicants, the ECHR concluded that the state did not intervene and that it certainly continues to exist. The applicants live together in conditions that are generally comparable to the conditions in which other families live, which does not lead to the thought that there is a risk that the state authorities decide to separate them because of their situation (para. 92). Therefore, the ECHR considers that their right to respect for family life has not been violated.

However, considering the rights, that is, the legal position of children who were born through surrogacy, the ECHR took the position that the repercussions of surrogacy are different. Based on the circumstance that every human being has the right to know the details of their identity,[5] also that this right can be questioned when the legal relationship between parents and children has not been established, the ECHR, in the specific case in which the registration of children and the establishment of that legal relationship towards the parents they live with is refused, concludes that the right of children to preserve their identity is called into question, which according to the position of the ECHR is a key element of the right to respect for private life. The ECHR concludes that refusing to recognize the biological relationship between the children and their father and preventing them from acquiring French citizenship place children in a position that is not in their best interest, which is why their right to respect for private life is violated.[6]

On the obligations of the state to enable the recognition of parentage in the case of the birth of a child through cross-border surrogacy, the ECHR declared itself at the request of the French Court of Cassation - Grand Chamber A*dvisory*

[5] Since the second half of the 20th century, the idea according to which the construction of personal identity is not only a private, intimate and psychological issue, but also has a social dimension and encompasses the right of every person to know its origin, has been increasingly present. The request to know one's personal past is not only a means for obtaining a certain benefit, status, inheritance, etc., but can also be understood as a goal: complete knowledge and construction of one's own personality (Ponjavić & Palačković, 2017, p. 21).

[6] See the decision and the same attitude of the ECHR in an almost identical situation in the case of *Labassee v. France*. In this case, the ECHR made a unanimous decision that the refusal of France to recognize the first and second applicants as parents of the child did not violate their right to respect for family life under Art. 8 of the Convention, but that there was a violation of the child's right to a private life, which entails determining his identity and recognizing the parental relationship between him and the first and second applicants. The ECHR confirmed the same position in the decision *D v. France*.

opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother (Request No P16-2018-001, April 10, 2019):

> In a situation where, as in the scenario outlined in the questions put by the Court of Cassation, 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 recognized in domestic law:
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> 1. the child's right to respect for private life within the meaning of Art. 8 of the Convention requires that domestic law provides 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 within the meaning of Art. 8 of the Convention 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 provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests.

Regarding surrogacy, the ECHR reasoned somewhat differently in the case of *Paradiso and Campanelli v. Italy*. The applicants in this case are spouses originally from Italy who, due to their inability to become parents naturally, resorted to a "surrogate arrangement" in Russia. The surrogate mother gave birth to a boy, and the applicants are registered as parents in the birthplace of the child. The birth certificate obtained in Russia did not, however, contain information that the child was born by a surrogate mother. After returning to Italy the applicants tried to verify the child's birth certificate issued in Russia. However, this led to the initiation of an investigation against them for providing false information. The national court ordered a DNA analysis, which showed that the boy had no genetic connection with the applicants. This circumstance, as well as the violation of regulations related to international adoption of children and the circumvention of the prohibition of surrogate arrangements that is in force in Italy, decided the national court to make a decision for the boy to be taken from the applicants and placed in a children's home. At the same time, the applicants were not informed about the boy's whereabouts, and they were forbidden to have contact with him. Then, in 2013, the boy got a new identity, and in the registers, it was recorded that the parents were unknown, foster care was established, and then he was placed in a family with the aim of being adopted.

The applicants turned to the ECHR, stating that their right to respect for family life had been violated due to the child being taken away and the refusal of legal recognition of their relationship. The ECHR found a violation of this right, stating that due to the non-recognition by the national authorities of the child's birth certificate issued in Russia, it was impossible to establish a legal relationship, but that the applicants had, at least initially, parental responsibility for the child and therefore *de facto* family ties must be taken into account. According to the opinion of the ECHR, the national authorities of Italy, by placing the nine-month-old boy in a home for neglected children, did not demonstrate that they properly considered his best interests, considering that separating a child from his family is always a measure of last resort, justified only in the case when the child is in immediate danger. Therefore, in its opinion, the policy of the national authorities and the position on a certain issue, in this case specifically the explicit prohibition of surrogate motherhood in Italy, are not an adequate and acceptable justification for the measure of taking away the child, and that is why the violation of the right to respect for family life has been established. Nevertheless, the consequence of determining the violation of this right does not however imply, according to the ECHR position, the obligation of the Italian authorities to return the child to the applicants, with reference to the fact that since 2013 he has been in a foster family, within which close personal ties have been developed.

In one of the harshest critiques presented in the theory, it was stated that the decision in the case of *Paradiso and Campanelli v. Italy* marks a new step in the extension of the notion of family life (Puppinck & Hougue, 2015, p. 41) and due to the fact that protection is provided to an illegally determined state with reference to the best interest of the child. This then implies that parents from this, we could say wild card principle, derive for themselves the right to family life and its protection, which the ECHR allowed. The applicants have neither biological nor legal ties to the child, but only a relationship that was based illegally in the past, so they seek to protect the right arising from an illegal factual situation which they created themselves (Puppinck & Hougue, 2015, p. 44). In theory it's also pointed out that despite the ECHR's statements about the importance of biological origin, the misconception that it has some objective value for the ECHR, *i.e.*, that its value depends on the individual's will, should be avoided, so the blood relationship is valid if it is required in a specific case (Puppinck & Hougue, 2015, p. 43). Proof of this is the fact that the ECHR in the case of *Paradiso and Campanelli v. Italy* completely ignores the child's biological parents, and the issue of the child's right to know his origin is not even raised (Puppinck & Hougue, 2015, p. 44). [7]

[7] In recent years, on an international level, the issue of legal regulation of the right of a child conceived with biomedical assistance (cases of conception by artificial heterologous insemination

Given that they lived together for only six months, the conclusion of the ECHR on the existence of family life between the applicants and the boy is disputed in theory, and the question of whether family life is a relationship that is not based on biological ties, nor is it based on law, but only on the fact that it looks like that, is also problematic (Puppinck & Hougue, 2015, p. 42). In support of this is the argument of the ECHR stated in para. 69 of the decision *Paradiso and Campanelli v. Italy* that the applicants "behaved like parents" in relation to the child for six months, which was sufficient for the ECHR to conclude on the existence of a *de facto* family life. It is stated that the primary reason for the existence of a family life with a child is the fact that a contract about surrogate motherhood existed, the signing of which expressed "an intended family life" (Puppinck & Hougue, 2015, p. 42). Finally, in theory, it is concluded that the ECHR tries to protect all forms of family life with this practice, regardless of biology and legality, thus introducing into practice the protection of "illegal family life" (Puppinck & Hougue, 2015, p. 42).

At the request of the Italian government, the case was considered by the Grand Chamber.[8] The ECHR first established that the relationship between the applicants and the child does not fall under the concept of family life. Namely, the parental right of the applicants was challenged in the Italian legal system because the applicants acted illegally - firstly because they brought a child to Italy from abroad who had no biological relationship with any of them, contrary to the current rules on international adoption and, secondly, because they entered into an agreement that contravened the prohibition of heterologous assisted reproduction. Taking into account the absence of any biological connection between the child and "parents", the short duration of the union of life with the child and the uncertainty of the legal ties between them, the ECHR, despite the existence of parental intentions, considered that the conditions for the existence of family life were not met (para. 157). According to the position of the ECHR, to allow the applicants to keep the child with them would be equal to legalizing the situation they themselves created by acting contrary to important provisions of Italian law. The ECHR has, therefore, accepted that the Italian courts, concluding that the child would not suffer serious or irreparable harm as a result of the separa-

or a donated egg cell) to know its biological origin is attracting a lot of attention. Two problems have been noticed regarding this issue. The first problem concerns the parents' moral obligation to tell the child the truth about its conception, that is, about its genetic origin. The other problem relates to the child's legal ability to find out information related to the identity of the donor (Stjepanović, 2018, 234).

[8] The decision of the Grand Chamber in the case of *Paradiso and Campanelli v. Italy* from January 24, 2017.

tion, had struck a fair balance between various interests involved, while remaining within a wide margin of appreciation. Therefore, the Grand Chamber of the ECHR concluded that there was no violation of Art. 8 of the Convention.

Regarding the legal connotations of cross-border surrogacy in ECHR practice, the case of *Valdís Fjölnisdóttir and Others v. Iceland*, the first case of its kind involving a married same-sex couple. The first and second applicants were "intended parents", but they were not biologically related to the child (the third applicant), who was born by a surrogate mother in California. The child was placed under foster care by the decision of the national authorities, and the first and second applicant were appointed as the child's foster parents. In this case, the ECHR considered the refusal of the national authorities to recognize the parental ties between the applicants and the child, because surrogate motherhood is illegal in Iceland.

In the specific case, the ECHR found that the applicant's right to respect for family life was not violated, because thanks to foster care there were no real and practical obstacles to enjoying family life. That is, the national authorities made an effort to maintain *de facto* family ties (family life) between the applicants and the child and to provide them with legal protection through foster care. Therefore, as in the aforementioned case *Mennesson v. France*, the ECHR found that there was family life between the three applicants, but that there was no positive obligation on the part of the state to recognize the parent–child relationship (according to the California birth certificate).

As pointed out in theory, the judgment *Valdís Fjölnisdóttir and Others v. Iceland* is a symbol of the general, cautious and minimalist approach of the ECHR in assessing the proportionality of the recognition of non-conventional parent–child relationships (Isailovic, Margaria, 2021). According to the ECHR, the child in this case was not left in complete legal limbo like the children in *Mennesson v. France*, nor given for adoption as in the case of *Paradiso and Campanelli v. Italy* (Isailovic, Margaria, 2021).

5. Conclusion

A number of specific issues related to reproductive rights are the subject of interpretations of the ECHR within the right to respect for family life. Despite its respectable jurisprudence, the ECHR does not have a clear and firm attitude on the issue of cross-border surrogacy, which can be concluded by analyzing the cases presented in the paper. Due to the lack of consensus on this issue, the contracting states are left with a very wide margin of appreciation. In all cases,

including those related to the issue of cross-border surrogacy, the ECHR always examines whether the state has fulfilled its positive and negative obligations, *i.e.*, the obligation not to interfere with the law or the obligation to act actively to enable the respect and protection of rights.

It is clear from the judicial practice cases related to cross-border surrogacy that, on one hand, there is a negative relationship and a trend of non-recognition of the right of the intended parents to be registered as parents of a child born with the help of surrogacy (refusal of the national authorities of the contracting states to recognize the parent–child relationship established in accordance with foreign law on the basis of surrogate motherhood being prohibited under national laws), while on the other hand, the ECHR in its decisions recognizes the protection from Art. 8 of the Convention and in cases where there is no genetic connection between the child and the parents, but *de facto* family life and close family relations have been established between them.

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PREKOGRANIČNA SUROGACIJA I PRAVO NA POŠTOVANJE PORODIČNOG ŽIVOTA

Sažetak

Surogacija je nesporno povezana uz pravo na poštovanje porodičnog života koje garantuje član 8 Evropske konvencije o ljudskim pravima i osnovnim slobodama. U praksi Evropskog suda za ljudska prava (ECHR) kao sporna otvorena su brojna pitanja, između ostalog i u kontekstu povezanosti prekogranične surogacije i prava na poštovanje porodičnog života. ECHR je, vodeći računa o okolnostima svakog konkretnog slučaja, razmatrao, pre svih, pitanje (ne)postojanja genetske veze između nameravanih roditelja i deteta koje je rodila surogat majka, trajanje kohabitacije među njima i pravnu nesigurnost koju surogacija stvara, odnosno njihov mogući uticaj na povredu prava na poštovanje porodičnog života.

Ključne reči: praksa Evropskog suda za ljudska prava, prekogranična surogacija, pravo na poštovanje porodičnog života.

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