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**CASE STUDY I –  
REPRODUCTIVE MATTERS**



## 2.1. REPRODUCTIVE MATTERS UNDER THE ECHR

### 2.1.1. A right to respect for the decision (not) to become a genetic parent

When it comes to reproduction both Articles 8 and 12 ECHR have played a role in the case law of the ECtHR. While ‘the right to found a family’ ex. Article 12 ECHR may seem the most obvious provision to base any claim in this respect on, it has in fact been the right to respect for private and family life (Article 8 ECHR) on the basis of which the most substantive case law in this field has been decided.<sup>1</sup> This has everything to do with the narrow wording and interpretation of Article 12, which reads:

‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.’

With the wording ‘this right’ at the end of the provision, the right to marry and the right to found a family are firmly bracketed together.<sup>2</sup> The Court has repeatedly held that the right to marry under Article 12 ECHR refers to the ‘traditional marriage between persons of opposite biological sex’ (see also Chapter 8, section 8.2).<sup>3</sup> In the 1950s, when the Convention was drafted, the founding of a family may well have been considered to be the primary function of the institution of marriage. The Court has, however, since observed ‘major social changes in the institution of marriage since the adoption of the Convention’<sup>4</sup> and held that ‘[...] the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision.’<sup>5</sup> Thereby also different-sex couples who do not wish to or are unable to found a family may exercise the right to marry. Still, Article 12 offers no protection to unmarried couples who wish to found a family; the right to found a family within the meaning of Article 12 exists only

<sup>1</sup> Various judges held in a dissenting opinion of 2011 that Art. 8 of the Convention by then appeared to play ‘an enhanced role [...] regarding questions related to procreation and reproduction.’ Joint dissenting opinion of Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria to ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00, para. 3.

<sup>2</sup> Compare C.A. White and C. Ovey, *Jacobs, White and Ovey, The European Convention on Human Rights* (Oxford, Oxford University Press 2010) p. 354.

<sup>3</sup> *Inter alia* ECtHR 24 June 2010, *Schalk and Kopf v. Austria*, no. 30141/04.

<sup>4</sup> ECtHR 11 July 2002, *Christine Goodwin v. the United Kingdom*, no. 28657/95, para. 100.

<sup>5</sup> *Inter alia* ECtHR 11 July 2002, *Christine Goodwin v. the United Kingdom*, no. 28657/95, para. 100. See also ch. 8, section 8.2.1.

within marriage.<sup>6</sup> In other words, only married different-sex couples can claim a right to found a family under Article 12.<sup>7</sup> Besides, as is clear from its wording, the exercise of this right is subjected to the national laws of the Contracting Parties to the ECHR. Article 12 furthermore primarily entails a negative obligation; States must refrain from interfering with the having of children within marriage. In exceptional circumstances, an interference with this right may be justified, for example if a person is detained.<sup>8</sup> The primary negative reading of Article 12 is affirmed by the Court's explicit finding that this provision 'or any other Article of the Convention'<sup>9</sup> does not guarantee a right to procreation.<sup>10</sup>

The right to found a family ex. Article 12 is furthermore closely interlinked with the right to respect for family life under Article 8 ECHR. As the Court has explained:

'The exercise of the right to marry and found a family gives rise to personal, social and legal consequences as a result of which there is a close affinity between the rights under Articles 8 and 12 of the Convention [...].'<sup>11</sup>

Whilst the concept of 'family' in Article 12 is limited to the circle of parents and children,<sup>12</sup> the notion 'family life' within the meaning of Article 8 ECHR has been given a much broader reading.<sup>13</sup> This notion is not confined to blood relationships or marriage-based relationships and may encompass other *de facto* family ties where

<sup>6</sup> See Harris et al., *Law of the European Convention on Human Rights* (Oxford, Oxford University Press 2009) p. 554 and H.L. Janssen, 'Commentaar op art. 12 EVRM, para. C.1.8', ['Commentary to Art. 12 ECHR, para. C.1.8'], in: *Sdu Commentaar EVRM, Deel 1 – Materiele bepalingen* ['Sdu Commentary to the ECHR, Part 1 – Material provisions'] (Den Haag, Sdu Uitgevers 2013).

<sup>7</sup> Compare White and Ovey 2010, *supra* n. 2, at p. 354 and Harris et al. 2009, *supra* n. 6, at p. 554.

<sup>8</sup> In *Dickson* the Court held that the Convention did not require States to allow for conjugal visits. ECtHR [GC] 4 December 2007, *Dickson v. the United Kingdom*, no. 44362/04, para. 81. In 1975 the Commission had held the right to found a family to be absolute. See ECmHR 21 May 1975 (dec.), *X. v. the United Kingdom*, no. 6564/74.

<sup>9</sup> ECtHR 6 March 2003 (dec.), *Margarita Šijakova and Others v. "the former Yugoslav Republic of Macedonia"*, no. 67914/01.

<sup>10</sup> *Idem* and ECtHR 15 November 2007 (dec.), *S.H. and others v. Austria*, no. 57813/00. In the latter case the ECtHR declared Art. 12 inapplicable to a complaint about an Austrian prohibition of the use of donated gametes in AHR treatment. The Court reiterated that '[...] the right to procreation [was] not covered by Art. 12'. On the basis of this decision Harris et al. concluded that '[...] there is no positive obligation on the State to facilitate the having of children within marriage by legislation to permit artificial insemination or, a fortiori, by providing for it through state funded medical institutions.' Harris et al. 2009, *supra* n. 6, at p. 555. On this question see also section 2.3.1 below. See furthermore M. Eijkholt, 'The right to found a family as a stillborn right to procreate?', 18 *Medical Law Review* (2010) p. 127.

<sup>11</sup> ECtHR 8 November 2011, *V.C. v. Slovakia*, no. 18968/07, para. 159, referring to ECtHR 5 January 2010, *Frasik v. Poland*, no. 22933/02, para. 90. In this case about the forced sterilisation of a woman of Roma origin, the Court found a violation of Art. 8 and therefore considered it not necessary to examine separately the applicant's complaint under Art. 12 of the Convention (para. 160).

<sup>12</sup> P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, Intersentia 2006) p. 856. The right to found a family does not extend to having grandchildren. ECtHR 6 March 2003 (dec.), *Šijakova and others v. "The former Yugoslav Republic of Macedonia"*, no. 67914/01.

<sup>13</sup> Compare White and Ovey 2010, *supra* n. 2, at p. 354.

the parties are living together outside of marriage.<sup>14</sup> The Court has, furthermore, held that the relationship of a cohabiting same-sex couple living in a stable *de facto* partnership also falls within the notion of ‘family life’.<sup>15</sup> Still, also this right does not grant a right to procreate. The Court has held that

[...] the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family.<sup>16</sup>

The Court has recognised, however, that the notion ‘private life’ (Article 8 ECHR) includes a right to respect for the decision to become a parent.<sup>17</sup> The first judgment in which the Court accepted this to be so was *Evans v. the UK* (GC, 2007).<sup>18</sup>

The applicant in the *Evans* case claimed that the provisions of the UK Human Fertilisation and Embryology Act 1990 which required her former partner’s consent before embryos made with their joint genetic material could be implanted in her uterus, violated her rights under Article 8 (in conjunction with Article 14, the prohibition of discrimination) of the Convention.<sup>19</sup> In the course of fertility treatment Ms. Evans was diagnosed with a pre-cancerous condition of her ovaries and was offered one cycle of *in vitro* fertilisation (IVF) treatment prior to the surgical removal of her ovaries. Before the embryos created could be implanted into Ms. Evans’ uterus, the relationship between her and her partner broke down. Subsequently her former partner did not consent to Ms. Evans using the embryos alone nor did he consent to their continued storage. Ms. Evans’ claims before the domestic courts, seeking an injunction against her former partner to give his consent, were rejected. After exhaustion of domestic remedies she lodged a complaint with the ECtHR.<sup>20</sup> The Grand Chamber of the ECtHR noted that the applicant did not complain that she was in any way prevented from becoming a mother in a social, legal, or even physical sense, since there was no rule of domestic law or practice to stop her from adopting a

<sup>14</sup> *Inter alia* ECtHR 24 June 2010, *Schalk and Kopf v. Austria*, no. 30141/04, para. 91 and ECtHR 8 November 2011, *V.C. v. Slovakia*, no. 18968/07, para. 142.

<sup>15</sup> ECtHR 24 June 2010, *Schalk and Kopf v. Austria*, no. 30141/04, para. 94.

<sup>16</sup> ECtHR 26 February 2002, *Fretté v. France*, no. 36515/97, para. 32, where the Court referred to ECtHR 13 June 1979, *Marckx v. Belgium*, no. 6833/74, para. 31 and ECtHR 28 May 1985, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, nos. 9214/80 a.o., para. 62.

<sup>17</sup> ECtHR [GC] 4 December 2007, *Dickson v. the United Kingdom*, no. 44362/04, para. 66. The Court referred to ECmHR 22 October 1997 (dec.), *E.L.H. and P.B.H. v. the United Kingdom*, no. 32568/96; ECtHR 18 September 2001 (dec.), *Kalashnikov v. Russia*, no. 47095/99; ECtHR 29 April 2003, *Aliiev v. Ukraine*, no. 41220/98, paras. 187–189; ECtHR 7 March 2006, *Evans v. the United Kingdom*, no. 6339/05, paras. 71–72 and ECtHR 30 October 2012, *P. and S. v. Poland*, no. 57375/08, para. 111. The Court has also spoken of ‘the right to respect for both the decisions to have and not to have a child’. ECtHR 8 November 2011, *V.C. v. Slovakia*, no. 18968/07, para. 138.

<sup>18</sup> ECtHR [GC] 10 April 2007, *Evans v. the United Kingdom*, no. 6339/05. The Chamber judgment in this case dates from 7 March 2006.

<sup>19</sup> Ms. Evans furthermore claimed that the legislation violated the embryos’ right to life under Article 2 ECHR, but that claim will not be discussed here.

<sup>20</sup> The application in this case was lodged on 11 February 2005. On 7 March 2006 a Chamber delivered its judgment in the case. On 5 June 2006 the applicant requested the referral of the case to the Grand Chamber, which delivered its judgment on 10 April 2007. ECtHR 7 March 2006, *Evans v. the United Kingdom*, no. 6339/05 and ECtHR [GC] 10 April 2007, *Evans v. the United Kingdom*, no. 6339/05.

child or even giving birth to a child originally created *in vitro* from donated gametes. Her complaint was, more precisely, that the consent provisions of the respective UK law prevented her from using the embryos that she and her former partner had created together, and thus, given her particular circumstances, from ever having a child to whom she was genetically related. The Grand Chamber considered that this more limited issue, concerning the right to respect for the decision to become a parent in the genetic sense, fell within the scope of Article 8 since

‘[...] “private life”, which is a broad term, encompassing, *inter alia*, aspects of an individual’s physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world [...], incorporates the right to respect for both the decisions to become and not to become a parent.’<sup>21</sup>

After the recognition of this right in *Evans*, the Court has in some – but not all relevant – later cases based this right on both the notion of private life and of family life.<sup>22</sup> Also, the Court has spoken of ‘a right to respect for [the] decision to become a *genetic* [emphasis added] parent’.<sup>23</sup> The Court has furthermore – albeit incidentally – considered this choice to be ‘a particularly important facet of an individual’s existence or identity’.<sup>24</sup>

In the case of *Ternovsky v. Hungary* (2010),<sup>25</sup> concerning the choice of giving birth in one’s home, the Court also recognised a right to decide upon circumstances of becoming a parent.<sup>26</sup> States have, further, an obligation under the Convention to protect the reproductive health of women.<sup>27</sup> Lastly, important for the present case study is that the Court has held that the right of a couple to conceive a child includes a right to make use of medically assisted procreation for that purpose.<sup>28</sup> The relevant ruling and its implications are discussed more elaborately in section 2.3 below.

<sup>21</sup> ECtHR 7 March 2006, *Evans v. the United Kingdom*, no. 6339/05, para. 57 and ECtHR [GC] 10 April 2007, *Evans v. the United Kingdom*, no. 6339/05, para. 71.

<sup>22</sup> ECtHR [GC] 4 December 2007, *Dickson v. United Kingdom*, no. 44362/04, para. 66 and ECtHR 28 August 2012, *Costa and Pavan v. Italy*, no. 54270/10.

<sup>23</sup> *Idem*.

<sup>24</sup> ECtHR [GC] 4 December 2007, *Dickson v. United Kingdom*, no. 44362/04, para. 78. As discussed below (section 2.3), the Court has not expressly repeated this in later case-law.

<sup>25</sup> ECtHR 14 December 2010, *Ternovsky v. Hungary*, no. 67545/09.

<sup>26</sup> The Court held: “Private life” [...] incorporates the right to respect for both the decisions to become and not to become a parent [...]. The notion of a freedom implies some measure of choice as to its exercise. The notion of personal autonomy is a fundamental principle underlying the interpretation of the guarantees of Article 8 [...]. Therefore the right concerning the decision to become a parent includes the right of choosing the circumstances of becoming a parent. The Court is satisfied that the circumstances of giving birth incontestably form part of one’s private life for the purposes of this provision [...]. The Court found that legislation which arguably dissuades health professionals who might otherwise be willing from providing the requisite assistance in giving birth in one’s home constituted an interference with the exercise of the right to respect for private life by prospective mothers. ECtHR 14 December 2010, *Ternovsky v. Hungary*, no. 67545/09, para. 22.

<sup>27</sup> The Court has ruled so in several cases about forced sterilisation of Roma women, e.g. ECtHR 8 November 2011, *V.C. v. Slovakia*, appl. no. 18968/07, para. 145.

<sup>28</sup> ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00, para. 78.

### 2.1.2. The status of the unborn under the ECHR

When it comes to the rights of the unborn child, the ECtHR has never taken a strong position. In *X v. the United Kingdom* (1980)<sup>29</sup> the Commission considered that the general usage of the term ‘everyone’ (*toute personne*) in the Convention and the context in which it was used in its Article 2 (the right to life) did not include the unborn. The Commission noted a ‘[...] divergence of thinking on the question of where life begins’, and took a clear stance in holding that the unborn did not enjoy an absolute right to life, as ‘[...] the “life” of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman.’

This early decision was later confirmed in the case of *Vo v. France* (2004),<sup>30</sup> where the Court observed that ‘[...] if the unborn [did] have a “right” to “life”, it [was] implicitly limited by the mother’s rights and interests.’<sup>31</sup> The Court did not rule out the possibility that in certain circumstances safeguards may be extended to the unborn child,<sup>32</sup> but considered it neither desirable, nor even possible, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 ECHR.<sup>33</sup> In the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins came within the margin of appreciation that States enjoyed in this sphere.

The term ‘unborn’ usually refers to an embryo *in vivo*, that is, an embryo in the woman’s body. In respect of *in vitro* embryos there is even less case law. In *Evans* (2007),<sup>34</sup> a Chamber of the Court referred to both the *Vo* judgment and to national law, when it held that the embryos created in the course of the IVF treatment as commenced by Ms. Evans and her former partner did not enjoy the right to life under Article 2 ECHR.<sup>35</sup> Remarkably, in *Costa and Pavan v. Italy* (2012, see also section 2.3.4 below) the Court stressed that ‘the concept of “child” [could] not be put in the same category as that of “embryo”,’<sup>36</sup> without explaining this finding further.<sup>37</sup>

<sup>29</sup> ECmHR 13 May 1980 (dec.), *X v. The United Kingdom*, no. 8416/79.

<sup>30</sup> ECtHR [GC] 8 July 2004, *Vo v. France*, no. 53924/00.

<sup>31</sup> *Idem*, para. 80.

<sup>32</sup> *Idem*, para. 80.

<sup>33</sup> *Idem*, para. 85.

<sup>34</sup> See section 2.1.1 above and section 2.3.2 below.

<sup>35</sup> ECtHR [GC] 10 April 2007, *Evans v. the United Kingdom*, no. 6339/05, para. 56, confirming ECtHR 7 March 2006, *Evans v. the United Kingdom*, no. 6339/05, para. 46. The subsequent case *Knecht* (2012) did not address the question as to the status of (frozen) embryos. The case concerned a complaint lodged by a woman who lost access to her frozen embryos when they were taken from the clinic storing them and transferred to the Romanian Institute of Forensic Medicine in connection with a criminal investigation. According to the statement of facts in the case the complaint was originally also based on Art. 2 of the Convention, but it was ultimately phrased and examined under Art. 8 ECHR only. The Court did not find a violation of that provision, as the breach of the applicant’s rights had yet been expressly acknowledged and redressed at national level. ECtHR 2 October 2012, *Daniela Knecht v. Romania*, no. 10048/10.

<sup>36</sup> ECtHR 28 August 2012, *Costa and Pavan v. Italy*, no. 54270/10, para. 62.

<sup>37</sup> Possibly the Grand Chamber of the Court will give more clarification on the matter in a pending case on donation of *in vitro* embryos for scientific research. In *Parrillo v. Italy*, a woman who wished to donate embryos created in the course of AHR treatment for scientific research, complained that she was



### 2.1.3. The rights of the (future) child under the ECHR

The ECHR does not contain a specific Article on the rights of the child, but all its provisions also apply to children. Further, the rights of the child have been given an increasingly more prominent role in the ECtHR's case law. This is first and foremost underlined by the fact that the Court has held that in judicial decisions where the rights under Article 8 ECHR of parents and those of a child are at stake, the rights of the child must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail.<sup>38</sup> The Court has held such in the context of adoption of a child, parental authority and child care,<sup>39</sup> in immigration cases<sup>40</sup> and in cases concerning child abduction.<sup>41</sup> This means, for example, that recognition of paternity cannot take place if such recognition is not in the child's interest.<sup>42</sup> The principle has also increasingly been recognised in cases where children claimed a right to know their genetic origins, although there the Court has still allowed States to balance the rights of the child against those of the parents concerned and the public interest (see section 2.1.4 hereafter).

The Court has further strengthened the protection of the rights of the child by interpreting the notion 'family life' under Article 8 ECHR extensively. In the ground breaking *Marckx* judgment of 1979, the Court for the first time held that *de facto* family life was also worthy of protection under Article 8 ECHR.<sup>43</sup> Consequently, States may not discriminate between children born within marriage and children born outside marriage, as such discrimination based on birth cannot be justified. The Court furthermore recognised that family life includes not only social, moral or cultural relations, but also comprises interests of a material kind such as inheritance rights.<sup>44</sup> Interpreting Article 8 in light of the Convention on the Rights of the Child,<sup>45</sup>

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banned from doing so because of an Italian law prohibiting such scientific research. The fact that the Chamber relinquished jurisdiction in favour of the Grand Chamber in this case, may be an indication that the Court will set out more general principles in this case. ECtHR 28 May 2013 (dec.), *Parrillo v. Italy*, no. 46470/11. On 28 January the Chamber relinquished jurisdiction in favour of the Grand Chamber in this case. The Grand Chamber held a hearing in the case in June 2014. See press release ECHR 173 (2014).

<sup>38</sup> ECtHR 5 November 2002, *Yousef v. the Netherlands*, no. 33711/96, para. 73.

<sup>39</sup> E.g. ECtHR 10 June 2006, *Schwizgebel v. Switzerland*, no. 25762/07; ECtHR 21 December 2010, *Anayo v. Germany*, no. 20578/07 and ECtHR [GC] 13 July 2000, *Scozzari and Giunta v. Italy*, nos. 39221/98 and 41963/98, para. 148.

<sup>40</sup> E.g. ECtHR [GC] 18 October 2006, *Üner v. the Netherlands*, no. 46410/99, para. 58 and ECtHR 23 June 2008, *Maslov v. Bulgaria*, no. 1638/03.

<sup>41</sup> E.g. ECtHR [GC] 6 July 2010, *Neulinger and Shuruk v. Switzerland*, no. 41615/07, paras. 135–136 and ECtHR [GC] 26 November 2013, *X v. Latvia*, no. 27853/09, paras. 93–108.

<sup>42</sup> ECtHR 5 November 2002, *Yousef v. the Netherlands*, no. 33711/96, para. 73.

<sup>43</sup> ECtHR 13 June 1979, *Marckx v. Belgium*, no. 6833/74, para. 31.

<sup>44</sup> It is not, as such, a requirement of Art. 8 that a child should be entitled to some share in the estates of his parents, as such an entitlement is not indispensable in the pursuit of a normal family life. However, once States grant such rights, they must, again, do so without discriminating on grounds of birth. ECtHR 13 June 1979, *Marckx v. Belgium*, no. 6833/74, paras. 52–53.

<sup>45</sup> ECtHR 28 June 2007, *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, para. 120, under reference to ECtHR 26 June 2003, *Maire v. Portugal*, no. 48206/99, para. 72.

the Court has, moreover, held that States have a positive obligation to protect children's family ties:

[...] where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible, from the moment of birth or as soon as practicable thereafter, the child's integration in his family [...].<sup>46</sup>

The child's right to personal identity, which is an aspect of the right to respect for private life under Article 8 ECHR, has proven key in parent-child relations. In the cases of *Mennesson v. France* and *Labassee v. France* (2014), for example, the Court ruled that establishment of parentage for a child born through surrogacy affected the establishment of the essence of his or her identity. As further explained in section 2.4.2 below, in these cases a refusal to recognise parental links between the intended and genetic father of the children concerned, has been found to violate these children's rights.

#### 2.1.4. The right to know one's genetic origins

As far as the present author is aware, there has not been any case before the ECtHR in which a donor-conceived child claimed that he or she had a right to access to information about his or her genetic parent(s). In a case of the late 1990s, however, which indirectly touched upon the matter, the Court observed that there was no consensus amongst the member States of the Council of Europe on the question of whether the interests of a child conceived in such a way were best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor's identity.<sup>47</sup>

The Court has furthermore examined several cases where children born out of wedlock or children who were given up for adoption anonymously relied on Article 8 in their claim that they had a right to know whom their natural parent(s) were.<sup>48</sup> The Court's rulings in these cases have proven indicative for the situation of children conceived by means of AHR or through surrogacy.

<sup>46</sup> ECtHR 22 April 1997, *X, Y and Z v. the United Kingdom*, no. 21830/93, para. 43. See also ECtHR 28 June 2007, *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, para. 119, under reference to ECtHR 27 October 1994, *Kroon and Others v. the Netherlands*, no. 18535/91, para. 32.

<sup>47</sup> ECtHR 22 April 1997, *X, Y and Z v. the United Kingdom*, no. 21830/93, para. 44. See also ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00, para. 83; C. Lind, 'Perceptions of sex in the legal determination of fatherhood – X, Y and Z v UK', 9 *Child & Fam. L. Q.* (1997) p. 401.

<sup>48</sup> The Court has also examined cases in which a man wished to institute proceedings to contest his paternity of a child born in wedlock or, alternatively, to have his putative biological paternity recognised. ECtHR 24 November 2005, *Shofman v. Russia*, no. 74826/01, para. 30; ECtHR 19 October 1999 (dec.), *Yildirim v. Austria*, no. 34308/96; ECtHR 28 November 1984, *Rasmussen v. Denmark*, no. 8777/79, para. 33 and ECtHR 18 May 2006, *Rózański v. Poland*, no. 55339/00, para. 62.

In *Mikulic* (2002),<sup>49</sup> the ECtHR ruled that there is ‘a direct link’ between the establishment of paternity and a child’s private life. The Court recognised that each individual has a vital interest, protected by Article 8 of the Convention, in receiving the information necessary to uncover the truth about an important aspect of one’s personal identity.<sup>50</sup> The Court has confirmed the right to know one’s origins and the child’s vital interest in its personal development in later cases. Birth, and in particular the circumstances in which a child was born, form part of a child’s private life guaranteed by Article 8 ECHR.<sup>51</sup> The Court has held that ‘[...] an individual’s interest in discovering his or her parentage does not disappear with age, quite the reverse’.<sup>52</sup> It has furthermore recognised that the process of ascertaining the identity of one’s parents may imply mental and psychological suffering.<sup>53</sup>

On the other hand, the Court has also explicitly recognised the rights of the parents in this context. In *Godelli* (2012), a case concerning a woman who had been given up for adoption anonymously after her birth, the Court noted that the expression ‘everyone’ in Article 8 ECHR applies to both the child and the mother: ‘[o]n the one hand, the child has a right to know its origins [...] [o]n the other hand, a woman’s interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions cannot be denied.’<sup>54</sup> The Court has, furthermore, held that the protection of third persons may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing. Also, there may be a general interest at stake. For example in the cases concerning anonymous adoption, the Court accepted this to be the general interest ‘[...] to protect the mother’s and child’s health during pregnancy and birth [...] and to avoid illegal abortions and children being abandoned other than under the proper procedure.’<sup>55</sup>

The Court has never ruled *in abstracto* whose interests should prevail in situations where these rights collide, except for when the parent is already deceased. In the latter situation, the deceased no longer enjoys a right to private life and the right of the child enjoys full protection.<sup>56</sup> In all other situations, the national system must, as a minimum, provide for an independent authority that can decide about access to

<sup>49</sup> ECtHR 4 September 2002, *Mikulic v. Croatia*, no. 53176/99.

<sup>50</sup> *Idem*, paras. 55 and 64.

<sup>51</sup> ECtHR [GC] 13 February 2003, *Odièvre v. France*, no. 42326/98. As Bonnet has observed, in establishing a right to knowledge of one’s identity the Court mobilised a complexity of different but interconnected elements of the right to respect for private life: relations with the outside world, personal development and mental health are all coalescing in the vital interest of obtaining information concerning the identity of one’s natural parents. V. Bonnet, ‘L’accouchement sous X et la Cour Européenne des Droits de l’Homme (à propos de l’arrêt *Odièvre c. la France* du 13 février 2003)’, 58 *Revue trimestrielle des droits de l’homme* (2004) p. 405 at p. 413.

<sup>52</sup> ECtHR 25 September 2012, *Godelli v. Italy*, no. 33783/09, para. 56.

<sup>53</sup> *Idem*.

<sup>54</sup> *Idem*, para. 50. Earlier ECtHR [GC] 13 February 2003, *Odièvre v. France*, no. 42326/98, para. 44.

<sup>55</sup> ECtHR 4 September 2002, *Mikulic v. Croatia*, no. 53176/99, para. 64.

<sup>56</sup> ECtHR 13 July 2006, *Jäggi v. Switzerland*, no. 58757/00, para. 42.

information about one's genetic origins.<sup>57</sup> The Court has – in any case initially – left States a wide margin of appreciation when it comes to the actual balancing of the rights at stake. Exemplary in this regard is the French case *Odièvre* (2003)<sup>58</sup> in which a woman who had been given up for adoption anonymously when she was a child claimed a right to knowledge about their personal history. Ms. Odièvre had been able to obtain non-identifying information about her natural family, but her request for disclosure of details about the identity of her brother was refused as it would entail a breach of confidence. The ECtHR observed that there were two competing interests in the case before it: on the one hand, the right to know one's origins and the child's vital interest in its personal development; and, on the other, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions.<sup>59</sup> The Court considered that those interests were not easily reconciled, as they concerned two adults, each endowed with free will. Furthermore, the Court noted, the rights of third parties – essentially the adoptive parents, the father and the other members of the natural family – and the general interest to avoid (illegal) abortions and children being abandoned other than under the proper procedure, were at issue. The Court left the respondent state a wide margin of appreciation '[...] in view of the complex and sensitive nature of the issue of access to information about one's origins, an issue that concern[ed] the right to know one's personal history, the choices of the natural parents, the existing family ties and the adoptive parents.'<sup>60</sup> It found that France had sought to strike a balance and to ensure sufficient proportion between the competing interests and concluded that the national authorities had not overstepped their wide margin of appreciation.

The seven dissenters to this judgment were of the opinion that the relevant French law had not provided for any balancing of interests, but merely '[...] accepted that the mother's decision constituted an absolute defence to any requests for information by the applicant, irrespective of the reasons for or legitimacy of that decision.'<sup>61</sup> The dissenters stressed that the right to respect for private life<sup>62</sup> included the right to personal development and to self-fulfilment, and underlined that the issue of access to information about one's origins concerned the essence of a person's identity and therefore constituted an essential feature of private life protected by Article 8 ECHR.<sup>63</sup> The dissenting judges linked personal identity to personal autonomy, more expressly than the majority of the Court had done, when considering that '[...] being given access to information about one's origins and thereby acquiring the ability

<sup>57</sup> ECtHR 4 September 2002, *Mikulic v. Croatia*, no. 53176/99, para. 64. This also holds for access to information about one's childhood ECtHR [GC] 7 July 1989, *Gaskin v. the United Kingdom*, no. 10454/83, para. 49.

<sup>58</sup> ECtHR [GC] 13 February 2003, *Odièvre v. France*, no. 42326/98.

<sup>59</sup> *Idem*, para. 44.

<sup>60</sup> *Idem*, para. 49.

<sup>61</sup> Joint dissenting opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää to ECtHR [GC] 13 February 2003, *Odièvre v. France*, no. 42326/98, para. 7.

<sup>62</sup> *Idem*. Literally the dissenting opinion here speaks of 'family life', however from the context one can distract that this was a mistake.

<sup>63</sup> *Idem*, para. 3.

to retrace one's personal history [was] a question of liberty and, therefore, human dignity that lie[d] at the heart of the rights guaranteed by the Convention.<sup>64</sup>

The Court subsequently accorded more weight to the child's interests in *Kalacheva v. Russia* (2009),<sup>65</sup> where a mother of a child born out of wedlock complained that unsuccessful court proceedings against the putative father of the child in order to establish his paternity had violated her Article 8 rights. The Court considered that establishment of paternity of the applicant's daughter was a matter related to her private life. Importantly, the Court held that the best interest of the child implicated an unambiguous answer on whether or not the putative father was indeed the father.<sup>66</sup> It concluded that the domestic authorities' approach in handling the applicant's case had fallen short '[...] of the State's positive obligation to strike a fair balance between competing interests of the parties to the proceedings with due regard to the best interests of the child'. The Court thus took the child's best interests – *inter alia*, the child's right to personal identity and personal autonomy – into account in finding a violation of the Article 8 rights of the mother.

Moreover, in *Godelli* (2012) – a case already briefly discussed (see section 2.1.4 above) – the Court found that the competing interests had not been adequately balanced at national level. In this case the Court accorded a fairly narrow margin of appreciation to the State, basing itself on a reasoning which resembled that of the dissenters to the *Odièvre* judgment. That is, the Court considered that the right to an identity, which includes the right to know one's parentage, was an integral part of the notion of private life and held that in such cases, 'particularly rigorous scrutiny' was called for when balancing the competing interests. The Court subsequently distinguished the case at hand from *Odièvre* on the point that the applicant in *Godelli* did not have access to any information about her mother and birth family, not even non-identifying information.<sup>67</sup> The Court found a violation of Article 8 on the ground that there was no machinery in place enabling the applicant's right to learn about her genetic origins to be balanced against the mother's interests in remaining anonymous. The *Godelli* judgment did not grant children an unqualified right to know all details about their genetic origins, however. After all, if non-identifying information had been made available, possibly no violation may have been found in this case. The fact that the Court has shifted from according a wide margin of appreciation in these matters, to according a narrow one, is proof, however, of the Court's increased attention to, and protection of, the rights of the child.

## 2.2. ABORTION UNDER THE ECHR

Abortion is and has always been a delicate issue within the Council of Europe. Views on the circumstances under which an abortion may be permissible, differ widely

<sup>64</sup> *Idem*.

<sup>65</sup> ECtHR 1 May 2009, *Kalacheva v. Russia*, no. 3451/05.

<sup>66</sup> *Idem*, para. 36.

<sup>67</sup> ECtHR 25 September 2012, *Godelli v. Italy*, no. 33783/09, para. 55.

between the High Contracting parties to the ECHR. Obviously, what makes abortion such a delicate matter is the fact that primarily two (conflicting) rights are at stake: those of the mother and arguably those of the unborn child.<sup>68</sup> Further, the (future) father may also claim certain rights. As observed by the Court:

[...] the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a mother or a father in relation to one another or *vis-à-vis* the foetus.<sup>69</sup>

Because of the lack of consensus on the issue, the Court – as earlier the Commission did – left and still leaves states a wide margin of appreciation in abortion issues. It finds that in such a delicate area the Contracting States must have a certain discretion.<sup>70</sup> The Court considers abortion issues to be up to national courts particularly because ‘[...] the central issue requires a complex and sensitive balancing of equal rights to life and demands a delicate analysis of country-specific values and morals.’<sup>71</sup> Consequently, the Court has been hesitant to recognise a right to abortion as such. However, already in the early case of *Brüggeman and Scheuten* (1976) the former Commission recognised that Article 8 is applicable to abortion issues:

[...] legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus.<sup>72</sup>

The Court confirmed this finding in later case law. In *R. R. v. Poland* (2011)<sup>73</sup> it spoke of ‘[...] the right to decide on the continuation of pregnancy’<sup>74</sup> and ruled that:

[...] the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy.<sup>75</sup>

Incidentally, the Court has spoken of ‘the right to decide on the termination of a pregnancy’, but at the same time stressed that this right was not absolute.<sup>76</sup> Also, this phrasing has not been repeated in later case law. In fact, in that very same ruling the Court confirmed that Article 8 cannot be interpreted as conferring a right to abortion.<sup>77</sup> In other cases the ECtHR considered it not to be its task to examine

<sup>68</sup> As yet discussed (see section 2.1.2 above), the Court has considered it neither desirable, nor even possible to answer in the abstract the question whether the unborn child is a person for the purposes of Art. 2 of the Convention (the right to life). ECtHR [GC] 8 July 2004, *Vo v. France*, no. 53924/00, para. 85.

<sup>69</sup> ECtHR 26 May 2011, *R. R. v. Poland*, no. 27617/04, para. 181, referring to ECtHR [GC] 8 July 2004, *Vo v. France*, no. 53924/00, para. 82.

<sup>70</sup> E.g. ECmHR 19 May 1992 (dec.), *Hercz v. Norway*, no. 17004/90.

<sup>71</sup> ECtHR 27 June 2006 (dec.), *D. v. Ireland*, no. 26499/02, para. 90.

<sup>72</sup> ECmHR 19 May 1976 (dec.), *Brüggeman and Scheuten v. Germany*, no. 6959/75.

<sup>73</sup> ECtHR 26 May 2011, *R. R. v. Poland*, no. 27617/04.

<sup>74</sup> *Idem*, para. 188.

<sup>75</sup> ECtHR 26 May 2011, *R. R. v. Poland*, no. 27617/04, para. 181.

<sup>76</sup> ECtHR 30 October 2012, *P. and S. v. Poland*, no. 57375/08.

<sup>77</sup> *Idem*. See earlier ECtHR [GC] 16 December 2010, *A, B and C v. Ireland*, no. 25579/05, para. 214.

whether the Convention guarantees a right to have an abortion.<sup>78</sup> The Court thus seems very reluctant to give a principled ruling on the matter.

The following subsections discuss the ECtHR's case law on abortion in chronological order. Not surprisingly, a considerable number of cases originate from Ireland. The fact that Ireland is one of the national jurisdictions included in this research, justifies a somewhat more extensive discussion of the facts of these cases. Also, exactly because of Ireland's very restrictive abortion regime, many Irish women have gone, and still go, abroad for an abortion.<sup>79</sup> The ECtHR has accordingly heard various cases from Ireland containing cross-border elements. For example, the first Irish case relating to abortion before the Strasbourg Court, *Open Door v. Ireland* (1992)<sup>80</sup> concerned not so much the question of a right to abortion in itself, but the issue of the provision of information about foreign abortion services. This case is, like particular cross-border aspects of the other relevant abortion cases, (further) discussed in section 2.4.1 below. The second Irish abortion case before the ECtHR, *D. v. Ireland* (2006),<sup>81</sup> could have resulted in a more substantial ruling of the Court on the scope of Article 8 in abortion matters, had the case not been declared inadmissible on grounds of non-exhaustion of domestic remedies.

### 2.2.1. The case of *D. v. Ireland* (2006)

Ms. D. complained before the ECtHR about the need to travel abroad to have an abortion in the case of a lethal foetal abnormality and about the restrictions for which the 1995 Regulation of Information (Services outside the State for Termination of Pregnancies) Act provided.<sup>82</sup> She thereby invoked Articles 3, 8 and 10 of the Convention. Ms. D. submitted that she was obliged to research abortion options in the United Kingdom and to travel abroad to be treated by unknown medical personnel in an unknown hospital, without the involvement of her treating doctor. She pointed out that certain follow-up matters were not available in Ireland following an abortion abroad and, with two children in Ireland, she could not remain in the UK for counselling there. She held that the State placed an unduly harsh burden on the few women in her situation, by denying them an abortion in Ireland, and claimed that Irish law was 'arbitrary and draconian'.<sup>83</sup>

In its decision of 27 June 2006, the ECtHR declared her application inadmissible for non-compliance with the requirement to exhaust domestic remedies as regards the availability of abortion in Ireland in the case of fatal foetal abnormality.<sup>84</sup> In the absence of a domestic decision, the ECtHR held it impossible to establish that

<sup>78</sup> E.g. ECtHR 20 March 2007, *Tysiqc v. Poland*, no. 5410/03, para. 103.

<sup>79</sup> See also ch. 5, section 5.4.

<sup>80</sup> ECtHR 29 October 1992, *Open Door and Dublin Well Woman v. Ireland*, nos. 14234/88 and 14235/88. See also ch. 5, section 5.2.

<sup>81</sup> ECtHR 27 June 2006 (dec.), *D. v. Ireland*, no. 26499/02.

<sup>82</sup> See ch. 5, section 5.2.3.

<sup>83</sup> ECtHR 27 June 2006 (dec.), *D. v. Ireland*, no. 26499/02, para. 59.

<sup>84</sup> *Idem*, paras. 103–104.

Article 40.3.3° clearly excluded an abortion in the applicant's situation in Ireland and that no effective remedies were available to request an exemption.<sup>85</sup> The Court acknowledged that Article 40.3.3° had to be understood as excluding a liberal abortion regime, but considered that the Irish courts were, nonetheless, unlikely to interpret the provision with remorseless logic, particularly when the facts were exceptional. The Court held it possible that an Irish court might, in fact, have allowed for her abortion to be carried out, through a further interpretation of the term 'unborn'. If it had been established that there was no realistic prospect of the foetus being born alive, then there was 'at least a tenable' argument which would be seriously considered by the domestic courts to the effect that the foetus was not an 'unborn' for the purposes of Article 40.3.3° or that, even if it was an 'unborn', its right to life was not actually engaged as it had no prospect of life outside the womb.<sup>86</sup> It has been suggested that by taking this approach the Court basically sought, and found, a way out of this case.<sup>87</sup> For one thing, the Court's suggestion that abortion on grounds of lethal foetal abnormality could potentially form a ground for a legal abortion in Ireland has not materialised (see Chapter 5).

While the *D.* case thus stranded in the admissibility stage, the case of the Polish Ms. Tysi c was the first case in which the Court can be said to have given a more substantive answer to the question of whether the Convention provides for a right to abortion. The issue of needing to travel abroad for an abortion, as put forward in the *D.* case, was addressed in the subsequent ruling *A, B and C v. Ireland* (2010), as discussed thereafter in section 2.2.3.

### 2.2.2. The case of *Tysi c v. Poland* (2007)

The applicant in *Tysi c* (2007) suffered, for many years, from severe myopia, a disability of medium severity whereby her eyesight had severely deteriorated. When in February 2000 she discovered that she was pregnant for the third time, she decided to consult several doctors as she was concerned that her pregnancy could have an impact on her health. Various medical experts concluded that there would be a serious risk to her eyesight if she carried the pregnancy to term. However, the head of the gynaecology and obstetrics department of a public hospital in Warsaw, found that there were no medical grounds for performing a therapeutic abortion. Ms. Tysi c was therefore unable to have her pregnancy terminated and gave birth to her third child in November 2000. Following the delivery, the applicant's eyesight deteriorated considerably as a result of what was diagnosed as a retinal haemorrhage. A panel of doctors concluded that her condition required treatment and daily assistance and declared her to be significantly disabled. Her criminal complaint against the head of the gynaecology and obstetrics department was unsuccessful.

<sup>85</sup> *Idem*, para. 69.

<sup>86</sup> ECtHR 27 June 2006 (dec.), *D. v. Ireland*, no. 26499/02, para. 69.

<sup>87</sup> B. Daly, "'Braxton Hick's' or the Birth of a New Era? Tracing the Development of Ireland's Abortion Laws in Respect of European Court of Human Rights Jurisprudence', 18 *European Journal of Health Law* (2011) p. 375 at p. 386.



Before the ECtHR, Ms. Tysi c claimed, *inter alia*, that she satisfied the Polish statutory conditions for access to abortion on therapeutic grounds. She maintained that the fact that she was not allowed to terminate her pregnancy in spite of the risks to which she was exposed, amounted to a violation of Article 8.<sup>88</sup> She further complained that no procedural and regulatory framework had been put in place to enable a pregnant woman like herself to assert her right to a therapeutic abortion, thus rendering that right ineffective.

The Court reiterated that ‘private life’ was a broad term, encompassing, *inter alia*, aspects of an individual’s physical and social identity, including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world. Furthermore, the Court referred to previous case law in which it had held that private life included a person’s physical and psychological integrity and that the State was under a positive obligation to secure to its citizens their right to effective respect for this integrity. The Court noted expressly that in the case before it ‘a particular combination of different aspects of private life’ was concerned. It found that, apart from balancing the individual’s rights against the general interest in the case of a therapeutic abortion the national regulations on abortion also had to be assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be.<sup>89</sup> The ECtHR further held explicitly that it did not consider it to be its task to examine whether the Convention guaranteed a right to have an abortion.<sup>90</sup> Instead, the Court chose a procedural approach and formulated the central question of this case as:

‘[...] whether, having regard to the particular circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests.’<sup>91</sup>

Having chosen this approach, the conclusion of the Court was that ‘[...] once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.’<sup>92</sup> With respect to the specific case at hand, the Court concluded that Polish law, as applied to Ms. Tysi c’s case, did

<sup>88</sup> Ms. Tysi c also complained under Arts. 3 (prohibition of inhuman and degrading treatment) and 13 (right to an effective remedy). As regards her complaint under Art. 3, the Court found that the facts did not reveal a breach of that provision and considered that it was more appropriate to examine Ms. Tysi c’s complaints under Art. 8. Relying on Art. 14, Ms. Tysi c furthermore alleged that she had been discriminated against on the grounds of her sex and her disability. Having regard to its reasons for finding a violation of Art. 8, however, the Court did not consider it necessary to examine the applicant’s complaints separately under Art. 14 ECHR.

<sup>89</sup> ECtHR 20 March 2007, *Tysi c v. Poland*, no. 5410/03, paras. 107–108.

<sup>90</sup> *Idem*, para. 103. In his dissenting opinion to the judgment, Judge Bonello considered: ‘In this case the Court was neither concerned with any abstract right to abortion, nor, equally so, with any fundamental human right to abortion lying low somewhere in the penumbral fringes of the Convention.’ Dissenting Opinion of Judge Bonello to ECtHR 20 March 2007, *Tysi c v. Poland*, no. 5410/03, para. 1.

<sup>91</sup> ECtHR 20 March 2007, *Tysi c v. Poland*, no. 5410/03, para. 113.

<sup>92</sup> *Idem*, para. 116.

not contain any effective mechanism capable of determining whether the conditions for obtaining a lawful abortion had been met.<sup>93</sup>

### 2.2.3. The case of *A, B and C v. Ireland* (2010)

A fresh application against Ireland lodged in 2005 challenged the ECtHR's line of case law as regards abortion once again. Three women residing in Ireland claimed that, given their financial situation and/or their state of health, they had to be allowed to have an abortion *within* Ireland, instead of being forced to travel to the United Kingdom to procure one.<sup>94</sup>

The first applicant, referred to as 'A', was an unmarried and unemployed mother of four children, all of whom had been placed in foster care. She was a former alcoholic struggling with depression and living in poverty. In 2005 she unintentionally became pregnant again. She decided to have an abortion to avoid jeopardising her health and her chances of reuniting her family. She paid for the abortion in a private clinic in the UK by borrowing money from a money lender. She travelled back to Ireland by plane the day after the abortion for her contact visit with her youngest child. On the train returning from Dublin she began to bleed profusely, and an ambulance met the train. At a nearby hospital she underwent a dilation and curettage. The applicant claimed she experienced pain, nausea and bleeding for weeks thereafter but did not seek further medical advice.

The second applicant ('B') became pregnant unintentionally. She had taken the 'morning-after pill' and was advised by two different doctors that there was therefore a substantial risk of an ectopic pregnancy, a condition which could not be diagnosed until six to ten weeks of pregnancy. Since she could not care for a child on her own at that time of her life, the applicant decided to have an abortion. Believing that she was not entitled to an abortion in Ireland, the applicant travelled to England for an abortion when she was seven weeks pregnant. By that time it had been confirmed that it was not an ectopic pregnancy. The applicant had had difficulty meeting the costs of the travel and, not having a credit card, had used a friend's credit card to book the flights.

Lastly 'C', the third applicant, was suffering from a rare form of cancer for which she had been treated with chemotherapy since 2002. Before the treatment she had discussed with her doctor the implications of her illness as regards her desire to have children. She had been advised that it was not possible to predict the effect of pregnancy on her cancer and that, if she did become pregnant, it would be dangerous for the foetus if she were to have chemotherapy during the first trimester. In 2005, while in remission from the cancer, the applicant had become pregnant without being aware of it. In the mean time, she underwent a series of tests for cancer for which

<sup>93</sup> *Idem*, para. 124.

<sup>94</sup> As explained in Ch. 5, under Irish law abortion is prohibited save in the exceptional circumstance that the life of the mother is endangered by the pregnancy.

pregnancy is a contraindication. When she discovered her pregnancy, she consulted various medical practitioners and searched the Internet, as she was concerned about the impact of the pregnancy on her health and life and about the risks the prior tests for cancer posed to the health foetus. *C* alleged that the information she had received from Irish medical experts was insufficient and unclear. Given the uncertainty about the risks involved, she decided to travel to England for an abortion. As her pregnancy was at an early stage, the applicant wished to have a medical abortion, whereby drugs would be administered to induce a miscarriage. She could not, however, find a clinic which would provide this treatment as she was a non-resident and because of the need for follow-up care. According to *C*, she consequently had to wait a further eight weeks until a surgical abortion was possible. After having returned to Ireland after the abortion, she suffered complications of an incomplete abortion, including prolonged bleeding and infection, allegedly without receiving adequate medical care.

All three applicants complained that the impossibility for them to have an abortion in Ireland placed an excessive burden on them, making their abortion procedures unnecessarily expensive, complicated and traumatic. They asserted that the restriction on abortion stigmatised and humiliated them and entailed the risk of damaging their health in breach of Article 3 of the Convention. Relying on Article 8, the applicants argued that the fact that it was open to women – provided they had sufficient resources – to travel outside Ireland to have an abortion, defeated the aim of the restriction. They also alleged that fact that abortion was available in Ireland only in very limited circumstances was disproportionate and excessive. The third applicant furthermore complained that the restriction on abortion, and the lack of clear legal guidelines regarding the circumstances in which a woman could have an abortion to save her life, infringed upon her right to life under Article 2 ECHR.<sup>95</sup>

In 2009 the Chamber relinquished jurisdiction in this case in favour of the Grand Chamber, which issued its judgment a year later, in December 2010.<sup>96</sup> The Court explicitly determined the scope of the case. In this regard it stressed that it did not consider it its role '[...]' to examine submissions which do not concern the factual matrix of the case before it'.<sup>97</sup> Rather, the Court held it to be its task to assess

'[...]' the impugned legal position on abortion in Ireland in so far as it directly affected the applicants, in so far as they belonged to a class of persons who risked being directly affected by it or in so far as they were required to either modify their conduct or risk prosecution [...].<sup>98</sup>

Before addressing this question on the merits, the Court first had to examine the admissibility of the case.

<sup>95</sup> The applicants furthermore invoked Arts. 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the Convention.

<sup>96</sup> ECtHR [GC] 16 December 2010, *A, B and C v. Ireland*, no. 25579/05.

<sup>97</sup> *Idem*, para. 123.

<sup>98</sup> *Idem*, para. 123.

### 2.2.3.1. *Admissibility*

Contrary to the *D* case as discussed above, the applications of *A*, *B* and *C* were not declared inadmissible for non-exhaustion of domestic remedies, even though that point was raised by the respondent government. The government claimed that the applicants could and should have started a constitutional action. In this context, they underlined ‘the interpretative potential of Article 40.3.3 of the Constitution’. The government suggested that there was potential that the claim of *C* would have been accepted, as ‘[...] the domestic courts would be unlikely to interpret Article 40.3.3° with “remorseless logic”’, as the ECtHR itself had held in the *D* decision (see above). It was, however, acknowledged that this Article ‘on no analysis’ permitted abortion in Ireland for social reasons. Particularly the latter acknowledgment was ground for the Court to consider it not demonstrated ‘[...] that the first and second applicants had an effective domestic remedy available to them as regards their complaint about a lack of abortion in Ireland for reasons of health and/or well-being.’<sup>99</sup> With the respect to the third applicant’s complaint, the Court joined the examination of this objection to examination of the merits of her complaint (see section 2.2.3.5 below).<sup>100</sup>

### 2.2.3.2. *Assessment of the complaints under Articles 2 and 3*

The third applicant was the only one to also rely on Article 2 (the right to life). She maintained that even in a life-threatening situation abortion was not available in Ireland, because there was no legislation implementing Article 40.3.3° of the Irish Constitution and providing clarity as to the circumstances under which an abortion could be legally performed in Ireland. All three applicants furthermore complained that the impact of the restrictions on abortion in Ireland and of travelling abroad for an abortion constituted treatment which breached Article 3 of the Convention. According to the applicants the criminalisation of abortion was ‘[...] discriminatory (crude stereotyping and prejudice against women), caused an affront to women’s dignity and stigmatised women, increasing feelings of anxiety’. Women in their situation only had two options; ‘[...] overcoming taboos to seek an abortion abroad and aftercare at home or maintaining the pregnancy in their situations’. These options were ‘degrading and a deliberate affront to their dignity’.<sup>101</sup> The government, for its part, argued that no issue arose under Article 2 of the Convention and denied the stigma and taboo effect of the criminalisation of abortion.<sup>102</sup>

The Court declared the Article 2 complaint manifestly ill-founded. It held that there was ‘no evidence of any relevant risk’ to *C*’s life, as there was no legal impediment to her travelling for an abortion abroad, and she had not submitted that possible post-abortion complications concerned a risk to her life.<sup>103</sup> By adopting this reasoning, the Court thus did not give a conclusive answer to the question whether the provision

<sup>99</sup> *Idem*, para. 152.

<sup>100</sup> *Idem*, para. 155.

<sup>101</sup> *Idem*, para. 162.

<sup>102</sup> *Idem*, para. 161.

<sup>103</sup> *Idem*, para. 158.

of abortion in case of a real threat to the life of the mother is required as a minimum level of protection offered to the pregnant woman under Article 2 of the Convention.

The complaints of the applicants under Article 3 (prohibition of degrading treatment), were likewise rejected. The Court considered it evident that travelling abroad for an abortion was '[...] both psychologically and physically arduous for each of the applicants' and that it was financially burdensome for the first applicant. Still – without further explaining this point – the Court did not consider that these circumstances disclosed a level of severity falling within the scope of Article 3 of the Convention.<sup>104</sup>

### 2.2.3.3. *Assessment of the complaints under Article 8*

The applicants accepted that the restrictive Irish abortion legislation pursued the aim of protecting foetal life, but they questioned whether the laws were effective in achieving that aim. They also questioned how the State could maintain the legitimacy of that aim '[...] given the opposite moral viewpoint espoused by human rights bodies worldwide'. In this regard they furthermore argued that '[...] there was evidence of greater support for broader access to legal abortion', within Ireland itself. Also, they asserted that the restrictive nature of the legal regime in Ireland disproportionately harmed women and therefore urged the Court '[...] to express the minimum requirements to protect a woman's health and well-being under the Convention'.

The Irish government, for its part, adduced that the protection accorded under Irish law to the right to life of the unborn was '[...] based on profound moral values deeply embedded in the fabric of society in Ireland and the legal position was defined through equally intense debate' and that this had been a 'long, complex and delicate process'. They, *inter alia*, argued that the Court had to respect 'a diversity of traditions and values' amongst the Contracting States and that the Court was not to scrutinise or measure the moral validity, legitimacy or success of this aim pursued with the Irish abortion laws, namely the protection of morals and the rights and freedoms of others including the protection of pre-natal life. The government denied the existence of a consensus in Europe in favour of greater access to abortion, including on social grounds. In any case, so they warned, it was difficult to determine the scope of fundamental rights based on any such consensus. Also, the protection of ECHR rights was not to be made dependent upon popular will. In conclusion the government claimed that it would be inappropriate for the ECtHR '[...] to attempt to balance the competing interests where striking that balance domestically has been a long, complex and delicate process, to which a broad margin of appreciation applied and in respect of which there was plainly no consensus in member States of the Council of Europe'.<sup>105</sup>

<sup>104</sup> *Idem*, paras. 163–164.

<sup>105</sup> ECtHR [GC] 16 December 2010, *A, B and C v. Ireland*, no. 25579/05, para. 191.

The Court started its assessment of the complaints under Article 8 with a repetition of its previous finding that this provision could not be interpreted as conferring a right to abortion.<sup>106</sup> At the same time it found in the case at hand that the prohibition of the termination of the first and second applicant's pregnancies sought for reasons of health and/or well-being amounted to an interference with their right to respect for their private lives:

‘While Article 8 cannot [...] be interpreted as conferring a right to abortion, the Court finds that the prohibition in Ireland of abortion where sought for reasons of health and/or well-being about which the first and second applicants complained, and the third applicant's alleged inability to establish her qualification for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8.’<sup>107</sup>

The implications of this important and new ruling were played down, however, as subsequently the Court effectively accepted even the most far-reaching interference with this right. The ECtHR held a complete prohibition on abortions for health and/or well-being reasons, to constitute no violation of Article 8, but to fall within the State's margin of appreciation.

#### 2.2.3.4. *A wide margin of appreciation, no violation*

The Court considered that the Irish abortion prohibition was based on ‘[...] profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which had [...] not been demonstrated to have changed significantly since then.’<sup>108</sup> The Irish choice had thus emerged from ‘the lengthy, complex and sensitive debate in Ireland’.<sup>109</sup> The Court was not convinced by evidence such as opinion polls, which the applicants had put forward, as proof that the views of the Irish people in respect of abortion had changed. It held that this could not displace the State's opinion to the Court on the exact content of the requirements of morals in Ireland.<sup>110</sup>

The Court ruled that Ireland enjoyed a wide margin ‘[...] in determining the question whether a fair balance had been struck between the protection of the public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the applicants to respect for their private lives under Article 8 of the Convention.’<sup>111</sup> Such a wide margin of appreciation was accorded, because of ‘the acute sensitivity of the moral and ethical issues raised by the question of abortion’.<sup>112</sup> Although the Court observed a consensus amongst a substantial majority

<sup>106</sup> *Idem*, para. 214.

<sup>107</sup> *Idem*, para. 214.

<sup>108</sup> *Idem*, para. 226.

<sup>109</sup> *Idem*, para. 239.

<sup>110</sup> *Idem*, para. 226.

<sup>111</sup> *Idem*, para. 233.

<sup>112</sup> *Idem*, para. 233.

of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law,<sup>113</sup> the Court did not consider this consensus to decisively narrow the broad margin of appreciation of the State:

‘Of central importance is the finding in the [...] *Vo* case [...] that the question of when the right to life begins came within the States’ margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected [...], the margin of appreciation accorded to a State’s protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. It follows that, even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court’s examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention [...].’<sup>114</sup>

The margin of appreciation was not unlimited, however, the Court clarified. A prohibition of abortion to protect unborn life was ‘[...] not automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother’s right to respect for her private life is of a lesser stature.’<sup>115</sup>

The Court attached considerable, if not decisive, weight to the fact that under Irish abortion law women who wished to have an abortion for health and well-being reasons were allowed the option of lawfully travelling to another State to do so.<sup>116</sup> The Court did not underestimate the serious impact of the impugned restriction on the first and second applicant and accepted that the process of travelling abroad for an abortion was ‘psychologically and physically arduous for the first and second applicants, additionally so for the first applicant given her impoverished circumstances’.<sup>117</sup> The Court even did not exclude, as the first two applicants had argued, that the impugned prohibition on abortion was to a large extent ineffective in protecting the unborn in the sense that a substantial number of women took the option open to them in law

<sup>113</sup> *Idem*, para. 235. In particular, the Court noted that the first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in some 30 Contracting States. The first applicant could have obtained an abortion justified on health and well-being grounds in approximately 40 Contracting States and the second applicant could have obtained an abortion justified on well-being grounds in some 35 Contracting States. The Court further noted that only three States had ‘more restrictive access to abortion services than in Ireland namely, a prohibition on abortion regardless of the risk to the woman’s life’ and that certain States had in recent years extended the grounds on which abortion could be obtained.

<sup>114</sup> ECtHR [GC] 16 December 2010, *A, B and C v. Ireland*, no. 25579/05, para. 237.

<sup>115</sup> *Idem*, para. 238.

<sup>116</sup> *Idem*, para. 239.

<sup>117</sup> *Idem*, para. 239.

of travelling abroad for an abortion not available in Ireland. It held it, however to be ‘[...] not possible to be more conclusive, given the disputed nature of the relevant statistics provided to the Court [...]’.<sup>118</sup> With a view to the wide margin of appreciation accorded to the Irish State, the Court concluded that Article 8 had not been violated in respect of the first and the second applicant:

‘[...] having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life [...] and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State. In such circumstances, the Court finds that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn.’<sup>119</sup>

Six dissenting judges strongly disagreed with the approach of the majority.<sup>120</sup> They argued that the margin should have been significantly reduced on grounds of the existing consensus on the balancing of the right to life of the foetus with the right to health and well-being of the mother. The dissenters considered the fact that the Court for the first time had disregarded the existence of a European consensus on the basis of ‘profound moral views’ to be a dangerous development:

‘Even assuming that these profound moral views are still well embedded in the conscience of the majority of Irish people, to consider that this can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court’s case-law.’<sup>121</sup>

The dissenters were also very critical that the majority referred in its reasoning to the right to lawfully travel abroad for an abortion. They argued that the majority based its reasoning on the ‘disputable’ premise that ‘[...] the fact that Irish law allows abortion for those who can travel abroad suffices to satisfy the requirements of the Convention concerning applicants’ right to respect for their private life’.<sup>122</sup> According to the dissenters, the position taken by the Court on the matter did ‘[...] not truly address the real issue of unjustified interference in the applicants’ private life as a result of the prohibition of abortion in Ireland’.<sup>123</sup>

The Court’s approach in respect of the margin of appreciation doctrine was unprecedented. It has been qualified as an ‘[...] unwelcome new approach that

<sup>118</sup> *Idem*, para. 239.

<sup>119</sup> *Idem*, para. 241.

<sup>120</sup> Joint dissenting opinion of judges Rozakis, Tulkens, Fura, Hirvelia, Malinverni and Poalelungi to ECtHR [GC] 16 December 2010, *A, B and C v. Ireland*, no. 25579/05.

<sup>121</sup> *Idem*, para. 9.

<sup>122</sup> *Idem*, para. 8.

<sup>123</sup> *Idem*, para. 8.



threaten[ed] to undermine the evolutive nature of the Convention's obligations'.<sup>124</sup> Others acknowledged that the approach was new and 'from an argumentative perspective at least remarkable', but nevertheless welcomed the Court's reluctance in taking a firm stance in controversial moral issues.<sup>125</sup> In (Irish) legal scholarship critique was also issued on how the ECtHR had established the position of the Irish people. It was held that the Court had too easily accepted that the Irish Protocols to the EU Treaties and the results of the Irish abortion referenda were sufficient to determine the views of the Irish people.<sup>126</sup> More fundamentally, the question was raised whether such an internal consensus could and should indeed trump an existing European consensus.<sup>127</sup>

### 2.2.3.5. *Procedural approach; violation in respect of third applicant*

The third applicant – who was suffering from a rare form of cancer – furthermore claimed that there was no legal framework in place '[...] through which the relevant risk to her life and her entitlement to an abortion in Ireland could have been established'. This point was supported by third party interveners *Doctors for Choice, Ireland* and the British Pregnancy Advisory Service, who submitted:

'Irish medical professionals were in an unclear position and unable to provide adequate medical services. Doctors advising a patient on the subject faced criminal charges, on the one hand, and an absence of clear legal, ethical or medical guidelines, on the other. The Medical Council Guidelines were of no assistance. They had never heard of any case where life-saving abortions had been performed in Ireland. Irish doctors did not receive any training on abortion techniques and were not therefore equipped to carry out an abortion or to provide adequate post-abortion care.'<sup>128</sup>

<sup>124</sup> E. Wicks, 'A, B, C v Ireland: Abortion Law under the European Convention on Human Rights', 11 *HRLR* (2011) p. 556 at p. 562. According to Wicks '[t]he margin of appreciation is controversial enough already without the Court choosing to depart from its previous practice of restricting the margin on the rare occasions when a moral consensus can be identified.' The author also claimed (at p.565) that the explicit recognition of an emerging consensus hinted at 'a more interventionist Court in future abortion cases'.

<sup>125</sup> J.H. Gerards, 'Case note to ECtHR [GC] 16 December 2010, *A, B and C v. Ireland*, no. 25579/05', 12 *European Human Rights Cases* 2011/40 (in Dutch).

<sup>126</sup> For example, McGuinness held: 'The Court seems to rely on [...] Protocol [17] and Protocol 35 of the Lisbon Treaty (which is essentially cut and pasted from Maastricht) as evidence against the argument that the will of the people had changed. This is at best a questionable argument which provides a shaky foundation for an already shaky application of the margin of appreciation.' S. McGuinness, 'Commentary A, B, and C leads to D (for Delegation!)', 19 *Medical Law Review* (2011) p. 476 at p. 486. De Londras and Dzehtsiarou held: 'The Court accepted that the net result in these referenda could be read as communicating accurately the position of the Irish people, i.e. that they were happy with the abortion regime as it stands in Ireland. However, a closer mining of the materials relied upon by the Court tells a somewhat more complex story.' They observed that '[...] perhaps the best course of action for the Court is not to read any meaning into these results at all outside of their role in determining the current legal position.' F. de Londras and K. Dzehtsiarou, 'Grand Chamber of the European Court of Human Rights, *A, B & C v Ireland*', 62 *International and Comparative Law Quarterly* (2013) p. 250 at pp. 260 and 261.

<sup>127</sup> De Londras and Dzehtsiarou 2013, *supra* n. 126, at p. 257.

<sup>128</sup> ECtHR [GC] 16 December 2010, *A, B and C v. Ireland*, no. 25579/05, para. 207.

The government had maintained that effective and accessible medical and judicial procedures existed whereby a woman could establish her entitlement to a lawful abortion in Ireland. The Court however, had ‘a number of concerns’ as to the effectiveness of the existing medical consultation procedure as a means of establishing the third applicant’s eligibility for a lawful abortion in Ireland.<sup>129</sup> The ground upon which a woman could seek a lawful abortion in Ireland was expressed in broad terms and the Irish professional medical guidelines did not give sufficiently precise guidance for doctors to assess whether the life of the pregnant woman was at risk. Also, there was

‘[...] no framework whereby any difference of opinion between the woman and her doctor or between different doctors consulted, or whereby an understandable hesitancy on the part of a woman or doctor, could be examined and resolved through a decision which would establish as a matter of law whether a particular case presented a qualifying risk to a woman’s life such that a lawful abortion might be performed.’<sup>130</sup>

‘Against this background of substantial uncertainty’, the Court considered it ‘evident’ that the provisions of the Irish Criminal Code on abortion constituted ‘[...] a significant chilling factor for both women and doctors in the medical consultation process.’<sup>131</sup>

Furthermore, the ECtHR did not accept that the litigation options relied on by the government constituted effective and accessible procedures which allowed the third applicant to establish her right to a lawful abortion in Ireland. The government had submitted that the third applicant could have initiated a constitutional action in which she could have obtained mandatory orders requiring doctors to terminate her pregnancy. The ECtHR did not consider constitutional courts to be the appropriate forum for such determinations, however, and it was not clear how the courts would enforce a mandatory order requiring doctors to carry out an abortion.

The Court accordingly rejected the government’s submission that the third applicant had failed to exhaust domestic remedies. It concluded that Article 8 ECHR had been violated as the Irish authorities had failed to comply with their positive obligation to secure to the applicant’s effective respect for her private life ‘[...] by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which [she] could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3° of the Constitution.’<sup>132</sup> Because of this finding, the Court found it not necessary to address the parties’ additional submissions concerning the timing, speed, costs and confidentiality of the domestic proceedings.<sup>133</sup>

<sup>129</sup> *Idem*, para. 252.

<sup>130</sup> *Idem*, para. 252.

<sup>131</sup> *Idem*, para. 254.

<sup>132</sup> *Idem*, para. 267.

<sup>133</sup> *Idem*, para. 263.

The Court noted in conclusion that Ireland had failed to implement Article 40.3.3° of the Irish Constitution and that the government had not given convincing explanations for this failure. In respect of the burden of such implementation it noted:

‘As to the burden which implementation of Article 40.3.3 would impose on the State, the Court accepts that this would be a sensitive and complex task. However, [...] it is not for this Court to indicate the most appropriate means for the State to comply with its positive obligations [...]. Equally, implementation could not be considered to involve significant detriment to the Irish public since it would amount to rendering effective a right already accorded, after referendum, by Article 40.3.3 of the Constitution.’

The – more pragmatic – procedural approach taken by the court in respect of the complaint of the third applicant originated from the *Tysiac* case.<sup>134</sup> It was further developed by the Court in the subsequent abortion case law, which is discussed hereafter.

#### 2.2.4. Consolidation of the procedural approach in abortion cases

The most prominent abortion case law of the ECtHR since the *A, B and C* judgment originates from complaints against Poland, another Council of Europe Member State with more restrictive abortion laws. *R. R. v. Poland* (2011)<sup>135</sup> is an important case in this regard, in which the Court also made important observations in respect of genetic screening (see section 2.3.4 below). The applicant in this case was 18 weeks pregnant when her family doctor estimated in February 2002 that it could not be ruled out that the foetus was affected with some malformation. *R. R.* informed her doctor that she wished to have an abortion if this suspicion proved true. Two further ultrasound scans confirmed that her foetus was probably malformed. *R. R.* was advised to have an amniocentesis, but all doctors she turned to refused to carry this out. When requesting an abortion, she was repeatedly refused. As a result of this hindrance to access to prenatal genetic screening, the statutory time limit for a legal abortion on the grounds of foetal abnormality passed. Subsequently, in July 2002, *R. R.* gave birth to a child suffering from Turner syndrome.

In 2004, *R. R.* lodged a complaint with the ECtHR. Relying on Articles 3, 8 and 13 ECHR, she complained that she was denied access to the prenatal genetic tests to which she was entitled when pregnant due to her doctors’ lack of proper counselling, procrastination and confusion. The Court found that her suffering reached the minimum threshold of severity under Article 3, calling it ‘[...] a matter of great regret that the applicant was so shabbily treated by the doctors dealing with her case.’ The Court noted that she was in a situation of great vulnerability, deeply distressed as she was by the information that the foetus could be affected with some malformation. She had to endure weeks of painful uncertainty concerning the health of the foetus

<sup>134</sup> McGuinness considered the *A, B and C v. Ireland* judgment ‘a logical and conservative follow-on from the decision in *Tysiac v Poland*’. McGuinness 2011, *supra* n. 126, at p. 483.

<sup>135</sup> ECtHR 26 May 2011, *R. R. v. Poland*, no. 27617/04.

and she suffered acute anguish through having to think about how she and her family would be able to ensure the child's welfare, happiness and appropriate long-term medical care. Her concerns were not properly acknowledged and addressed by the health professionals dealing with her case and no regard was had to the temporal aspect of her predicament. This suffering could be said to have been aggravated by the fact that the diagnostic services which she had requested early on at all times had been available and that she had been entitled as a matter of domestic law to avail herself of them. In conclusion, the Court found a violation of Article 3, which was the first time it had done so in an abortion case.<sup>136</sup>

In its examination of the complaint under Article 8, the Court once again confirmed that the matter before it fell within the scope of this provision. Like in the case of *A, B and C v. Ireland*, the ECtHR observed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion.<sup>137</sup> And again, the Court chose a procedural approach. Referring to the *A, B and C* case, the Court reiterated:

‘While a broad margin of appreciation is accorded to the State as regards the circumstances in which an abortion will be permitted in a State, once that decision is taken the legal framework devised for this purpose should be “shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention” [...].’<sup>138</sup>

The Court held that the State's positive obligation to secure to their citizens their right to effective respect for their physical and psychological integrity could include an obligation to adopt regulations concerning access to information about an individual's health. It added:

‘While the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – be also assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be [...].’<sup>139</sup>

The Court underlined that these positive obligations had to be assessed on the basis of the rule of law, which presupposed that domestic law had to provide for legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention.<sup>140</sup> The Court furthermore reiterated that the Convention was intended to guarantee rights that were practical and effective.<sup>141</sup> This meant that the relevant decision-making process had to be fair and it had to

<sup>136</sup> See also S. Donoghue and C.-M. Smyth, ‘Abortion for Foetal Abnormalities in Ireland; The Limited Scope of the Irish Government's Response to the A, B and C Judgment’, 20 *European Journal of Health Law* (2013) p. 117 at p. 133.

<sup>137</sup> ECtHR 26 May 2011, *R. R. v. Poland*, no. 27617/04, para. 186.

<sup>138</sup> ECtHR 26 May 2011, *R. R. v. Poland*, no. 27617/04, para. 187.

<sup>139</sup> *Idem*, para. 188.

<sup>140</sup> *Idem*, para. 190.

<sup>141</sup> The Court referred to ECtHR 9 October 1979, *Airey v. Ireland*, no. 6289/73, para. 24.

afford due respect for the interests safeguarded by it. Having regard to the particular circumstances of the case, and notably the nature of the decisions to be taken, it had to be examined if an individual had been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of his or her interests.<sup>142</sup> The Court continued:

‘The Court has already held that in the context of access to abortion a relevant procedure should guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered. The competent body or person should also issue written grounds for its decision [...]’.<sup>143</sup>

Apart from a right to be heard in person, the Court also recognised a right to timely access to information about one’s health. In the context of pregnancy, this included information about the foetus’ health, as ‘during pregnancy the foetus’ condition and health constitute an element of the pregnant woman’s health’.<sup>144</sup> The Court considered the effective exercise of this right to relevant information on the mother’s and foetus’ health to be ‘directly relevant’ and ‘often decisive’ for the possibility of exercising personal autonomy, also covered by Article 8 of the Convention’.<sup>145</sup>

In the case before it, the Court observed ‘a striking discordance’ between the theoretical right to a lawful abortion in Poland and the reality of its practical implementation.<sup>146</sup> It found that the relevant Polish law did not contain any effective mechanisms which would have enabled *R. R.* to seek access to a diagnostic service, decisive for the possibility of exercising her right to take an informed decision as to whether to seek an abortion or not.<sup>147</sup> The Court concluded that Article 8 was violated, because the Polish State had not complied with its positive obligations to safeguard the applicant’s right to respect for her private life ‘[...] in the context of controversy over whether she should have had access to, firstly, prenatal genetic tests and subsequently, an abortion, had the applicant chosen this option for her’.<sup>148</sup> This aspect of the case, concerning genetic testing, is further discussed below under 2.3.4.

The *R. R.* judgment by some has been read as containing another indication that a right to abortion on medical grounds could be read into the Convention.<sup>149</sup> While later case law has not shown this to be the case, the principles as established in the *R. R.* case as regards the procedure allowing for a timely decision that must be in place, have been subsequently confirmed in the Strasbourg case law.<sup>150</sup>

<sup>142</sup> The Court referred to *mutatis mutandis* ECtHR 8 July 1987, *W. v. the United Kingdom*, no. 9749/82, paras. 62 and 64.

<sup>143</sup> ECtHR 26 May 2011, *R. R. v. Poland*, no. 27617/04, para. 191.

<sup>144</sup> *Idem*, para. 197.

<sup>145</sup> *Idem*, para. 197.

<sup>146</sup> *Idem*, para. 210.

<sup>147</sup> *Idem*, para. 208.

<sup>148</sup> ECtHR 26 May 2011, *R. R. v. Poland*, no. 27617/04, para. 211.

<sup>149</sup> E.g. Donoghue and Smyth 2013, *supra* n. 136, at p. 133, referring to para. 159 of the *R. R.* judgment.

<sup>150</sup> For instance, in *P. and S. v. Poland*, concerning a minor pregnant girl, the Court ruled that in such a situation, the interests and life prospects of the mother of the girl were also involved in the decision

### 2.2.5. The rights of the father-to-be in abortion cases

There have been a few claims before the ECtHR by fathers-to-be who opposed to an intended abortion by the mother-to-be. They were however not very successful, as the Court found the interference with the father's rights justified in order to protect the rights of the mother-to-be, whose pregnancy was terminated 'in accordance with her wish' and '[...] in order to avert the risk of injury to her physical or mental health'.<sup>151</sup> In *Boso* (2002) the Court held that:

[...] any interpretation of a potential father's rights under Article 8 of the Convention when the mother intends to have an abortion should above all take into account her rights, as she is the person primarily concerned by the pregnancy and its continuation or termination.<sup>152</sup>

The interests of fathers-to-be can thus only be defined by taking account of the mother's rights to physical integrity and personal autonomy.

## 2.3. ASSISTED HUMAN REPRODUCTION AND SURROGACY UNDER THE ECHR

As to date there have been relatively few cases on AHR before the ECtHR, but the fast-moving scientific developments in this field may well lead to a growing number of cases in the future. So far, there have been cases about IVF treatment and the use of donated gametes during such treatment as well as cases concerning prenatal or preimplantation genetic screening. There have not been any cases concerning the commensurability of surrogacy or gender selection brought before the Court, but there have been cases on the question of the recognition of parentage of intended (commissioning) parents who engaged in a surrogacy arrangement in a foreign country. All these cases – that are discussed in more detail in the subsequent sections – were decided on the basis of Article 8 ECHR (the right to respect for private and family life).

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whether to carry the pregnancy to term or not. This implied that there had to be a procedure in place '[...] for the determination of access to a lawful abortion whereby both parties [could] be heard and their views fully and objectively considered, including, if necessary, the provision of a mechanism for counselling and reconciling conflicting views in favour of the best interest of the minor.' The Court once again stressed that '[...] effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, [was] directly relevant for the exercise of personal autonomy' and underlined that the time factor was of critical importance. ECtHR 30 October 2012, *P. and S. v. Poland*, no. 57375/08, para.111.

<sup>151</sup> E.g. ECmHR 13 May 1980 (dec.), *X. v. the United Kingdom*, no. 8416/79 (by some this case is referred to as '*Paton v. UK*', see J. McHale, 'Fundamental rights and health care', in: E. Mossialos et al. (eds.), *Health Systems Governance in Europe: The Role of European Union Law and Policy* (Cambridge, Cambridge University Press 2010) p. 282 at p. 289, online available at [www.euro.who.int/en/who-we-are/partners/observatory/studies/health-systems-governance-in-europe-the-role-of-eu-law-and-policy](http://www.euro.who.int/en/who-we-are/partners/observatory/studies/health-systems-governance-in-europe-the-role-of-eu-law-and-policy), visited June 2014) and ECmHR 19 May 1992 (dec.), *Herz v. Norway*, no. 17004/90.

<sup>152</sup> ECtHR 5 September 2002 (dec.), *Boso v. Italy*, no. 50490/99.

In the case of *Dickson* (2007) – which concerned the refusal of facilities for artificial insemination to a prisoner and his wife – the Court found that Article 8 was applicable and that the artificial insemination facilities at issue concerned the private and family life of the applicants which notions incorporated the right to respect for their decision to become genetic parents.<sup>153</sup> Subsequently – under reference to this paragraph of the *Dickson* judgment – the Grand Chamber of the Court in *S.H. and Others v. Austria* (2011) held for the first time that:

‘[...] the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Article 8, as such a choice is an expression of private and family life. Article 8 of the Convention therefore applies to the present case.’<sup>154</sup>

This finding may give the impression that the Court recognised an enforceable right to conceive a child and to make use of medically assisted procreation to that end, and has thus defined positive obligations for the State to enable such access.<sup>155</sup> This reading has, however, been refuted by the Court itself. The *S.H. and Others* case was about an Austrian prohibition on the use of donated gametes in the course of AHR treatment. The Chamber, ruling first in the case in 2010, had already emphasised that there was ‘no obligation on a State to enact legislation of the kind and to allow artificial procreation’.<sup>156</sup> After the case was referred to it, the Grand Chamber acknowledged that the matter before it could be seen as ‘[...] raising an issue as to whether there exist[ed] a positive obligation on the State to permit certain forms of artificial procreation using either sperm or ova from a third party.’ It however chose to approach the case as one involving an interference with the applicants’ right to avail themselves of techniques of artificial procreation as a result of the operation of the relevant sections of the Austrian Artificial Procreation Act. The outcome of this assessment is discussed in further detail below (see 2.4.3). For now it suffices to say that the most plausible reading of the above quoted paragraph is that it confirms that there is a right to *respect for the decision* to conceive a child and for the decision to resort to assisted human reproduction techniques to that end. The wording ‘such a choice’ also affirms that the Court had a somewhat narrow interpretation of this right in mind.<sup>157</sup>

A further and related question is how important the words ‘a couple’ are in the above quoted paragraph. The question is whether it includes individuals who wish

<sup>153</sup> ECtHR [GC] 4 December 2007, *Dickson v. the United Kingdom*, no. 44362/04, para. 66.

<sup>154</sup> ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00, para. 82. Subsequently confirmed in, *inter alia*, ECtHR 2 October 2012, *Daniela Knecht v. Romania*, no. 10048/10, para. 54.

<sup>155</sup> This wording was used by Brems in her case note to the 2006 Chamber judgment in *Evans*. E. Brems, ‘Case note to *Evans v. the United Kingdom* (2006)’, 7 *European Human Rights Cases* 2006/47 (in Dutch).

<sup>156</sup> ECtHR 4 April 2010, *S.H. a.o. v. Austria*, no. 57813/00, para. 74.

<sup>157</sup> This approach was also taken by the respondent government. In accepting that Art. 8 ECHR was applicable to the case it referred to the judgment of the Austrian Constitutional Court in the case which had held that the decision of spouses or a cohabiting couple to conceive a child and to make use for that end of medically assisted procreation techniques fell within the sphere of protection of Art. 8.

to become a genetic parent and who need help from a third party to that end. From cases like *Evans*, it follows that Article 8 grants *individuals* a right to respect for the decision to become a genetic parent. In *Costa and Pavan* (2012, see section 2.3.4 below), the Court held – under reference to *Dickson* – that it had acknowledged a right to respect for the decision to become genetic parents and that it had concluded in *S.H. and Others* as referred to above that Article 8 applies to heterologous insemination techniques for *in vitro* fertilisation.<sup>158</sup> On the basis of this phrasing it has been suggested that the Court acknowledged in *Costa and Pavan* that individuals also enjoy the right to conceive a child and to make use of medically assisted procreation for that purpose.<sup>159</sup> It is true that the Court referred to the more neutral term ‘parents’ and not to a ‘couple’, and to heterologous insemination, which – other than homologous insemination – involves a third party. Still, future case law will have to show if the right to make use of medically assisted procreation is also enjoyed by individuals. Also, it remains to be seen if the term ‘couple’ in this context will be held to include same-sex couples (see also Chapter 8, section 8.2.4.3).

The following subsections discuss the ECtHR’s case law in the field of AHR on a thematic basis, starting with the question of access to such treatment. There are no separate subsections on gender selection, vitrification of egg cells, post-mortem reproduction or public funding for AHR treatment, as there has so far simply not been any case law of the Strasbourg Court on these matters. From this discussion it will become clear that once States introduce possibilities for AHR, they are bound by certain obligations under the Convention. For example, they must create a transparent system of procedural safeguards and they must respect the principle of non-discrimination when offering such services.

### 2.3.1. Access to AHR treatment

To date there have been few cases brought before the ECtHR concerning a complaint about limited or obstructed access to AHR treatment. The only case decided by the Court where this matter was at stake, concerns *Gas and Dubois* (2012).<sup>160</sup> A same-sex couple in a French civil partnership (PACS), *inter alia*, complained that they did not have access to IVF treatment involving anonymous donor insemination. As further explained in Chapter 8, section 8.2.4.3, the Court rejected this complaint, first of all because the applicants had not challenged the legislation in question before the national courts. The Court further noted that such treatment was available in France only for different-sex couples and ‘[...] for therapeutic purposes only, with a view in particular to remedying clinically diagnosed infertility or preventing the transmission of a particularly serious disease’. Without explaining this further, the Court concluded that the applicants’ situation was not comparable to that of infertile

<sup>158</sup> ECtHR 28 August 2012, *Costa and Pavan v. Italy*, no. 54270/10, para. 49.

<sup>159</sup> A. Hendriks, ‘Case-note to ECtHR 2 October 2012, *Daniela Knecht v. Romania*, no. 10048/10’, 13 *European Human Rights Cases* 2012/228 (in Dutch).

<sup>160</sup> EHRM 15 March 2012, *Gas and Dubois v. France*, no. 25951/07.



heterosexual couples and held that they were therefore no victim of a difference in treatment.<sup>161</sup>

Given that various Council of Europe Member States – including the three States studied in this research<sup>162</sup> – have set conditions for access to AHR treatment, for instance in respect of civil status or age, it is not unlikely that more ECtHR case law on the question will develop in the future. This may also involve questions as to the positive obligations of the States in this area, for instance in relation to funding of AHR treatment.

### 2.3.2. Balancing the rights of parties to AHR treatment

The *Evans* case – as discussed in section 2.1.1 above – concerned the question whether IVF treatment could be continued if one of the parties withdrew his or her consent. The crux of the matter was that the Article 8 rights of two private individuals, Ms. Evans and her former partner, were in conflict. Moreover, as the Grand Chamber of the ECtHR underlined in its judgment, each person's interest was entirely irreconcilable with the other's, since if Ms. Evans was permitted to use the embryos, her former partner would be forced to become a father, whereas if his refusal or withdrawal of consent was upheld, Ms. Evans would be denied the opportunity of becoming a genetic parent. In the difficult circumstances of the case, whatever solution the national authorities adopted would result in the interests of one of the parties being wholly frustrated.<sup>163</sup> In addition, so the ECtHR observed, the case did not involve simply a conflict between individuals: the legislation in question also served a number of wider public interests for instance in upholding the principle of the primacy of consent and promoting legal clarity and certainty.<sup>164</sup>

The Grand Chamber acknowledged that the issues raised by the case before it were undoubtedly of a morally and ethically delicate nature and that there was no uniform European approach in the field.<sup>165</sup> It considered it relevant that the relevant domestic law was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology, and the fruit of much reflection, consultation and debate.<sup>166</sup>

As regards the balance struck between the conflicting Article 8 rights of the parties to the IVF treatment, the Court had great sympathy for Ms. Evans, who clearly desired a genetically-related child above all else. However, it did not consider that her right to respect for the decision to become a parent in the genetic sense was to be accorded greater weight than her former partner's right to respect for his decision not

<sup>161</sup> *Idem*, para. 63.

<sup>162</sup> See Ch. 4, section 4.3.3, Ch. 5, section 5.3.3 and Ch. , section 6.3.2.

<sup>163</sup> ECtHR [GC] 10 April 2007, *Evans v. the United Kingdom*, no. 6339/05, para. 73.

<sup>164</sup> *Idem*, para. 74.

<sup>165</sup> *Idem*, paras. 78–79.

<sup>166</sup> *Idem*, para. 86.

to have a genetically-related child with her.<sup>167</sup> Given the lack of European consensus, the fact that the domestic rules had been clear and had been brought to the attention of Ms. Evans and the fact that they had struck a fair balance between the competing interests, the ECtHR concluded that there was no violation of Article 8.<sup>168</sup> The absolute nature of the rules ‘[...] served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case-by-case basis, [...] “entirely incommensurable” interests [...]’.<sup>169</sup>

The four dissenters on the contrary did not consider that the domestic legislation had struck a fair balance in the special circumstances of the case.<sup>170</sup> While they agreed with the majority that, in particular where an issue was of a morally and ethically delicate nature, a bright-line rule could best serve the various – often conflicting – interests at stake, in the particular circumstances of the case, however, the bright-line rule had been too absolute in nature.<sup>171</sup> The dissenters argued that the fact that the legislation in place effectively deprived Ms. Evans from ever again being able to decide to become a genetic mother inflicted a disproportionate moral and physical burden that could ‘[...] hardly be compatible with Article 8 and the very purposes of the Convention protecting human dignity and autonomy.’<sup>172</sup>

### 2.3.3. Donation of gametes

The question as to whether a prohibition on gamete donation was in violation of the Convention was put before the Court in *S.H. and Others v. Austria* (2011), by

<sup>167</sup> ECtHR [GC] 10 April 2007, *Evans v. the United Kingdom*, no. 6339/05, para. 90. Earlier the Chamber had regarded it not self-evident that in the process of IVF treatment the balance of interests would always tip decisively in favour of the female party. The Chamber had not been persuaded that the situation of the male and female parties to IVF treatment could not be equated. It held that ‘[...] while there [was] clearly a difference of degree between the involvement of the two parties in the process of IVF treatment, the Court [did] not accept that the Article 8 rights of the male donor would necessarily [have been] less worthy of protection than those of the female [...]’. The Grand Chamber did not examine this specific question in detail, but it also did not refute this finding. ECtHR 7 March 2006, *Evans v. the United Kingdom*, no. 6339/05, para. 66. Ben-Naf’tali and Canor acknowledged that Ms. Evans could well have had a fundamental human right to be a mother to a genetically related child, but they did not think that she had a human right to be the genetically related mother of her former partner’s child. In their view her desire, or ‘human aspiration’ to that effect did not rise to the level of a human right. O. Ben-Naf’tali and I. Canor, ‘Case note to Evans v. United Kingdom (2007)’, *American Journal of International Law* (2008), p. 132. See also R. Thorton, ‘European Court of Human Rights: Consent to IVF treatment’, in: *International journal of Constitutional Law* 2008, p. 325 and Brems 2006, *supra* n. 155.

<sup>168</sup> ECtHR [GC] 10 April 2007, *Evans v. the United Kingdom*, no. 6339/05, para. 92.

<sup>169</sup> *Idem*, para. 89. The Chamber had noted in this regard that ‘[...] strong policy considerations underlay the decision of the legislature to favour a clear or “bright line” rule which would serve both to produce legal certainty and to maintain public confidence in the law in a sensitive field.’ As paraphrased in ECtHR [GC] 10 April 2007, *Evans v. the United Kingdom*, no. 6339/05, para. 60.

<sup>170</sup> Joint dissenting opinion by Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele to ECtHR [GC] 10 April 2007, *Evans v. the United Kingdom*, no. 6339/05.

<sup>171</sup> *Idem*, para. 6.

<sup>172</sup> *Idem*, para. 13.

two Austrian married couples who wanted a child but suffered from infertility.<sup>173</sup> Owing to their medical conditions only *in vitro* fertilisation with the use donor gametes would allow the couples to have a child of whom one of them would be the genetic parent. The one couple was in need of sperm of a donor, whereas the other couple wished to use donor ova in the *in vitro* fertilisation process. The applicable Austrian Artificial Procreation Act of 1992, allowed for certain assisted procreation techniques, in particular *in vitro* fertilisation with ova and sperm from the spouses or cohabitating partners themselves (homologous methods) and, in exceptional circumstances, the donation of sperm when introduced into the reproductive organs of a woman. *In vitro* fertilisation techniques with the use of donated sperm or ova from a third party, as requested by the applicants in this case, were, however, prohibited under Austrian law. With this prohibition the Austrian legislature aimed to avoid the forming of unusual personal relationships such as a child having ‘more than one biological mother (a genetic one and one carrying the child)’.<sup>174</sup> The prohibition also aimed to avoid the risk of the exploitation of women, as pressure might be put on a woman from an economically disadvantaged background to donate ova, who otherwise would not be in a position to afford an *in vitro* fertilisation in order to have a child of her own. In 1998 the two women lodged an application with the Austrian Constitutional Court for a review of the constitutionality of the prohibition. This Court ruled that the legislature had not overstepped its margin of appreciation when it established the permissibility of homologous methods as a rule and insemination using donor sperm as an exception.

The couples subsequently lodged a complaint with the ECtHR in 2000.<sup>175</sup> They alleged in particular that the provisions of the Austrian Artificial Procreation Act prohibiting the use of ova from donors and sperm from donors for *in vitro* fertilisation, the only medical techniques by which they could successfully conceive children, violated their rights under Article 8 of the Convention read alone and in conjunction with Article 14 (the prohibition of discrimination). The Austrian government claimed in response that States enjoyed a wide margin of appreciation in the area and had to decide for themselves what balance had to be struck between the competing interests ‘in the light of the specific social and cultural needs and traditions of their countries.’<sup>176</sup> They pointed out that in Austria unease existed ‘[...] among large sections of society about the role and possibilities of modern reproductive medicine.’<sup>177</sup> Ovum donation entailed a risk of exploitation and humiliation of women involved. Also, it raised questions of divided motherhood and the child’s right to know its genetic origins.<sup>178</sup> Because there was, furthermore, a risk of selective reproduction involved, the matter

<sup>173</sup> ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00.

<sup>174</sup> In the terminology of this research these concern the genetic mother and the biological mother (the birth mother).

<sup>175</sup> Both the Chamber, and later the Grand Chamber rejected the government’s preliminary objections that the two husbands had failed to exhaust domestic remedies their personal situation was intrinsically linked to that of their spouses. ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00, para. 47.

<sup>176</sup> *Idem*, para. 63.

<sup>177</sup> *Idem*, para. 64.

<sup>178</sup> *Idem*, para. 66.

raised ‘[...] fundamental questions regarding the health of children thus conceived and born, touching essentially upon the general ethical and moral values of society.’<sup>179</sup> The Austrian legislature had ‘after thorough preparation’, balanced the interests at stake and had come to a law that took into account human dignity, the well-being of the child and the right to procreation.<sup>180</sup>

In 2010 the Chamber of the ECtHR, by a majority, found a violation of Article 8 in conjunction with Article 14.<sup>181</sup> It held that the applicants were subject to an unjustified difference in treatment,<sup>182</sup> *vis-à-vis* other couples who, owing to their medical condition, did not need egg cell donation or sperm donation for *in vitro* fertilisation. The Chamber was not persuaded that a complete prohibition was the only or the least intrusive means to prevent the risks associated with egg cell donation.<sup>183</sup> It saw no insurmountable obstacles to bringing family relations which would result from a successful use of the artificial procreation techniques at issue into the general framework of family law and other related fields of law. The Chamber considered that the various arguments advanced by the government in order to justify the prohibition of egg cell donation were of little relevance for the examination of the prohibition on the use of donor sperm. The government had asserted that non-*in vitro* artificial insemination had been in use for some time, that it was easy to handle and that its prohibition would therefore have been hard to monitor. Balancing this argument of ‘mere efficiency’ against the interests of the applicants, the Chamber found that the difference in treatment at issue was not justified. It therefore concluded, by six votes to one, that there had been a violation of Article 14 in conjunction with Article 8 ECHR.

Not surprisingly, the Austrian government requested the case to be referred to the Grand Chamber. This was accepted, and by judgment of 3 November 2011 the Grand Chamber overturned the Chamber judgment, ruling that the Convention had not been violated. The Grand Chamber assessed the matter on the basis of Article 8 only.<sup>184</sup> It accepted that the issue fell within the scope of this Article, that the measure at issue was provided for by law, and that it pursued the legitimate aims of the protection of

<sup>179</sup> *Idem*, para. 65.

<sup>180</sup> *Idem*, para. 65.

<sup>181</sup> ECtHR 4 April 2010, *S.H. a.o. v. Austria*, no. 57813/00.

<sup>182</sup> *Idem*, para. 63.

<sup>183</sup> *Idem*, paras. 77–78. The Court considered the risk that women might be exploited and that the technique might be used for selective reproduction, an argument directed against artificial procreation in general. In this respect the Court observed that under Austrian law remuneration of ova and sperm donation was prohibited. Further, the risks to the health of the mother were not any different from those in the case of ova taken from the woman aspiring to be a mother herself, an *in vitro* fertilisation technique allowed in Austria. In response to the government’s argument concerning unusual family relationships, the Court noted that family relationships which do not follow the typical parent-child relationship based on a direct biological link, were nothing new.

<sup>184</sup> Initially, the Grand Chamber did not justify this decision, but after having found no violation of Art. 8 ECHR, it considered that that the substance of this complaint had been sufficiently taken into account in examination of the applicants’ complaints under Art. 8 of the Convention. There was therefore no cause for a separate examination of the same facts from the standpoint of Art. 14 read in conjunction with Art. 8 of the Convention. ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00, para. 120.

health or morals and the protection of the rights and freedom of others.<sup>185</sup> The Court stressed that it was not its task to review the Austrian legislation or practice in the abstract, but that it had to confine itself, ‘without overlooking the general context’, to an examination of the issues raised by the case before it.<sup>186</sup>

In respect of the margin of appreciation to be accorded to the State when deciding any case under Article 8 of the Convention, the Grand Chamber reiterated its standing case law concerning the various factors that influenced the width of the margin to be accorded. It first considered that where a particularly important facet of an individual’s existence or identity was at stake, the margin allowed to the State would normally be restricted. The Court did not make explicit, however, whether it considered the matter at hand to concern such a particularly important facet of an individual’s existence or identity.<sup>187</sup> Still, this was not the only factor influencing the width of the margin, as the Court continued by repeating its standing case law:

‘Where, however, 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 will be wider [...]. By reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the “exact content of the requirements of morals” in their country, but also on the necessity of a restriction intended to meet [...]. There will usually be a wide margin of appreciation accorded if the State is required to strike a balance between competing private and public interests or Convention rights [...].’<sup>188</sup>

The Court observed a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of *in vitro* fertilisation, reflecting an emerging European consensus. The Court, however, did not consider this emerging consensus sufficient to narrow the margin of appreciation of the State for the following reasons:

‘That emerging consensus is not, however, based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State. Since the use of IVF treatment gave rise then and continues to

<sup>185</sup> ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00, para. 90.

<sup>186</sup> *Idem*, para. 92.

<sup>187</sup> *Idem*, para. 82. In its earlier judgment in ECtHR [GC] 4 December 2007, *Dickson v. the United Kingdom*, no. 44362/04, the Court had held that the choice to become a genetic parent indeed concerned such a matter.

<sup>188</sup> ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00, para. 94, referring to: ECtHR [GC] 10 April 2007, *Evans v. the United Kingdom*, no. 6339/05, para. 77; ECtHR [GC] 22 April 1997, *X, Y and Z v. the United Kingdom*, no. 21830/93, para. 44; ECtHR 26 February 2002, *Fretté v. France*, para. 41; ECtHR [GC] 11 July 2002, *Christine Goodwin v. the United Kingdom*, no. 28957/95, para. 85; ECtHR [GC] 16 December 2010, *A, B and C v. Ireland*, no. 25579/05, para. 232 and ECtHR [GC] 4 December 2007, *Dickson v. the United Kingdom*, no. 44362/04, para. 78.

give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is not yet clear common ground amongst the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one [...]. The State's margin in principle extends both to its decision to intervene in the area and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests [...]. However, this does not mean that the solutions reached by the legislature are beyond the scrutiny of the Court. It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by those legislative choices.<sup>189</sup>

The four dissenting judges were very critical in respect of this approach. They found that instead a narrow margin had to be accorded as the right at stake was crucial to the individual's effective enjoyment of intimate or key rights. They furthermore held that the Court was overextending the margin of appreciation:

‘The Court [...] takes the unprecedented step of conferring a new dimension on the European consensus and applies a particularly low threshold to it, thus potentially extending the States' margin of appreciation beyond limits. The current climate is probably conducive to such a backward step. The differences in the Court's approach to the determinative value of the European consensus and a somewhat lax approach to the objective indicia used to determine consensus are pushed to their limit here, engendering great legal uncertainty.’<sup>190</sup>

The majority of the Grand Chamber found that ‘concerns based on moral considerations or on social acceptability’ were to be taken seriously in a sensitive domain like artificial procreation. Given the fact that ‘the field of artificial procreation is developing particularly fast both from a scientific point of view and in terms of the development of a legal framework for its medical application’,<sup>191</sup> the Court was sympathetic to States acting with particular caution in the field of artificial procreation, also because the consequences of legislative measures could well become apparent only after a considerable length of time.<sup>192</sup> At the same time, it held that moral concerns were not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique; the State had to provide for a legal framework concerning AHR ‘[...] which allow[ed] the different legitimate interests involved to be adequately taken into account.’<sup>193</sup> Thereby it was not, however, required that legislation governing important aspects of private life provided for the weighing of competing interests in the circumstances of each individual case.

<sup>189</sup> ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00, paras. 96–97.

<sup>190</sup> Joint dissenting opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria to ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00, para. 8.

<sup>191</sup> *Idem*, para. 103.

<sup>192</sup> *Idem*, para. 103.

<sup>193</sup> *Idem*, para. 100.

Where such important aspects were at stake, the legislature could adopt rules of an absolute nature which served to produce legal certainty (see also section 2.3.2 on the weighing of interests in reproduction matters).<sup>194</sup>

The Court examined the situation of the two couples, the first and second applicants and the third and fourth applicants respectively, separately. In respect of the prohibition on egg cell donation, the Court attached weight to the fact that the Austrian legislature had not completely ruled out artificial procreation, since it allowed the use of homologous techniques. It also noted that the Austrian Artificial Procreation Act provided for specific safeguards and precautions, which intended to prevent potential risks of eugenic selection and their abuse and to prevent the risk of exploitation of women in vulnerable situations as ovum donors.<sup>195</sup> According to the Court, the Austrian legislature could theoretically have adopted a legal framework satisfactorily regulating the problems arising from ovum donation, such as the creation of relationships in which the social circumstances deviated from the biological ones. At the same time, however, the Court was mindful of '[...]' the fact that the splitting of motherhood between a genetic mother and the one carrying the child differs significantly from adoptive parent-child relations and has added a new aspect to this issue.<sup>196</sup> The Court emphasised that the central question in terms of Article 8 of the Convention was not '[...]' whether a different solution might have been adopted by the legislature that would arguably have struck a fairer balance, but whether, in striking the balance at the point at which it did, the Austrian legislature exceeded the margin of appreciation afforded to it under that Article.<sup>197</sup> By a majority of 13 out of 17 judges, the Grand Chamber concluded that it had not. Thereby it attached some importance to the fact that there was no sufficiently established European consensus in respect of the use of donated egg cells in AHR treatment.

The Court assessed the Austrian prohibition on sperm donation against the background of the wider context of the legislative framework of which it formed a part.<sup>198</sup> The Court took into account that the prohibition of the donation of gametes was a controversial issue in Austrian society, '[...]' raising complex questions of a social and ethical nature on which there was not yet a consensus in the society and which had to take into account human dignity, the well-being of children thus conceived and the prevention of negative repercussions or potential misuse.<sup>199</sup> According to the Court, the Austrian legislature had adopted a careful and cautious approach in seeking to reconcile social realities with its approach of principle in this field. The Court observed in this respect:

<sup>194</sup> *Idem*, para. 110.

<sup>195</sup> *Idem*, para. 105. The Court noted that the use of artificial procreation techniques was reserved to specialised medical doctors who had particular knowledge and experience in this field and were themselves bound by the ethical rules of their profession. Also the remuneration of ovum and sperm donation was statutorily prohibited.

<sup>196</sup> *Idem*, para. 105.

<sup>197</sup> *Idem*, para. 106.

<sup>198</sup> *Idem*, para. 112.

<sup>199</sup> *Idem*, para. 113.

[...] that there [was] no prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation techniques not allowed in Austria and that in the event of a successful treatment the Civil Code contain[ed] clear rules on paternity and maternity that respect the wishes of the parents (see, *mutatis mutandis*, *A. B. and C. v. Ireland*, cited above, § 239).<sup>200</sup>

The four dissenting judges considered this argument ‘particularly problematical’. They held:

‘In our view, the argument that couples can go abroad (without taking into account the potential practical difficulties or the costs that may be involved) does not address the real question, which is that of interference with the applicants’ private life as a result of the absolute prohibition in Austria; it totally fails to satisfy the requirements of the Convention regarding the applicants’ right to compliance with Article 8. Furthermore, by endorsing the Government’s reasoning according to which, in the event that treatment abroad is successful, the paternity and maternity of the child will be governed by the Civil Code in accordance with the parents’ wishes, the Grand Chamber considerably weakens the strength of the arguments based on “the unease existing among large sections of society as to the role and possibilities of modern reproductive medicine”, particularly concerning the creation of atypical family relations [...]. Lastly, if the concern for the child’s best interests – allegedly endangered by recourse to prohibited means of reproduction – disappear as a result of crossing the border, the same is true of the concerns relating to the mother’s health referred to several times by the respondent Government to justify the prohibition.’<sup>201</sup>

These judges were, furthermore, critical of the Court’s dealing with the time-aspect in the case. They held that the majority should have taken account of developments since 1999, when the Austrian Constitutional Court had dismissed the application lodged by the applicants. They found this approach ‘[...] all the more problematical in that the main thrust of the Grand Chamber’s reasoning [was] based on the European consensus regarding gamete donation [...] [had] evolved considerably.’<sup>202</sup>

The Grand Chamber concluded its ruling with noting that this area – which was subject to a particularly dynamic development in science and law – was to be kept under review by the Contracting States.<sup>203</sup> Thereby the Court referred to its own case law in the field of legal recognition of transsexuality in which the Court had repeatedly issued similar warnings, before changing its position, on the basis of evolved European consensus.<sup>204</sup>

<sup>200</sup> *Idem*, para. 114.

<sup>201</sup> Joint Dissenting Opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria to ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00, para. 13.

<sup>202</sup> *Idem*, paras. 4–6.

<sup>203</sup> ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00, para. 118.

<sup>204</sup> ECtHR [GC] 17 October 1986, *Rees v. the United Kingdom*, no. 9532/81, para. 47 and ECtHR [GC] 11 July 2002, *Christine Goodwin v. the United Kingdom*, no. 28957/95, para. 74.



The *S.H. and Others* case thus set some general principles in respect of AHR, the wide margin of appreciation granted to States in such matters being the most prominent. On the matter of donation of gametes in particular, there have been no further cases decided by the Court since *S.H. and Others*.<sup>205</sup>

#### 2.3.4. Preimplantation genetic diagnosis

The ECtHR has firstly ruled upon cases concerning prenatal screening. The first case in which it did so, albeit indirectly, concerned a situation where compensation was claimed for the birth of children with severe disabilities which had not been detected during pregnancy on account of negligence in establishing a prenatal diagnosis. The applicants in the French cases of *Draon* and *Maurice* (2005)<sup>206</sup> were parents who had brought proceedings against hospitals because of such negligence, but while these proceedings were pending, a new law on medical liability was introduced in France. This new law no longer provided for a possibility to claim compensation from the hospital or doctor responsible for life-long ‘special burdens’ resulting from the child’s disability. Consequently the applicants were not awarded compensation for such special burdens. The ECtHR found that the law in question violated their right to protection of property (Article 1 of Protocol No. 1 ECHR). The Court did not find it necessary to examine, ‘[...] whether the measures taken by the respondent State in relation to disabled persons [had] anything to do with the applicants’ right to lead a normal family life’.<sup>207</sup> The Court thus left undecided whether Article 8 was applicable to the case, but nonetheless considered that – even supposing it was applicable – the situation complained of by the applicants did not constitute a breach of that provision.<sup>208</sup> The Court noticed that the new rules were ‘[...] the result of comprehensive debate in Parliament, in the course of which account [had been] taken of legal, ethical and social considerations’, and concerns relating to the proper organisation of the health service and the need for fair treatment for all disabled persons.<sup>209</sup> They at least pursued the legitimate aim of the protection of health or morals.<sup>210</sup> The Court left the State a wide margin of appreciation in ‘this difficult social sphere’<sup>211</sup> and concluded that by deciding to reorganise the system of compensation for disability in France, the French legislature had not overstepped its margin of appreciation.<sup>212</sup>

Another important case on the issue of prenatal screening concerned *R. R. v. Poland* (2011),<sup>213</sup> as discussed in section 2.2.4 above. In that case, the Court found a violation

<sup>205</sup> See, however, the pending case *Parrillo v. Italy*, no. 46470/11.

<sup>206</sup> ECtHR 16 October 2005, *Draon v. France*, no. 1513/03 and ECtHR 16 October 2005, *Maurice v. France*, no. 11810/03.

<sup>207</sup> ECtHR 16 October 2005, *Maurice v. France*, no. 11810/03, para. 119.

<sup>208</sup> *Idem*, para. 120.

<sup>209</sup> *Idem*, para. 121.

<sup>210</sup> *Idem*, para. 121.

<sup>211</sup> *Idem*, para. 123.

<sup>212</sup> *Idem*, para. 124.

<sup>213</sup> ECtHR 26 May 2011, *R. R. v. Poland*, no. 27617/04.

of Article 3 ECHR, but also concluded that Article 8 ECHR had been violated, because the relevant Polish law did not contain any effective mechanisms which would have enabled *R. R.* to seek access to a diagnostic service, decisive for the possibility of exercising her right to take an informed decision as to whether to seek an abortion or not.<sup>214</sup> It was also in this case that the Court explicitly recognised a right to timely access to information about the foetus' health (see section 2.2.4 above).<sup>215</sup>

In *Costa and Pavan* (2012)<sup>216</sup> the Court assessed whether a legal prohibition on preimplantation genetic diagnosis (PGD) was in violation of the Convention. The applicants in this case were a couple who had found in 2006, when their daughter was born, that they were healthy carriers of cystic fibrosis. In 2010 the woman had fallen pregnant again and a prenatal test had shown that the unborn child had also been affected by the disease. They had decided to have the pregnancy terminated on medical grounds. The couple subsequently wished to have access to AHR treatment including PGD but had been denied such access as there was a blanket ban on the use of PGD in place in Italy. That same year they lodged a complaint with the ECtHR, who decided to give priority to the case.

The Court was not convinced by the government's argument that the case did not come within the scope of the Convention because the applicants in fact claimed 'a right to have a healthy child'. The Court held that Article 8 ECHR was applicable to the case before it as '[...] the applicants' desire to conceive a child unaffected by the genetic disease of which they are healthy carriers and to use [AHR treatment] and PGD to this end [...] [was] a form of expression of their private and family life.'<sup>217</sup> There had been an interference with these Article 8 rights, because the applicants had had no access to AHR under Italian law, in particular to PGD, as the relevant law had imposed a blanket ban on access to this technique. The Court accepted that this interference was in accordance with the law and that it could be regarded as pursuing the legitimate aims of protecting morals and the rights and freedoms of others. The interference was, however, disproportionate.

The government's arguments that the interference was justified because of '[...] concern to protect the health of "the child" and the woman, the dignity and freedom of conscience of the medical professions and the interest in precluding a risk of eugenic selection'<sup>218</sup> were not persuasive to the Court. It considered the Italian legislation incoherent and inconsistent:

'While stressing that the concept of "child" cannot be put in the same category as that of "embryo", [the Court] fails to see how the protection of the interests referred to by the

<sup>214</sup> *Idem*, para. 208. A violation of the procedural limb of Art. 8 ECHR in a case concerning prenatal screening was also found in ECtHR 24 June 2014, *A.K. v. Latvia*, no. 33011/08.

<sup>215</sup> ECtHR 26 May 2011, *R. R. v. Poland*, no. 27617/04, para. 197.

<sup>216</sup> ECtHR 28 August 2012, *Costa and Pavan v. Italy*, no. 54270/10.

<sup>217</sup> *Idem*, para. 50.

<sup>218</sup> *Idem*, para. 54.

Government can be reconciled with the possibility available to the applicants of having an abortion on medical grounds if the foetus turns out to be affected by the disease, having regard in particular to the consequences of this both for the foetus, which is clearly far further developed than an embryo, and for the parents, in particular the woman [...]. [...] Furthermore, the Government have failed to explain how the risk of eugenic selection and affecting the dignity and freedom of conscience of the medical professions would be averted in the event of an abortion being carried out on medical grounds. [...] The Court cannot but note that the Italian legislation lacks consistency in this area. On the one hand it bans implantation limited to those embryos unaffected by the disease of which the applicants are healthy carriers, while on the other hand it allows the applicants to abort a foetus affected by the disease [...].'

As a result of this incoherent and inconsistent legislation, so the Court continued, the couple had been left with only one choice, which, moreover, brought anxiety and suffering, namely to start a pregnancy by natural means and terminate it if prenatal tests showed the foetus to have the disease, a situation which involved anxiety for the woman particularly. The applicants had already terminated one earlier pregnancy for that reason.

The Court distinguished the case from *S.H. and Others v. Austria* (2011), in which it, as discussed above, had held a ban on gamete donation not to violate the Convention. The case before it namely concerned homologous insemination instead of heterologous insemination. Also, the Italian ban on PGD had to be assessed in the light of the Italian abortion legislation.<sup>219</sup> The Court subsequently noted that while PGD raised sensitive moral and ethical questions, the national 'solutions' were not beyond the scrutiny of the Court.<sup>220</sup> The Court did not explicitly address the government's argument that there was no consensus on the matter, but noted and stressed that this concerned a specific case, which affected apart from Italy only two more High Contracting Parties. Unanimously the Court concluded that the interference with the applicants' right to respect for their private and family life had been disproportionate.<sup>221</sup>

### 2.3.5. Surrogacy

To date there have been no cases before the ECtHR where the Court was asked to rule on the compatibility of surrogacy with the Convention. The Court has, however, examined – and will in future cases examine – complaints about the non-recognition of parental links that were established abroad in cross-border surrogacy cases. Because of their cross-border aspects, these judgments are discussed below in section 2.4.2. The Court noted in these judgments that surrogacy concerns a delicate ethical issue in respect of which no consensus exists in Europe. The Court also

<sup>219</sup> *Idem*, para. 62.

<sup>220</sup> *Idem*, para. 61.

<sup>221</sup> ECtHR 28 August 2012, *Costa and Pavan v. Italy*, no. 54270/10, paras. 63–64. The judgment became final in February 2013 when a request for referral to the Grand Chamber was dismissed.

importantly held that establishment of parentage for a child born through surrogacy affects the establishment of the essence of his or her identity, as protected by the right to respect for private life.

### 2.3.6. Establishment of parental links after AHR treatment

The Court's case law on the right to respect for family life under Article 8 ECHR is elaborate. There have been, however, only few cases where this right was relied upon to claim legal recognition of family ties with a child that was conceived in the course of AHR treatment with the use of donor gametes and/or a surrogate mother.

In a case of the early 1990s the Commission held that the situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child.<sup>222</sup> In this case a refusal to grant him visitation rights to the child was held not to be in violation of Article 8 ECHR, as the Commission was of the opinion that the applicant's contact with the child, both in itself and together with his donorship, formed an insufficient basis for the conclusion that as a result thereof such close personal ties had developed between them that their relationship fell within the scope of 'family life' as referred to in Article 8.

Mere genetic parenthood has thus not been held to be sufficient for protection of the right to respect for family life under Article 8 ECHR. This has been confirmed by case law outside the area of gamete donation, for example in situations where a woman who had given her children up for adoption after birth, claimed a right to contact with and information about her genetic children.<sup>223</sup> There have also been various cases before the Court where a man unsuccessfully tried to challenge the paternity of another man's paternity of his (presumed) genetic child.<sup>224</sup> The Court accepted in those cases that a decision to reject a request to legally establish paternity of a (presumed) genetic child interfered with the right to respect for private life under Article 8 ECHR. However, such an interference could be justified so long as there was no close personal relationship between the (presumed) genetic father and the respective child.

Hence, for genetic parents it may not be sufficient to rely on their genetic parenthood in order to establish parental links with their child. The actual existence of family life is what counts under the right to respect for family life. This is not to say that genetic parenthood does not play a role in the Court's case law on reproductive matters. In fact, in the French cross-border surrogacy cases to which already reference was made in section 2.1.3 above, genetic parenthood can be held to have played a decisive role. As discussed in more detail below in section 2.4.2, the Court ruled that where the legal parent-child relationship is concerned, an essential aspect of the

<sup>222</sup> ECmHR 8 February 1993 (dec.), *J.R.M. v. the Netherlands*, no. 16944/90.

<sup>223</sup> ECtHR 5 June 2014, *I. S. v. Germany*, no. 31021/08.

<sup>224</sup> ECtHR 22 March 2012, *Ahrens v. Germany*, no. 45071/09.

identity of individuals is at stake and stressed the importance of biological parentage as a component of identity, as protected under the right to respect for private life (Article 8 ECHR).<sup>225</sup>

There have, further, been cases before the Strasbourg Court where a person claimed the recognition of parenthood of a child conceived with the use of donor gametes, and to whom he or she was thus not genetically related. The first time the Court was confronted with such a question was in 1997 in the *X, Y and Z* case. A female-to-male post-operative transsexual was not permitted under UK law to marry a woman and could therefore not be regarded as the father of the child born with his female partner. The child had been conceived by artificial insemination, using sperm from an anonymous donor. The Grand Chamber of the Court noted that until then it had been called upon to consider only family ties existing between genetic parents and their offspring, while the case at hand ‘raised different questions’.<sup>226</sup> The Court continued:

‘[...] it has not been established before the Court that there exists any generally shared approach amongst the High Contracting Parties with regard to the manner in which the social relationship between a child conceived by AID [‘artificial insemination by donor’] and the person who performs the role of father should be reflected in law. Indeed, according to the information available to the Court, although the technology of medically assisted procreation has been available in Europe for several decades, many of the issues to which it gives rise, particularly with regard to the question of filiation, remain the subject of debate. For example, there is no consensus amongst the member States of the Council of Europe on the question whether the interests of a child conceived in such a way are best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor’s identity. [...] In conclusion [...], the Court is of the opinion that Article 8 cannot, in this context, be taken to imply an obligation for the respondent State formally to recognise as the father of a child a person who is not the biological father.’<sup>227</sup>

The fact that this case concerned a transsexual, while there was at the time no European consensus on transsexuality, has unmistakably been an important, if not crucial, factor in the Court’s conclusion in this case. One must therefore be careful not to disentangle this ruling from the particular factual circumstances of the case at hand. Still, the finding that Article 8 would not imply an obligation for States to formally recognise as the father of a child a person who was not the biological father is interesting. The Court adopted a similar line of reasoning in later case involving a same-sex couple who had a child after resorting to AHR treatment. Here a clear overlap with Case Study II is visible. As further explained in Chapter 8, section 8.2.4.2, in *Boeckel and Gessner-Boeckel* (2013),<sup>228</sup> the Court declared manifestly ill-founded the complaint of two women in a civil partnership, who wished to be both registered as parents in the birth certificate of the child to whom one of them had given birth.

<sup>225</sup> ECtHR 26 June 2014, *Mennesson v. France*, no. 65192/11, para. 100.

<sup>226</sup> ECtHR [GC] 22 April 1997, *X, Y and Z v. the United Kingdom*, no. 21830/93, para. 43.

<sup>227</sup> *Idem*, paras. 44 and 52.

<sup>228</sup> ECtHR 7 May 2013 (dec.), *Boeckel and Gessner-Boeckel v. Germany*, no. 8017/11.

The Court held that it could be ruled out ‘[...] on biological grounds that the child descended from the other partner.’ It accepted that, under these circumstances, there was ‘[...] no factual foundation for a legal presumption that the child descended from the [...] partner [of the woman who had given birth to the child]’.<sup>229</sup>

## 2.4. CROSS-BORDER CASES AND THE ECHR

The ECtHR has decided a couple of interesting cross-border cases involving either abortion or surrogacy. While there have been no cases on travel bans as such or on refusals to reimburse the costs of treatment obtained abroad, there have been cases on access to and provision of information about foreign treatment options. Also, the matter of after care, after abortions abroad has been addressed in the case law. Lastly, the Court has decided cases about the recognition of parental links with a child born after surrogacy in a foreign country. These three limbs of case law are discussed in the three following subsections.

### 2.4.1. Information about foreign treatment options and follow-up treatment

In *Open Door* (1992) an injunction had been granted restraining the Irish counselling agencies *Open Door Counselling* and *Dublin Well Woman Centre* from assisting pregnant women in seeking legal abortion services abroad (see also Chapter 5, section 5.2.2). In its report of March 1991 the European Commission on Human Rights had held that this injunction was not prescribed by law and therefore violated their right to freedom of expression (Article 10 ECHR).<sup>230</sup> While the Commission had thus not decided the nub of the matter before it, the Court instead addressed the proportionality of the injunction.<sup>231</sup>

The Court firstly noted that there was no doubt that the injunction constituted an interference with the applicants’ freedom to impart and receive information.<sup>232</sup> The

<sup>229</sup> *Idem*, para. 30. At the time this research was concluded (i.e. 31 July 2014) there was another (potentially) relevant case pending (*Francine Bonnaud and Patricia Lecoq v. France*, no. 6190/11), where two women who live as a couple and who both had a child following AHR treatment complain about the rejection of their requests to be granted parental authority each in respect of the other’s child. In May 2013 the Court invited the Government to submit observations ‘in the light of the judgments in *Gas and Dubois v. France* and *X and Others v. Austria*, and the adoption in France of the law of 17 May 2013 opening marriage to same sex couples.’ ECtHR, *Factsheet Sexual Orientation Issues*, edn. April 2015.

<sup>230</sup> ECmHR 7 March 1991 (report), *Open Door and Dublin Well Woman v. Ireland*, nos. 14234/88 and 14235/88. By decision of 15 May 1990 the ECmHR had already declared the complaint admissible. After the delivery of this report, both the Commission and the Irish government decided to bring the case before the ECtHR.

<sup>231</sup> See also D. Cole, “‘Going to England’: Irish Abortion Law and the European Community”, 17 *Hastings Int’l & Comp. L. Rev.* (1993–1994) p. 113 at p. 135.

<sup>232</sup> ECtHR 29 October 1992, *Open Door and Dublin Well Woman v. Ireland*, nos. 14234/88 and 14235/88, para. 50.

Court furthermore held that the restriction was prescribed by law<sup>233</sup> and pursued the legitimate aim of ‘[...] the protection of morals of which the protection in Ireland of the right to life of the unborn [was] one aspect’.<sup>234</sup> It acknowledged that since it was not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, ‘[...] national authorities enjoy[ed] a wide margin of appreciation in matters of morals, particularly in an area such as [abortion] which touche[d] on matters of belief concerning the nature of human life.’<sup>235</sup> However, the restriction was disproportionate to the aims pursued. The Court was struck by ‘the absolute nature of the Supreme Court injunction which imposed a “perpetual” restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy’.<sup>236</sup>

In assessing the proportionality of the restriction, the Court took into consideration a number of other factors. First, it assessed that the link between the provision of information and the destruction of unborn life was not as definite as contended;<sup>237</sup> and that information could be obtained from other sources in Ireland.<sup>238</sup> The restriction was further ineffective in protecting the right to life of the unborn since it did not prevent large numbers of Irish women from continuing to obtain abortions in Great Britain.<sup>239</sup> Also, the injunction created a risk to the health of those women seeking abortions at a later stage in their pregnancy due to the lack of proper counselling and had adverse effects on women who were not sufficiently resourceful or did not have the necessary level of education to have access to alternative sources of information.<sup>240</sup> The Court accordingly found a violation of Article 10 ECHR. Having regard to this finding, the Court – like the Commission earlier – considered it unnecessary to examine the case under Articles 8 (right to respect for private life) and 14 (prohibition of discrimination) ECHR.<sup>241</sup>

Later, in *A, B and C v. Ireland*, the Court – as discussed above – set access to information about foreign abortion services as an element of the minimum level of protection that States with a restrictive abortion regime had to offer under Article 8. The Court held that Ireland had met that minimum standard because:

‘[...] the Thirteenth and Fourteenth Amendments to the Constitution removed any legal impediment to adult women travelling abroad for an abortion and to obtaining information in Ireland in that respect. Legislative measures were then adopted to ensure the provision of information and counselling about, *inter alia*, the options available including abortion services abroad, and to ensure any necessary medical treatment before, and

<sup>233</sup> *Idem*, para. 60.

<sup>234</sup> *Idem*, para. 63.

<sup>235</sup> *Idem*, para. 68.

<sup>236</sup> *Idem*, para. 73.

<sup>237</sup> *Idem*, para. 75.

<sup>238</sup> *Idem*, para. 76.

<sup>239</sup> *Idem*, para. 76.

<sup>240</sup> *Idem*, para. 77.

<sup>241</sup> *Idem*, para. 83.

more particularly after, an abortion. The importance of the role of doctors in providing information on all options available, including abortion abroad, and their obligation to provide all appropriate medical care, notably post abortion, is emphasised in CPA work and documents and in professional medical guidelines [...]. The Court has found that the first two applicants did not demonstrate that they lacked relevant information or necessary medical care as regards their abortions [...].<sup>242</sup>

The ECtHR concluded that *because* Ireland had provided for '[...] the right to travel abroad lawfully for an abortion with access to appropriate information and medical care in Ireland', the prohibition in Ireland of abortion for health and well-being reasons had not exceeded the margin of appreciation accorded in that respect to the Irish State.<sup>243</sup>

A somewhat different, but nonetheless much connected, question was at issue in the case of *Women on Waves* (2009). In 2004 the 'abortion boat' of the Dutch foundation *Women on Waves* set sail to Portugal to campaign in favour of the decriminalisation of abortion (see also Chapter 6, section 6.4.1.3). The ship was, however, blocked from entering Portuguese territorial waters by a Portuguese warship acting on the basis of a ministerial order banning such entry. After being unsuccessful in challenging the ban before the national courts, *Women on Waves* and two Portuguese organisations who had invited the foundation to come to Portugal, filed a complaint with the ECtHR. They based their complaints on a number of Convention provisions, including Article 2 of Protocol No. 4 (freedom of movement). The Court decided to examine the case on the basis of Article 10 (the freedom of expression) only and found a violation of this provision. The Strasbourg Court accepted that the measure pursued the legitimate aims of the prevention of disorder and the protection of health, but also noted that these had affected the very substance of the ideas and information imparted. It further took into account that the case did not involve private land or publicly owned property but the territorial waters of the respondent State, and that it had not been shown that the applicant associations had intended to deliberately breach Portuguese legislation on abortion. The Court reiterated that freedom to express opinions in the course of a peaceful assembly was so important that it could not be restricted in any way, so long as the person concerned did not commit any reprehensible acts. Lastly, the Portuguese authorities could have resorted to other means of preventing disorder and protecting health than taking such a radical measure as dispatching a warship, with a serious deterrent effect. The Court unanimously found a violation of Article 10 ECHR in this case.

#### **2.4.2. Legal recognition of parental links established abroad**

The issue of legal recognition of parental links established in another country, has, incidentally, come before the Strasbourg court. Until the *Menesson* and *Labassee*

<sup>242</sup> *Idem*, para. 239.

<sup>243</sup> *Idem*, para 241.



judgments (as discussed in greater detail below) were issued, cross-border adoption cases like *Wagner* and *Negrepointis-Giannisis*<sup>244</sup> were the most cited authorities in relation to this question. The applicants in the *Wagner* case were a Luxembourg national and her adoptive child, who has been born in Peru. They had unsuccessfully applied to the Luxembourg Courts to have the adoption decision pronounced in Peru declared enforceable in Luxembourg. The Luxembourg courts had dismissed the application because the Luxembourg Civil Code made no provision for full adoption by a single woman. The ECtHR found a violation of Article 8 ECHR (to right to respect for private and family life) in this case. While the Court accepted that the refusal pursued the legitimate aim of protecting the ‘health and morals’ and the ‘rights and freedoms’ of the child,<sup>245</sup> the Court found that the failure of the Luxembourg courts to recognise the family ties created by the judgment of full adoption delivered in Peru, was disproportionate. The Court stressed the importance of carrying out an actual examination of the situation<sup>246</sup> and held:

‘The Court considers that the decision refusing enforcement fails to take account of the social reality of the situation. Accordingly, since the Luxembourg courts did not formally acknowledge the legal existence of the family ties created by the Peruvian full adoption, those ties do not produce their effects in full in Luxembourg. The applicants encounter obstacles in their daily life and the child is not afforded legal protection making it possible for her to be fully integrated into the adoptive family. Bearing in mind that the best interests of the child are paramount in such a case [...], the Court considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention.’<sup>247</sup>

The Court also found a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 ECHR. While it again could not exclude that the aim invoked by the government could be considered legitimate, the unequal treatment of the applicant,<sup>248</sup> was disproportionate. The Court considered:

‘The consequence of this refusal to order enforcement is that the second applicant suffers on a daily basis a difference in treatment by comparison with a child whose full adoption is recognised in Luxembourg. It is an inescapable finding in this case that the child’s ties with her family of origin have been severed but that no full and entire substitute tie exists with her adoptive mother. The second applicant is therefore in a legal vacuum which has not been remedied by the fact that simple adoption has been granted in the meantime [...] It follows in particular that, not having acquired Luxembourg nationality, the second applicant does not have the advantage of, for example, Community preference;

<sup>244</sup> ECtHR 28 June 2007, *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01 and ECtHR 3 May 2011, *Negrepointis-Giannisis v. Greece*, no. 56759/08.

<sup>245</sup> ECtHR 28 June 2007, *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, para. 126.

<sup>246</sup> *Idem*, para. 135.

<sup>247</sup> *Idem*, paras. 131–132.

<sup>248</sup> The Court considered the applicant to be in a similar situation to that of ‘[...] any child who ha[d] been the subject in Peru of a full adoption judgment entailing the severance of the ties with his or her family of origin and whose adoptive parent ha[d] sought to have that judgment enforced under Luxembourg law.’ *Idem*, para. 151.

if she wished to serve an occupational apprenticeship she would not obtain a work permit unless it were shown that an equivalent candidate could not be found on the European employment market. Next, and above all, for more than ten years the minor child has had to be regularly given leave to remain in Luxembourg and has had to obtain a visa in order to visit certain countries, in particular Switzerland.<sup>249</sup>

The mother was held to indirectly suffer, on a daily basis, the obstacles experienced by her child and therefore also to be discriminated against. The Court did not find any ground in the present case to justify such discrimination of the applicants.<sup>250</sup> In any event, the child could not be blamed for circumstances for which she was not responsible.<sup>251</sup>

This line of reasoning was pursued in two recent judgments that come within the scope of this case study. In June 2014, the Court decided two important cases against France on international surrogacy.<sup>252</sup> The applicants in *Mennesson* and *Labassee* were two couples who had engaged in heterologous surrogacy in the United States of America (USA), as well as their children whom were consequently born in California and Minnesota respectively. In both cases the couple had had recourse to *in vitro* fertilisation using a donated ovum and the sperm of Mr. Mennesson and Mr. Labassee respectively. The embryos thus obtained were subsequently implanted into the uterus of a surrogate mother. The surrogate mother for the Mennesson couple gave birth to twins in October 2001, while the surrogate mother for the Labassee couple gave birth to a daughter in November 2001.

In both cases the couples had been legally recognised as the parents of the children by Court order in the relevant US State. In the case of the Mennessons this was done before the birth of the twins and the Californian Court had yet recognised Mrs. Mennesson, the intended non-genetic mother, as legal mother of the child. Subsequently, in both cases a birth certificate had been drafted, stating that the couple (the intended parents) were the parents of the child. Upon return to France, the couples unsuccessfully sought to have these birth certificates entered in the French register of births, marriages and deaths. The French authorities refused such entries, because they suspected that the cases involved surrogacy arrangements, surrogacy being unlawful under French law. In the *Mennesson* case, the public prosecutor instructed that the birth certificates be, nevertheless, entered in the register and subsequently brought proceedings against the couple with a view to having the entries annulled. The Labassee couple instead obtained an ‘*acte de notoriété*’, a document issued by a judge attesting to the existence of a *de facto* parent-child relationship. However, the public prosecutor refused to enter this in the French register, after which the couple appealed the case to the courts.

<sup>249</sup> *Idem*, paras. 155–156.

<sup>250</sup> *Idem*, para. 157.

<sup>251</sup> *Idem*, para. 158.

<sup>252</sup> ECtHR 26 June 2014, *Mennesson v. France*, no. 65192/11 and ECtHR 26 June 2014, *Labassee v. France*, no. 65941/11.

Both domestic proceedings ended before the Court of Cassation, which ruled on 6 April 2011 that recording such entries in the register would give effect to a surrogacy agreement that was null and void on public policy grounds under the French Civil Code. This Court ruled that the right to respect for private and family life had not been infringed now that the annulment of the entries had not prevented children from living in France with the intended parents. Also, the legal parenthood of the parents was still recognised under the laws of California and Minnesota respectively. That very same day the couples filed a complaint with the ECtHR. Mr. Mennesson also lodged an application with the Paris District Court for a certificate of French nationality for the twins. In March 2014 he was informed that the request was still being processed.<sup>253</sup>

Before the Strasbourg Court, the applicants in both cases invoked Article 8 ECHR (the right to respect for private and family life) and complained of the fact that, to the detriment of the children's best interests, they were unable to obtain recognition in France of legal parent-child relationships that had been lawfully established abroad as the result of a surrogacy agreement.

In *Mennesson*, the Court found that the refusal of the French authorities to legally recognise the family tie between the applicants constituted an interference with Article 8, of both its private life aspect and its family life aspect. The Court referred in this regard to its approach in *Wagner* and *Negrepontis-Giannisis* (see above). The Court furthermore accepted that this interference had a sufficient legal basis in domestic law, which was foreseeable and accessible.<sup>254</sup> Also, the interference pursued a legitimate aim, but the Court did not accept all aims put forward by the French government. The government had claimed that the refusals to record the American birth certificates in the French register, were based on '[...] ethical and moral principles according to which the human body could not become a commercial instrument and the child be reduced to the object of a contract.'<sup>255</sup> The Court did not accept that the interference pursued the legitimate aim of the prevention of disorder or crime, as the government had not established that where French nationals had recourse to a surrogacy arrangement in a country in which such an agreement was legal this amounted to an offence under French law. The Court understood, however, that the government sought '[...] to deter its nationals from having recourse to methods of assisted reproduction outside the national territory that [were] prohibited on its own territory and aim[ed], in accordance with its perception of the issue, to protect children and [...] surrogate mothers'. Accordingly, the Court accepted that the interference pursued the legitimate aims of the protection of health and the protection of the rights and freedoms of others.<sup>256</sup> The Court did not further elaborate on the first legitimate aim, but basically focused on the latter in its subsequent assessment of the necessity of the measure, in particular on the protection of the child.

<sup>253</sup> ECtHR 26 June 2014, *Mennesson v. France*, no. 65192/11, para. 28.

<sup>254</sup> *Idem*, paras. 57–58.

<sup>255</sup> *Idem*, para. 60.

<sup>256</sup> *Idem*, paras. 61–62.

The French government had pointed out that to authorise entry in the register of births, marriages and deaths of the details of foreign civil-status documents of children born as the result of a surrogacy agreement performed outside France, would have been ‘[...] tantamount to tacitly accepting that domestic law had been circumvented and would have jeopardised the consistent application of the provisions outlawing surrogacy.’<sup>257</sup> The Court acknowledged that the community had an interest ‘[...] in ensuring that its members conform to the choice made democratically within that community’,<sup>258</sup> but found that it had to be verified whether the domestic courts had duly taken account of the need to strike a fair balance between this interest and ‘[...] the interest of the applicants – the children’s best interests being paramount – in fully enjoying their rights to respect for their private and family life.’<sup>259</sup>

The Court defined the interests of the child in this case in the context of the right to personal identity. It held in this regard:

‘Respect for private life requires 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>260</sup>

This was also reason for the Court to reduce the margin of appreciation, despite the fact that surrogacy raised sensitive ethical questions and the fact that there was accordingly no consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children thus conceived abroad.<sup>261</sup>

The Court noted that the children concerned were in a position of legal uncertainty, about their lineage and their nationality, and this uncertainty was liable to have negative repercussions on the definition of their personal identity. Although aware that the children had been identified in the USA as the children of Mr. and Mrs. Mennesson, France nonetheless denied them that status under French law. The Court considered that this ‘contradiction’ undermined the children’s identity within French society.<sup>262</sup> The non-recognition of the legal parenthood of the French couple also had implications for the children’s inheritance rights. All together ‘a serious question’ arose as to the compatibility of this situation with the child’s best interests:

‘The Court can accept that France may wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory [...]. [...] [H]owever, the effects of non-recognition in French law of the legal parent-child relationship between children thus conceived and the intended parents are not limited to the

<sup>257</sup> *Idem*, para. 83.

<sup>258</sup> *Idem*, para. 84.

<sup>259</sup> *Idem*, para. 84.

<sup>260</sup> *Idem*, para. 80.

<sup>261</sup> *Idem*, paras. 78 and 80.

<sup>262</sup> *Idem*, para. 96.

parents alone, who have chosen a particular method of assisted reproduction prohibited by the French authorities. They also affect the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation with the child’s best interests, respect for which must guide any decision in their regard.<sup>263</sup>

The Court, moreover, found that this analysis took on ‘a special dimension’ where one of the intended parents was also the child’s genetic parent. It stressed the importance of biological parentage ‘as a component of identity’ and continued:

‘[...] it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof. Not only was the relationship between the third and fourth applicants and their biological father not recognised when registration of the details of the birth certificates was requested, but formal recognition by means of a declaration of paternity or adoption or through the effect of *de facto* enjoyment of civil status would fall foul of the prohibition [on attribution of the status of father or mother by contract and on giving effect to a parent-child relationship provided for in a surrogacy agreement] established by the Court of Cassation in its case-law in that regard [...]. The Court considers, having regard to the consequences of this serious restriction on the identity and right to respect for private life of the third and fourth applicants, that by thus preventing both the recognition and establishment under domestic law of their legal relationship with their biological father, the respondent State overstepped the permissible limits of its margin of appreciation. [...] Having regard also to the importance to be given to the child’s interests when weighing up the competing interests at stake, the Court concludes that the right of the third and fourth applicants to respect for their private life was infringed.’<sup>264</sup>

While the Court thus found a violation of the right to respect for private life of the children, the Court found no violation of the right to respect for family life of the parents and the children. The Court accepted that this right had been interfered with, but held that a fair balance had been struck between the interests of the applicants and those of the State. The applicants had put forward that on account of the lack of recognition in French law of the legal parent-child relationship, the children did not have French civil-status documents or a French family record book, and were therefore obliged to produce – non-registered – US civil documents accompanied by an officially sworn translation each time access to a right or a service required proof of the legal parent-child relationship. They were sometimes met with ‘[...] suspicion, or at the very least incomprehension, on the part of the person dealing with the request’. Moreover, the children had not been granted French nationality, which complicated travel as a family and raised concerns about the stability of the family unit.<sup>265</sup> The Court noted it was not established that it was impossible to

<sup>263</sup> *Idem*, para. 99.

<sup>264</sup> *Idem*, paras. 100–101.

<sup>265</sup> *Idem*, paras. 88–89.

overcome these practical difficulties. Also, the inability to obtain recognition of the legal parent-child relationship under French law had not prevented the applicants from enjoying in France their right to respect for their family life. The family had been able to settle in France shortly after the birth of the children and had been in a position to live there together ‘[...] in conditions broadly comparable to those of other families [...]’. There was nothing to suggest that they were at risk of being separated by the authorities on account of their situation under French law.<sup>266</sup>

In the case of the Labassee family, the Court adopted the same approach as in *Mennesson*, finding that there had been no violation of Article 8 concerning the applicants’ right to respect for their family life, and a violation of Article 8 concerning the right of the child concerned to respect for her private life. The Chamber was unanimous in both cases, and both judgments became final in September 2014.

In legal scholarship it was noted that the fact that the Court had examined the issue (also) from the perspective of the right of the child to personal identity, made this judgment widely applicable, including in international surrogacy cases where no family life had yet been established between the intended – and genetic – parent(s) and the child. In this regard, the question was posed whether or not the personal identity of the intended (genetic) parents was also at stake.<sup>267</sup> Further, the question was raised regarding what the Court would have ruled if none of the intended parents were also genetic parents of the child.<sup>268</sup>

A month after the *Mennesson* and *Labassee* judgments, the Court decided another international surrogacy case, which concerned the length of a procedure for the issuing of travel documents for a child born via heterologous surrogacy in the Ukraine. The applicants in *D and Others*<sup>269</sup> were a Belgian married couple who had entered into a surrogacy agreement in the Ukraine, following which a child was born in February 2013. The intended father was also the genetic father of the child, while the genetic mother was the woman who had donated the egg cell. In accordance with Ukrainian law, the Belgian couple had been recorded on the child’s birth certificate as the parents of the child. When they subsequently applied to the Belgian embassy in Ukraine for a passport, this was denied, because they failed to prove that they were the genetic parents of the child. The couple subsequently had started proceedings before the Belgian courts in order to obtain emergency travel documents (a ‘*laissez-passer*’). The competent court had given the case priority, but had refused the issuing of the travel documents, so long as the genetic parenthood of the intended father was not established. It took four months and 12 days before the Belgian court found it established in August 2013 that the intended father was

<sup>266</sup> *Idem*, para. 92.

<sup>267</sup> N.R. Koffeman, ‘Case-note to ECtHR 26 June 2014, *Mennesson v. France*, no. 65192/11 and ECtHR 26 June 2014, *Labassee v. France*, no. 65941/11’, 15 *European Human Rights Cases* 2014/222 (in Dutch), referring to ECtHR 22 March 2012, *Ahrens v. Germany*, no. 45071/99, para. 60, where the Court held that: ‘[...] establishment of paternity concern[s] that man’s private life under Article 8, which encompasses important aspects of one’s personal identity [...]’.

<sup>268</sup> *Idem*.

<sup>269</sup> ECtHR 8 July 2014 (dec.), *D. a.o. v. Belgium*, no. 29176/13.

also the genetic father of the child and ordered the issuing of the required travel documents. While the proceedings were pending, the child remained in the Ukraine, while the parents had to go back to Belgium, because their visas had expired. They visited the child twice for a duration of one month in total. Since August 2013 the couple and the child lived together in Belgium.

The legal situation of the applicants had thus significantly changed since their lodging of a complaint with the ECtHR in April 2013. The Court accordingly struck down their complaint about the Belgian authorities' refusal to authorise the child's entry to the national territory. This had been adequately and sufficiently remedied and the dispute was to be considered as resolved.

The applicants had further alleged that their effective separation from the child, on account of the Belgian authorities' refusal to issue a travel document, had been contrary to the best interests of the child and in breach of their right to respect for family life under Article 8 ECHR. The Court found the duration of the temporary separation, for the duration of the proceedings, not unreasonable. The Court held that States were under no obligation under the Convention to authorise the entry of a child born with a foreign surrogate mother, without first subjecting the case to some form of legal examination.<sup>270</sup> It further took into account that the Belgian couple – who had sought legal advice of both a Belgian and a Ukrainian lawyer – could have reasonably foreseen that a court procedure was required, before they could bring the child to Belgium. The Belgian State could not be held responsible for the fact that the couple had not been granted a visa in the Ukraine for an extended period. Furthermore, while their case had been pending before the Belgian court, the couple had been enabled to spend time with the child in the Ukraine, without any interference from the authorities. Also, the Belgian court had given the case priority. The Court concluded that the Belgian state had not exceeded the margin of appreciation and declared the complaint manifestly ill-founded.

The Court thus did not hold, in *D and Others*, that States were under no obligation under the Convention to authorise the entry of a child born with a foreign surrogate mother, but it accepted that the authorities first subjected the case to some form of legal examination.<sup>271</sup> Even more fundamental questions in respect of international surrogacy may be addressed in an Italian case that was still pending before the Court at the time this research was concluded (i.e., 31 July 2014).<sup>272</sup> In that international surrogacy case, the child had been placed for adoption by the Italian authorities after it had become clear that the intended parents were not the genetic parents of the child.

<sup>270</sup> *Idem*, para. 59.

<sup>271</sup> N.R. Koffeman, 'Case-note to ECtHR 8 July 2014 (dec.), *D. a.o. v. Belgium*, no. 29176/13', 15 *European Human Rights Cases* 2014/269 (in Dutch).

<sup>272</sup> *Paradiso and Campanelli v. Italy*, no. 25358/12, lodged on 27 April 2012. This application was communicated to the Italian Government on 9 May 2012.

## 2.5. CONCLUSIONS

The ECtHR's case law with regard to reproductive matters, while still fairly limited, is steadily expanding. The overall first impression that arises from the case law discussed in this chapter is that of a rather reluctant, sometimes evasive and overall pragmatic Court when it comes to reproduction matters. Having regard to the wide variety of views in this ethically and morally sensitive field and the fast-moving scientific developments, the Court has left many reproductive matters up to the national authorities to decide. It has not, for example, taken a strong stance on the status of the unborn life. The Court generally leaves States a wide margin of appreciation in dealing with as morally and ethically sensitive issues as reproductive matters, which involve a complex balancing of various individual and general interests, and upon which generally no European consensus exists. As a result, even far-reaching interferences, such as an absolute prohibition on abortion on social and medical grounds or on the use of donated gametes in the course of IVF treatment, have been held not to violate the Convention.

The Court has, furthermore, introduced some variations on its well-established margin of appreciation doctrine, especially in the context of reproductive rights. In *S. H. and Others*, the Court seemed to set the barrier higher than it had done previously in its case law, by holding that for a common ground to decisively narrow the margin, it had to be 'based on settled and long-standing principles established in the law of the member States'. The Court's approach in defining the issue on which consensus had to exist in *A, B and C* – whereby an existing consensus on allowing for abortion on social and medical grounds was outweighed by a lack of European consensus in respect of the right to life of the unborn – was also unprecedented. These variations on the margin of appreciation doctrine illustrate that the Court is generally reluctant to intervene in reproductive matters. States are left much room to introduce change at their own pace, as long as the competing interests have been weighed in the national legislative process, and as long as they keep this area under review.<sup>273</sup>

Although the life, physical integrity and personal autonomy of pregnant women enjoy protection as rights under the ECHR, the ECtHR has repeatedly held that neither Article 8 ECHR, nor any other Convention Article, can be interpreted as conferring a right to abortion. Nonetheless, it has found that a prohibition on abortion for reasons of health and/or well-being amounted to an interference with the right to respect for private life. Further, it has held that the right to respect for private life incorporates the right to respect for the decision not to become a (genetic) parent. From the *A, B and C* case it follows that a State may completely ban abortion on such grounds, as long as it allows women the option of lawfully travelling to another State to undergo an abortion and as long as women have access to appropriate information

<sup>273</sup> ECtHR [GC] 3 November 2011, *S.H. a.o. v. Austria*, no. 57813/00, paras. 103 and 118. The Court accepted that States adopt rules in this area which do not provide for the weighing of competing interests in the circumstance of each individual case.



and medical care before and after the abortion. The burden of travelling as such was not considered in violation of the Convention.

On the other hand, it must be borne in mind that the Convention only sets a minimum standard and that States are free to offer a higher level of protection to the Convention rights. Also, there has been an increasingly greater impact of the ECHR on national abortion regimes through the Court's procedural approach in these matters. Apart from violations of the right to respect for private life (Article 8), this has even resulted in the finding of a violation of Article 3 ECHR (the prohibition of inhuman and degrading treatment). A similar impact of the ECtHR's case law is visible in the area of AHR. States must shape their legal frameworks in the area of reproductive matters '[...] in a coherent manner which allows the different legitimate interests involved to be adequately taken into account.'<sup>274</sup> In *Costa and Pavan* this resulted in an obligation for Italy to legalise PGD. States must, furthermore, provide for an independent authority that can decide about access to information about one's genetic origins (see section 2.1.4 above).

Hence, while principled choices in reproductive matters are left to the States, the fact that reproductive matters fall within the scope of the Convention means that, as soon as a State regulates this area of law, certain general obligations resulting from the Convention apply. As the discussed case law shows, these entail that the right or entitlement granted at national level must be effective, and that the relevant legislation must be coherent and allow for the different legitimate interests involved to be adequately taken into account. In abortion situations this means concretely that the pregnant woman has the right to be heard in person, that the competent body or person should issue written grounds for its decision and the woman must be given timely access to information about her and the foetus' health. The right or entitlement must, furthermore, be granted in a non-discriminatory manner,<sup>275</sup> although the Court has also held a same-sex couple as not being in a similar situation to infertile different-sex couples with regard to access to AHR treatment (see section 2.3.1 above).

The ECtHR's case law has also had an impact on the States' standard-setting in cross-border situations. In respect of cross-border abortions, States must ensure that women can freely travel to another country, that they have access to information about foreign abortion options and that they have access to follow-up treatment upon return to their home countries. These minimum requirements were, at the same time, considered sufficient to justify very restrictive national abortion legislation (see section 2.2.3). In cross-border surrogacy cases, States must recognise parental links

<sup>274</sup> *Idem*, para. 100.

<sup>275</sup> The Chamber judgment in the case of *S.H. and Others v. Austria* (2010) (see sections 2.3 and 2.3.3 above) illustrated this approach well. While the Convention does not guarantee a right to access to assisted human reproduction, the Chamber held that the prohibition of discrimination entailed that an Austrian prohibition on IVF treatment with the use of donor gametes could not be justified. This judgment was, however, overruled by the Grand Chamber, and such reasoning has since not been repeated by the Court.

established abroad between a genetic intended father and a child born with a surrogate mother in a foreign country. Here, the Court based its reasoning completely on the right to personal identity of the child, and this was, in *Menesson* and *Labassee*, also ground for narrowing the margin of appreciation.

All in all, it seems that the Court's case law in reproductive matters, particularly in the field of assisted human reproduction and surrogacy, is not yet crystallised. The Court has stressed that this area needs to be kept under review by the Contracting States, and at the time of conclusion of this research (i.e., 31 July 2014) various cases were still pending, which could potentially challenge the Court to tackle (more) substantive claims.

