Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective

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9 Case Analysis

Children's Rights to the Fore in the European Court of Human Rights' First International Surrogacy Judgments

Abstract

As the world's foremost regional human rights court, it was only a matter of time before the European Court of Human Rights would confront applications concerning ICS situations. The Court did so in its first international surrogacy judgments: *Mennesson v. France* and *Labassee v. France*. Given the treatment of the rights of the children involved in those cases and the findings therein, this Chapter spotlights these judgments and provides analysis of the findings of the Court. By taking a strong child-centred approach, the Court highlighted the vulnerability of children in ICS arrangements. Significantly, the Court's judgments focus on the child's rights to nationality and identity; therefore, the discussion presented in the case analysis builds on the previous two chapters of this study, providing a further opportunity through which to view these rights of the child in the practical ICS context. This Chapter discusses the impact of these judgments in Europe and internationally, as Governments grapple with the complexities and impacts of ICS arrangements, in particular relating to the rights of children born through this new method of family formation. Although the Grand Chamber of the European Court of Human Rights has dealt with subsequent applications concerning ICS since passing the judgments this Chapter focuses on, the discussion presented in this Chapter provides insight into the reasoning of a judicial body grappling with ICS as a novel issue. It highlights the roots of the Court's approach in relation to some of the child rights dimensions raised by ICS.

Main Findings

- The findings of the Chamber of the European Court of Human Rights in the *Mennesson* and *Labassee* judgments emphasise that the child's right to identity is of central importance to the right to respect for private life under Article 8 of the European Convention on Human Rights.
- The Court observed that nationality is an important element of identity, and that uncertainty regarding ones' ability to acquire nationality can negatively impact on identity formation.
- In the judgments, the Court attached significant weight to the biological link (based on DNA) between the children and their commissioning fathers,

saying this is another element of identity and that it was not in the children's best interests to deny legal recognition of this link.
- The Court held that the balance struck between the children's best interests and the other interests at stake – including the public interests that the French Government argued it was seeking to protect – was incorrect, because the children's best interests were not satisfactorily upheld.
- These judgments can be understood as strong children's rights judgments, owing to the Court's approach to examining the practical reality of the children's situations, and considering their circumstances in relation to their commissioning parents, with the Court placing a primary focus on what was in the children's best interests.

Contextual notes

- Since the time of writing this Chapter, in January 2017 the Grand Chamber of the European Court of Human Rights issued its first ICS judgment, in *Paradiso and Campanelli v. Italy.*
- Given the significance of the Grand Chamber's judgment in the development of ICS jurisprudence, an Addendum to Chapter Nine is included as part of this doctoral thesis, presenting an overview of the Grand Chamber's decision and brief analysis of the judgment from a child rights perspective.

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1 Introduction

The concept of 'family', including how it is formed and structured continues to change and evolve in the twenty-first century, largely facilitated through scientific and technological advances and enabled by shifting attitudes and greater societal acceptance of new versions of what it means to have and be part of a family. Sitting within this wider context, international commercial surrogacy (ICS) has developed over the past decade as a significant issue in international family law. Increasingly however, it demands recognition as a complex human rights challenge. This is particularly the case regarding the rights of children in ICS arrangements, given that their rights are acutely at risk due to the circumstances of their conception and birth in this manner. The human rights of women are also jeopardised through ICS, given the central role they play as surrogate mothers in such situations. Their involvement is often by virtue of their own economic marginalisation and in the context of a supply and demand situation whereby commissioning parents from more developed countries (as is the tendency) are reliant on the reproductive function of such women to have children through ICS. National courts in many

jurisdictions world-wide have been wading into ICS cases for some years now, albeit largely reluctantly given the abundance of ethical, legal and rights-based issues involved, and the associated difficulties in applying out-moded national legislation, ill-suited to the complexities of such matters.

However, the human rights issues raised by ICS situations have been notably absent amongst cases reported from regional human rights systems and courts. Given this, the recent judgments of the European Court of Human Rights in the joint Chamber applications of *Mennesson v. France* (Application No.61592/11)[1] and *Labassee v. France* (Application No.65941/11)[2] represent a turning point in international surrogacy jurisprudence. For the first time, the Court has adjudicated applications concerning ICS; in dealing with these applications under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[3] the Court has taken some initial steps towards confronting the human rights issues faced by many of the parties involved in ICS arrangements. Yet with its first international surrogacy judgments, the Court has resolutely established a strong platform for the significance and importance of the rights of the child in ICS situations. In relation to the issues before it, notably the Court's judgments in both *Mennesson* and *Labassee* place a clear focus on the rights of the child. In doing so, the Court has upheld the best interests and broader rights of the child in the context of the right to respect for private life under the Convention in forthright and commendable fashion, which will have an impact in France, Europe and beyond.

2 Children in limbo for over ten years

Both the *Mennesson* and *Labassee* applications concerned children born in the United States as a result of married, heterosexual French couples commissioning (separate) international commercial surrogacy arrangements with American birth mothers. In the Mennesson's case, the surrogacy arrangement with a surrogate mother in California resulted in twin girls; the Labassee's arrangement with a surrogate mother in Minnesota led to the birth of a female child. In both cases, the children are genetically related to their commissioning father, but not to their commissioning mother (the conception of the children was enabled through the use of donor oocytes). The applicants to the European Court of Human Rights in each case were the commissioning parents together with the children themselves.

1 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014.
2 *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014.
3 Convention for the Protection of Human Rights and Fundamental Freedoms (1950; CETS No.005; ECHR). The articles of the ECHR referred to in this Case Analysis refer to the ECHR as amended by Protocol No.11 and Protocol No.14.

In France, all surrogacy, whether altruistic or commercial, is illegal under Article 16-7 of the code civil. This provision is one of public order (*l'ordre public)*, aimed towards preserving and protecting the fundamental values and morals of French society. Regarding surrogacy, this is directed towards preventing the exploitation of women and their reproductive functions, and the commodification of children among other things. Breaching the French ban on surrogacy is a criminal offence, subject to imprisonment and fines. Both the Mennesson and Labasee couples experienced infertility, leading them to pursue international surrogacy. What they did not foresee was the extremely uncertain legal status that the children born through such arrangements would experience, due to the nature of their conception and birth in another state which allows surrogacy under law. In fact, these children have been in a state of legal limbo since birth: for 14 years (Mennesson twins) and 13 years (Labassee child) respectively.

'How and why did the children's uncertain legal status persist?' one may well ask. Put simply, the French Government refused to register the children's births in the French civil register (l'état civil français), blocking them from being recognised as French citizens, and leading to the children not being afforded a number of other rights and entitlements. Although the children (all of whom hold American nationality) have been allowed to enter and live in France with their commissioning parents, no legal parental relationship has been able to be established under French law. This occurred despite the existence of American court judgments (from the Supreme Court of California and the Court of the State of Minnesota) finding both sets of commissioning parents always intended to care for and raise the children as their own; that the birth mothers involved both consented to their parental rights ending with the Court judgments; and recognising the filial relationship of the commissioning parents in relation to their children under the applicable American state laws. Due to the French failure to recognise the children's relationship with their commissioning parents under French law, the odd situation has existed whereby the children have been living and growing up in France with and cared for by their commissioning parents, yet without any filial link to these people, who have been their parents – in the social sense, and in respect of the fathers, in a genetic sense – since their birth.

3 Arguments in the European Court of Human Rights

On the basis of this refusal to register the children's births in the French civil register, the applicants in *Mennesson* and *Labassee* claimed breaches of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which establishes the right to respect for family and private life. The arguments supporting these claims focussed strongly on the need for the State to make decisions concerning children consistent with its

obligations under the United Nations Convention on the Rights of the Child (CRC).[4] The applicants argued the deprivation of filiation left the children without legal protection regarding their status in their family units, and that this filiation was legitimate, based not only on the genetic link to their fathers, but also the recognition under United States law of the relationship between the children and their commissioning parents (both the fathers and mothers). The applicants pointed to the practical realities of the children being without French legal recognition, including having no certificate of French nationality, no French passport, restricted freedom of movement, lack of a valid residence permit, inferior inheritance rights, the impossibility of gaining the right to vote in France, and the burden of dealing with administrative matters related to schooling and social security as non-French children, without filial links to their commissioning parents. Along with other difficulties they faced, these things hindered their ability to have a normal family life and caused heavily disproportionate repercussions for the children.

Moreover, the applicants said the decision to refuse registration ignored the concrete circumstances of the parent-child relationship, both socially and biologically. Here, the applicants relied on the Court's Chamber judgment in *Wagner and J. M. W. L. v. Luxembourg*[5] pointing to a government failure to take into account the 'social reality' of the situation in relation to legal protection of the children. Whilst the applicants acknowledged the State benefited from a wide margin of appreciation regarding surrogacy, they argued that the requirement to take into account the best interests of the child effectively restricts the margin of appreciation. The applicants argued the refusal to register the children in the French civil register was therefore a decision not in the best interests of the child under the CRC.

In response, the French Government's arguments rested heavily on the aims underlying the prohibition of surrogacy in France, including guarding against the commodification of the human body and protecting the best interests of the child. The Government posited that surrogacy is a matter of moral order and ethics, and in the absence of consensus amongst Council of Europe High Contracting Parties, States have a wide margin of appreciation. In an argument that neatly encapsulates the legal bind that many countries are finding themselves in relating to the question of how to approach international commercial surrogacy, the French Government asserted that given the illegality of surrogacy in France, recognising the legal status of the practice outside France would amount to de-facto acceptance of an intentional circumvention of French law. This would lead to an inconsistent and therefore untenable position. The code civil must be upheld in order to prevent criminal offences against the public order; in this regard, the Government noted the genetic link between the children and their French fathers could not be

4 UNTS vol. 1577, p.3, entry into force September 2, 1990.

5 *Wagner and J. M. W. L. v. Luxembourg* (App. No.76240/01), judgment of June 28, 2007.

recognised as amounting to paternity under French law, given the evasion of the code civil which had occurred.

Regarding the practical situation of the children arising through their lack of filiation, the Government put forward the view that the commissioning parents (that is, both Mr and Mrs Mensseson and Mr and Mrs Labassee) exercise full parental authority based on the American court judgments, and administrative hurdles have been overcome satisfactorily, with family life taking place in a 'normal' manner. Moreover, the Government said the commissioning parents should not have ignored French law in the first place; in doing so, they should have been aware of the difficulties they would likely face as a result. The response of the French Government in not registering the children was therefore, according to the French Government itself, proportionate in light of the aims pursued through the law.

4 Judgments in the European Court of Human Rights

The European Court of Human Rights, faced with decision-making in the first applications concerning international commercial surrogacy before it, interestingly found that although an interference with the applicant's right to respect for their family life existed, there had not been a violation of Article 8 in this respect.[6] The Court's rationale for not finding a violation of any of the applicant's right to respect for family life is clear through the Court's weighing of the fact that the practical difficulties the families faced were not insurmountable, and the impact of the lack of filiation under French law against the State's margin of appreciation (which was wide, based on the comparative law analysis undertaken by the Court, highlighting a lack of consensus amongst Council of Europe members around surrogacy). The Court said all the children were in practice able to live as a family with their commissioning parents, from quite soon after birth; the lack of French nationality for the children did not threaten the stability of the family unit; there was no apparent risk of the authorities separating them due to the absence of filiation under French law. It was on this basis that the Court was able to find that although there was an interference with the applicant's right to respect for family life under Article 8, there was no violation in this respect; ultimately, the Cour de Cassation had struck a fair balance in its decisions, between the interests of the applicants and the State regarding respect for family life.

Regarding the right to respect for private life under Article 8 however, the Court found a violation of the children's rights (but not their parent's right

6 For the Court's reasoning for its finding that there was no violation of Article 8 regarding the right to respect for family life, see *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 at [87]-[95]; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 at [66]-[74].

to respect for private life) in both cases. In making this finding, the Court placed heavy emphasis on the overriding importance of the rights of the children (albeit concerning their relationships with their parents). Costs were awarded, along with compensation to the children for moral damage (€ 5000 each).

5 Multifaceted concept of identity central to private life

Significantly, especially given none of the applicants in either case argued a violation of Article 8 connected to uncertainty around the children's identity, the Court's finding of a violation of the right to respect for the children's private lives turned heavily on the issue of their right to identity and what this entails. The Court stated that respect for private life under Article 8 of the ECHR requires that a person can establish their identity as a human being, an essential aspect of this being their filiation.[7] The denial of filiation under French law in the situations of the Mennesson and Labassee children had led to a situation of legal uncertainty for those children. The lack of legal recognition they endured amounted to an infringement on their right to identity, given its impact on their very ability to establish their identity. Furthermore, the Court importantly observed that nationality is an aspect of identity; the children faced indeterminate uncertainty regarding their ability to acquire French nationality, which the Court said was likely to negatively affect the formation of their identities.[8]

Linked to the impairment of identity through lack of filial recognition under French law, the Court found the children would be treated less favourably regarding their succession rights vis-à-vis their parents. In practice, the children would only be able to inherit from their parents as third parties, which the Court viewed as a deprivation linking to their inability to fully establish their identities.[9] The existence of a biological link between the children and their commissioning (and therefore their genetic) fathers was another significant consideration for the Court in reaching its decision that France had violated the children's rights to respect for private life. Finding that biological filiation is a further important aspect of identity, the Court said it is not in the children's best interests to deny recognition of this under law, given it is not reflective of the biological reality of the children's situation.[10] The consequences

7 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 at [80] and [96]; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 at [75].

8 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 at [97]; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 at [76].

9 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 at [98]; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 at [77].

10 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 at [100]; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 at [79].

of this serious restriction on identity in this respect meant the Court found France had exceeded its margin of appreciation.

Overall regarding the right to respect for private life, the lack of filial connection established under French law and the bearing this had on the substance of the children's identity (and therefore their right to preserve their identity under Article 8 of the Convention on the Rights of the Child[11]) left them in a position incompatible with their best interests, which the Court stated must guide any decision concerning them (as per Article 3 of the CRC, which establishes the 'Best Interests' principle[12]).[13] The Court, in balancing the interests at stake, found the balance reached by the State was incorrect, as it did not uphold the best interests of the children satisfactorily.

6 Children's rights to the fore

Although the judgments of the European Court of Human Rights in *Mennesson* and *Labassee* can be read as continuing the potentially concerning trend in the international commercial surrogacy context of law-making through judicial intervention – which is already happening in some domestic jurisdictions – the judgments should first and foremost be understood in large part as a 'win' for children's rights. Whilst the Court did not engage (and indeed, did not need to in order to rule on the matters at hand) in any issues related to the wider ethics and legality of the practice of ICS (for example, commodification and sale of children; the potential for child trafficking; coercion and exploitation of women acting as surrogates; reproductive rights, autonomy and health of women; issues of global injustice between more and less-developed states), it reached its decision with the rights of the child top-of-mind. In adopting an unambiguous, child-centred approach in its judgments in both *Mennesson* and *Labassee*, the Court's Chamber has planted a stake in the ground; in matters of ICS, the rights of the child should be a central concern for all those involved in making decisions pertaining to children born through such arrangements.

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11 UNTS vol. 1577, p.3, entry into force September 2, 1990. Article 8(1) establishes that "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

12 UNTS vol. 1577, p.3, entry into force September 2, 1990. Article 3(1) establishes that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Adherence to the best interests of the child is one of the four general or guiding principles of the CRC (which form general requirements for all rights under the CRC), the others being non-discrimination (Article 2), the child's right to life, survival and development (Article 6), and respect for the views of the child (Article 12). See U.N. Doc. CRC/C/58 at section III, pp.9-13 (1996).

13 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 at [99]-[101]; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 at [79]-[80].

The strength of the judgments lies in the fact that the Court examined the children's situations in relation to their commissioning parents with regard to what was in the children's best interests. By necessity, this required the Court to take a view of the children's situation grounded in practical reality; the Court did not shy away from this. It is important to remember that the Mennesson and Labassee children had been living with their commissioning parents since birth, for well over a decade; they are the genetic children of their commissioning fathers (who are, therefore, both their social and genetic parents). Significantly, the central thrust of the Court's reasoning, focussing on the substantive right to identity, points towards an urgent need for greater efforts by all those involved in dealing with ICS situations to give effect to Article 8 of the CRC (protecting the child's right to preserve their identity), and by extension, Article 7 of the CRC (protecting birth registration, nationality and filiation).[14]

Moreover, the emphasis the Court placed on the importance of establishing filiation in these ICS cases highlights the criticality of the child-parent nexus to identity formation, and its role in fulfilling the right to respect for private life. Had the children and parents involved in these applications not been able to live together as a family unit in France, it seems very likely the Court may well have been open to finding a violation of the right to respect for family life too (and this may well have extended to a finding of a violation regarding not only the children, but their parents as well).

Despite the European Court of Human Rights' strong focus on the right to identity in deciding these cases – and indeed, the importance it placed on the existence of a biological link between the children and their commissioning fathers – it is a shame the Court did not make any mention (in obiter dicta or otherwise) of the full picture concerning their genetic and biological makeup. Although not necessary to decide the applications, the judgments would have been strengthened through the Court at least observing that the children's genetic relationship with their genetic mothers (oocyte donors), and biological relationship with the women who carried them to term and gave birth to them (through acting as their surrogate mothers), forms another significant aspect of their identity, and one which steps should be taken to protect and preserve knowledge of. Judicial discussion by the Court of this aspect of identity would have highlighted this reality, relevant for all children born through ICS. Furthermore it would have led to a more holistic approach in considering the rights of the child in cases such as these, and extended understanding of what is required in order to fully uphold a child's best interests in ICS situations, consistent with their rights under the CRC.

14 UNTS vol. 1577, p.3, entry into force September 2, 1990. Article 7(1) provides that "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

In the future, the Court may well be confronted with a factual scenario requiring it to confront the broader human rights issues at play in international commercial surrogacy situations, including the intersection of the rights and interests of the various parties involved in such situations. The Court should be applauded placing such strong emphasis on children's rights in its judgments in the *Mennesson* and *Labassee* matters. In doing so, it has brought sharp focus to the reality of ICS that it is a phenomenon driven towards producing a child, that the child is the person at the centre of such arrangements and yet often it is the child's rights which are least considered and protected in the course of their conception, birth and life thereafter. However, in future the Court may have to deal more explicitly with the rights of the other parties involved in international commercial surrogacy arrangements, or at least consider them. Although the most likely other parties in international commercial surrogacy situations whose rights the Court will need to examine more closely are the commissioning parents, the rights of gamete donors (and therefore genetic parents) and of surrogate mothers are likely to also be of relevance and importance. This will present the Court with a complex web of rights issues to untangle, requiring a delicate balancing assessment on the basis of specific circumstances.

For example, regarding the rights of women in international commercial surrogacy, these intersect at a number of points with the rights of the child and may well present a clash of rights.[15] Women acting as surrogates in ICS may not do so of their own free will, and may be pressured or in extreme cases coerced into ceding their reproductive autonomy. Such situations can involve the commissioning parents of the surrogate herself wishing to abort the foetus, bringing the surrogate woman's rights into conflict with the commissioning parent's interests or in direct conflict with the rights of the future child. Moreover, as in a traditional domestic surrogacy situation, the actions of the surrogate in ICS during the pregnancy (in particular regarding personal health and lifestyle decisions) may have a bearing on the health and development of the future child, again bringing rights into potential conflict.

Finally in terms of women's rights in relation to the rights of the child born through ICS, as much as the child has a right to preserve their identity and therefore know the identity of their birth mother, it is arguable that the surrogate woman herself has a claim to know the child she carries to term and births, despite the intention and understanding that she will provide that child to the commissioning parent(s) upon birth. From a genetic identity perspective, this may also be the case for women who act as oocyte donors in ICS, and are therefore the genetic mothers of international surrogate children. Here, the realisation of the child's identity rights is intimately linked to and will in part

15 The preamble of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, UNTS vol. 1249, p.13, entry into force September 3, 1981 recognises that "the role of women in procreation should not be a basis for discrimination".

be reliant on the decisions made by donor mothers as to whether they are willing to be known to their genetic offspring. In this connection, it will be interesting to see whether the European Court of Human Rights is presented in future with the opportunity to not only extend its jurisprudence relating to ICS, but also its wider body of decisions relating to reproductive rights and assisted human reproduction under Article 8 of the ECHR, and the right to become or not become a parent, as well as the significance of the genetic parent-child relationship.[16] Indeed, there is certainly potential for these issues to dovetail in applications involving children born to European commissioning parents through ICS arrangements involving European surrogate mothers and/or oocyte donors.[17]

7 French Government reaction and future implications of the *Mennesson* and *Labassee* judgments for human rights in the context of international commercial surrogacy

Following publication of the judgments, the French Minister for Families announced France will not appeal the Court's decisions, meaning the decisions will be incorporated into French law, and children born outside of France to French commissioning parents through surrogacy will be recognised as French citizens. Furthermore, the judgments have now become final, given that no request was received by the Court for referral of the judgments to the Grand Chamber within the request for referral period following the Chamber's judgments.[18] The immediate impact of the judgments will not be restricted

16 Within the Court's pre-existing body of jurisprudence in this respect, see for example *Evans v. United Kingdom* (2008) 46 E.H.R.R. 34; *Dickson v. United Kingdom* (2008) 46 E.H.R.R. 41; *SH and others v. Austria* (App. No.57813/00), judgment of November 03, 2011 [GC]; *Costa and Pavan v. Italy* (App. No.54270/10), judgment of August 28, 2012; *Knecht v. Romania* (App. No.10048/10), judgment of October 02, 2012; and the pending application *Nedescu v. Romania* (App. No.70035/10).

17 In fact, the pending application of *Paradiso and Campanelli v. Italy* (App. No. 25358/12) may provide such an opportunity, given the matter involves Italian commissioning parents and a surrogate mother in Russia (the nationality of both the genetic mother and father remain unclear on the facts before to the Court to date).

18 Article 43-44 Convention for the Protection of Human Rights and Fundamental Freedoms (1950; CETS No.005; ECHR). Article 43(1) states that "Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber." Article 44(2)(b) states that the judgment of a Chamber shall become final "three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested". The ECHR Press Unit confirmed to the author of this Case Analysis (via email on October 01, 2014) that *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 and *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 became final on 26 September, 2014, as no requests for referral to the Grand Chamber were received by the Court regarding either judgment.

to the three children in the *Mennesson* and *Labassee* cases; one estimate says children in similar situations born as a result of French parents undertaking international surrogacy now number some 2000.[19] Extrapolating out to wider Europe, the impact is potentially much greater, given the expectation on other Council of Europe members to adhere to the Court's judgments (erga omnes character of judgments), consistent with the principle of subsidiarity underlying the Court. Other members upholding the res interpretata effect of the Court's decisions in regard to the Court's decisions in *Mennesson* and *Labassee* may at least prevent a future stream of international surrogacy situations relating to filiation from clogging the Court's docket.

In terms of the future implications of these decisions, it will be interesting to see what approach the Court will take in an application concerning children born through ICS with no biological link to either of their commissioning parents. Such a factual scenario is currently pending before the Court in the application of *Paradiso and Campanelli v. Italy* (App. No. 25358/12). The application presents an extremely complex ICS situation involving a child born to Italian commissioning parents and a surrogate mother in Russia; DNA tests show neither of the commissioning parents are genetically related to the child, despite the commissioning parents intending there would be a genetic link between the child and the commissioning father (therefore the child's genetic identity remains unknown). Pursuant to an Italian Court order, the child was removed from the commissioning parents and is residing in a child welfare institution; the applicants are prevented from having contact with the child. Their application is brought in reliance on Articles 6, 8, and 14 of the ECHR and Article 1 of Protocol No. 12 to the Convention. Notably however, in its *Mennesson* and *Labassee* judgments, whilst emphasising the importance of the genetic link between the children and the fathers, the Court did not explicitly state that the existence of a genetic link between a child and a commissioning parent is so critical that it must be present for filial recognition in law in ICS situations.

Whether this is an intentional door left open, or simply something the Chamber did not wrestle with in reaching its decision is hard to say. However, it appears that the Court will very likely have to deal with this issue explicitly in *Paradiso and Campanelli v. Italy*, given it is faced with a child who has no genetic link to its commissioning parents, and a claim by those commissioning parents that the refusal to recognise parentage under Italian law violates their and the child's Article 8 rights (in conjunction with other ECHR rights).[20] A

19 James Brooks, 'France to recognise children born via surrogates abroad', *BioNews* 761, July 07, 2014, available from http://www.bionews.org.uk/page_434635.asp [Accessed September 20, 2014).

20 Moreover, the Court may find itself in a situation where a finding of a violation of Article 8 in terms of right to respect for family life (as well as private life) is more likely, given that unlike in the *Mennesson* and *Labassee* situations, *Paradiso and Campanelli* concerns a child and commissioning parents who have been prevented from living together and from having

further difficult test for the Court would be the extent to which it would apply similar lines of reasoning to applications regarding potential future (conceived but as yet unborn, or simply planned) children commissioned through ICS, as distinct from already existing children who are born this way. Again, should applications come before the Court on the basis of such situations, opportunities may exist for the Strasbourg jurisprudence relating to ICS to grow, and to for its jurisprudence relating to wider issues of reproductive rights, the unborn child and the right to life to be extended.

More widely, the *Mennesson* and *Labassee* decisions are emblematic of the fact that the status of the child and legal parentage is in an evolutionary phase, due to the rise of ICS. Increasingly, the executive, legislative and judicial branches of government in countries around the world are being confronted with complex issues arising out of ICS situations. Some, such as Ireland, are currently grappling with these issues through both the Courts and the legislative development process.[21] The European Court of Human Rights, in reaching these decisions has highlighted the paramountcy of the best interests of the child in ICS situations. Helpfully, the Court has also provided clear direction as to what it views as essential to the substance of the child's right to identity, which will deepen understanding of this concept from a legal perspective. In this vein, the Court's judgments in *Mennesson* and *Labassee* are important given their role in clarifying the significance of the nexus between the child's right to identity and to nationality. Given that the spectre of statelessness is a reality for children born through ICS, the Court's emphasis on nationality as an element of identity underscores the obligation on states to ensure children are able to acquire a nationality, and are not rendered stateless in ICS situations.

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contact. However, the Court's determination regarding the significance of a genetic link could be the first crucial issue that the other subsequent issues raised in the application will then turn on.

21 The Children and Family Relationships Bill 2014 is a landmark piece of draft legislation setting out fundamental reforms to Irish family law, including provisions relating to international commercial surrogacy and children conceived and born through assisted reproductive technology. At the time of time of writing this Case Analysis, the Bill is under consideration by the Irish Government. The Irish Ombudsman for Children published Advice on the General Scheme of the Children and Family Relationships Bill 2014 in May 2014. Among other things, the Ombudsman emphasised the need for clear laws on international commercial and altruistic surrogacy consistent with the best interests of the child, as well as the importance of the child's right to preserve their identity when born through international surrogacy or via assisted reproductive technology. The Ombudsman's advice is available from http://www.oco.ie/wp-content/uploads/2014/06/OCOAdviceonChildandFamilyRelBill2014.pdf [Accessed September 20, 2014). The Irish Courts have been actively dealing with cases of both domestic and international surrogacy over recent years; a landmark appeal is pending before the Supreme Court of Ireland which may have significant implications for parties to surrogacy arrangements with a connection to Ireland (case on appeal: *M.R & Anor -v- An tArd Chlaraitheoir & Ors* [2013] IEHC 91, judgment of Abbott J. of March 05, 2013).

Outside Europe, the Court's judgments in *Mennesson* and *Labassee* should be of interest to all States which find themselves on the demand or supply-side of ICS as it continues to grow internationally. Given the recent supply-side growth of the ICS market in Asian countries (and the demand flowing from within the Asia-Pacific region as well as from Europe and North America), human rights issues in ICS are likely to continue to come before national courts in the Asia-Pacific region for adjudication.[22] Given the lack of a regional human rights court in this region of the world, the judgments of the European Court of Human Rights on this subject may therefore play an important role in national judicial determination of ICS cases, based on their persuasive value. The judgments will also be of particular interest to the Members of the Hague Conference on Private International Law, as its Permanent Bureau continues work at the request of its Members into the viability of a private international law convention addressing child status and parentage in international surrogacy situations.[23] Perhaps, however, it is the audience that the judgments are least likely to reach, namely prospective commissioning parents around the world, who the Court's findings could have the most important impact on. The legal limbo and associated consequences experienced by the Mennesson and Labassee children is surely a cautionary example of the potential risks involved in international commercial surrogacy arrangements. One would hope it is a clarion call for prospective commissioning parents to rigorously consider the likely impact on their potential future children, before taking a leap into this brave new world of human reproduction to create them.

22 Indeed, among others, the recent case of Baby Gammy, born to Australian commissioning parents and a Thai surrogate mother in Thailand is illustrative of the human and children's rights issues being raised in the Asia-Pacific region through international commercial surrogacy. The case received international media attention in August/September 2014 due to the fact that Baby Gammy, born with Down syndrome, was left in Thailand with his surrogate mother whilst his twin sister was taken to Australia by the twin's commissioning parents. The commissioning father's past child abuse convictions came to light as a result of media attention and an investigation was launched by Australian child welfare authorities into the welfare of the baby girl. The Thai government reacted with plans to outlaw international commercial surrogacy in Thailand.

23 This work is being dealt with as a project entitled "The private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements". See for further information http://www.hcch.net/index_en.php?act=text.display&tid=178 [Accessed September 20, 2014].

ADDENDUM TO CHAPTER 9:

BRIEF CASE COMMENTARY – *PARADISO AND CAMPANELLI V. ITALY*, GRAND CHAMBER OF THE EUROPEAN COURT OF HUMAN RIGHTS

1. Introduction

Chapter 9 of this doctoral thesis presented a case analysis of the first European Court of Human Rights (ECtHR) judgments concerning ICS, both issued by the Chamber of the Court's Fifth Section. However, in January 2017, the Grand Chamber of the ECtHR issued its first ICS judgment, in the case of *Paradiso and Campanelli v. Italy*.[24] Given the landmark nature of this judgment, this Addendum to Chapter 9 is included as part of the present doctoral thesis, to provide an overview of the Grand Chamber's decision and a short analysis of the case from a child rights perspective.

2. The circumstances of the case

The circumstances of the case are complex and are comprehensively outlined by the Grand Chamber in Section I of its judgment.[25] To summarise the most pertinent facts, after being approved to adopt a child in Italy but not having been offered a child to adopt,[26] the applicants had commissioned a child through ICS via a clinic in Russia. The male applicant's sperm was provided to create the embryos which were implanted into the surrogate for the purposes of the surrogacy,[27] and the use of his sperm was certified by the surrogacy clinic.[28] The surrogate gave birth to a child on 10 March 2011 and provided her written consent to the child being registered as the applicants' child.[29] The child was registered in Russia and a Russian birth certificate was issued, listing the applicants as the child's parents.[30] In the days following the child's birth, the female applicant and the child moved to live together in a rented flat in Moscow (she had travelled to Moscow, however, the male applicant had remained in Italy).[31]

The female applicant and the child travelled to Italy (arriving on 30 April 2011)[32] after having obtained documentation from the Italian Consulate in Moscow allowing her to travel to Italy with the child.[33] Subsequently, criminal proceedings were initiated by the Italian authorities against the applicants, on the grounds that by bringing the child to Italy they had acted in violation of the Italian Criminal Code

24 *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment (Grand Chamber), 24 January 2017.
25 *Ibid*, at [8]-[56].
26 *Ibid*, at [9]-[10].
27 *Ibid*, at [11].
28 *Ibid*, at [12].
29 *Ibid*, at [14].
30 *Ibid*, at [16].
31 *Ibid*, at [15].
32 *Ibid*, at [18].
33 *Ibid*, at [17].

and the Adoption Act.[34] Concurrently, proceedings were initiated by the Public Prosecutor to have the child made available for adoption because he was determined to be in a state of abandonment under the law; a *guardian ad litem* was appointed for the child.[35]

The applicants challenged the authorities' measures to place the child under guardianship;[36] the Italian authorities' social workers reported the applicants were caring for the child to the highest standards.[37] DNA testing of the child and male applicant revealed that no genetic link existed between them,[38] and the applicants' request to register the particulars of the child's birth certificate in the Italian civil status register was refused.[39]

The Campobasso Minors Court subsequently ordered the child be removed from the applicants' care and be taken into social services' care and placed in a children's home;[40] the applicants said the decision was enforced the same day as the order was made, without advance notice.[41] At the time of his removal, the child had been in the applicants' care for approximately eight months.[42] The applicants appealed this decision; the Campobasso Appeal Court dismissed their appeal, finding the child was in a state of abandonment given the applicants were not his parents.[43] Ultimately, the child never returned to the care of the applicants; he lived in a children's home for approximately 15 months and all contact between the child and the applicants was prohibited.[44] Later he was formally adopted into another family.[45]

3. *The central issues before the Grand Chamber*

As previously noted in Chapter Eight of this doctoral thesis, the Chamber of the ECtHR held in its 2015 judgment in the case[46] that *de facto* family life existed between the applicants and the child under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[47] and that there had been an interference with the applicants' *de facto* family life[48] and the male applicant's private life.[49] The Chamber further held that the interference amounted to a violation

34 *Ibid*, at [21].
35 *Ibid*, at [22].
36 *Ibid*, at [23]-[33].
37 *Ibid*, at [25].
38 *Ibid*, at [30].
39 *Ibid*, at [32].
40 *Ibid*, at [36]-[37].
41 *Ibid*, at [38].
42 *Ibid*, at [152].
43 *Ibid*, at [40].
44 *Ibid*, at [49].
45 *Ibid*, at [50]-[55].
46 *Paradiso and Campanelli v. Italy*, Application No 25358/12, Merits and Just Satisfaction, 27 January 2015.
47 Convention for the Protection of Human Rights and Fundamental Freedoms (1950; CETS No.005; ECHR).
48 *Supra* n.23, at [67]-[69].
49 *Ibid*, at [70].

of Article 8, because by removing the child, the authorities had not struck an appropriate balance between the interests at stake.[50] However, due to the child having developed an attachment with his foster family, the Chamber ruled the State was not obliged to return the child to the applicants.[51]

At appeal, the central issues before the Grand Chamber were a) the applicability of Article 8 to the case; b) whether the measures taken by the Italian authorities resulting in the child's removal amounted to an interference with the applicants' Article 8 rights; and c) whether those measures were taken consistently with Article 8(2) of the ECHR.

N.B. In its judgment in *Paradiso*, the Grand Chamber for the most part distinguishes its judgments in *Mennesson v. France* and *Labassee v. France*. It does so largely on the basis that in those cases, a genetic link existed between the children involved and at least one of their commissioning parents.[52] Furthermore, in *Paradiso*, the child was not an applicant before the Court.[53]

4. The main findings of the Grand Chamber

a) Applicability of Article 8

The Grand Chamber overturned the Chamber's view regarding family life, holding that no family life had existed between the applicants and the child – it said the child was not and had never been a member of the applicants' family.[54] The reasons the Grand Chamber gave for its conclusion that no family life existed between the applicants and the child were: because a genetic link did not exist between the child and the applicants; the length of time of their relationship with the child (eight months) was viewed as being short; and the fact of the lack of legal basis to their relationship with the child. The Grand Chamber reached this view regarding family life despite acknowledging the quality of the emotional bond between the applicants and the child, and the applicants' demonstrated 'parental project'.[55]

b) Interference with the applicants' Article 8 rights

However, the Grand Chamber said that the applicants were affected by the judicial decisions which led to the child's removal into social services' care with a view to adoption. The Grand Chamber found that the removal of the child, his placement in a children's home without any contact with the applicants, and his subsequent placement under guardianship with a view to his adoption amounted to an interference with the applicants' Article 8 right to respect for their private life.[56]

50 *Ibid*, at [75]-[87].
51 *Ibid*, at [88].
52 *Supra* n.1, at [133]; [195].
53 *Ibid,* at [135]; [195].
54 *Ibid,* at [157]-158].
55 *Ibid,* at [151].
56 *Ibid,* at [166].

c) Measures consistent with Article 8(2) of the ECHR

The Grand Chamber (by a majority of eleven to six) held that the Italian authorities had acted consistently with Article 8(2) of the ECHR, and therefore, there was no violation of Article 8.[57] The Grand Chamber said that the measures taken culminating in the child's removal from the applicants had been in accordance with law and in pursuance of a legitimate aim (preventing disorder; to protect the rights and freedoms of others; the State had exclusive competence to recognise parent-child relationships in order to protect children).[58] Regarding proportionality, the Grand Chamber found the Italian Courts had struck a fair balance between the public and private interests at stake.[59]

The Grand Chamber emphasised that the child was not an applicant in the appeal but that "[T]his does not mean however, that the child's best interests and the way in which these were addressed by the domestic courts are of no relevance."[60] (The Court went on to cite Article 3 of the United Nations Convention on the Rights of the Child). However, the Grand Chamber observed that "the Court does not consider in the present case that the domestic courts were obliged to give priority to the preservation of the relationship between the applicants and the child. Rather, they had to make a difficult choice between allowing the applicants to continue their relationship with the child, thereby legalising the unlawful situation created by them as a *fait accompli*, or taking measures with a view to providing the child with a family in accordance with the legislation on adoption."[61] The Grand Chamber said the Italian Courts had appropriately considered the best interests of the child and found that his removal from the applicants' care would not cause him grave or irreparable harm.[62] The Grand Chamber also emphasised the illegality of the applicants' actions and that their relationship with the child was always precarious from the time they brought him to Italy to live with them, and that the negative DNA test results had rendered the relationship even more tenuous.[63]

5. Analysing the Grand Chamber judgment from a child rights perspective

The Grand Chamber's judgment in *Paradiso and Campanelli v. Italy* is problematic from a child rights perspective in a number of respects, which are relevant to outline given the context of this doctoral thesis.

a) The (non)existence of family life

The Grand Chamber's view that the child was not a member of the applicants' family and that no family life existed between the child and the applicants takes an overly restrictive view of what constitutes family life. The Court does not seem to attach any weight to the fact that had it not been for the applicants, the child would not

57 *Ibid*, at [215]-[216].
58 *Ibid*, at [168]-[174]; and [175]-[178].
59 *Ibid*, at [200]ff.
60 *Ibid*, at [208].
61 *Ibid*, at [209].
62 *Ibid*, at [210].
63 *Ibid*, at [211].

exist. This fact remains, regardless that due to a clinical error, their intention to have a child through ICS with a genetic link to the male applicant was not borne out in practice. On the facts available, only the applicants had cared for the child (or indicated any interest in caring for the child) from the time he was born until the time he was removed from their care; therefore, no one but the applicants can be said to have parented the child during that period.

The first year of life is a formative time for a child, during which children form attachment(s) to persons caring for them, and these attachments can be important throughout childhood and into adulthood. Based on the Italian authorities' social worker's report, evidence existed that such attachments had and were continuing to form between the child and the applicants, and that his welfare needs were being met through the care and family environment provided by the applicants. Moreover, the child had been in the applicants' care for eight months, which amounted to most of his life; in terms of a baby's life, this was tantamount to a lifetime.

b) The best interests of the individual child

In its statement of the international law relevant in the case,[64] the Grand Chamber provides a sound overview of the relevant provisions of the CRC, including the best interests of the child principle, and also cites relevant provisions of the Committee on the Rights of the Child's General Comment No. 7 on implementing child rights in early childhood.

The Grand Chamber only limitedly follows through on these provisions relating to the child's rights and best interests in its decision in *Paradiso.* Because of the view taken by the Grand Chamber concerning family life (N.B. the dissenting judges took the view that family life did exist between the applicants and the child[65]), the *Paradiso* judgment is problematic from the outset from a child rights perspective. In its judgment, the Grand Chamber provides relatively little reasoning that seeks to apply the relevant provisions of the CRC and the best interests of the child principle. This stems from the Grand Chamber's view that because it found family life did not exist between the applicants and the child, its role was not to examine the case from the perspective of preserving a family unit, "but rather from the angle of the applicants' right to respect for their private life, bearing in mind that what was at stake was their right to personal development through their relationship with the child."[66] On this basis, with respect to the child's best interests, the Grand Chamber was, therefore, satisfied that the Italian courts had based their decisions on relevant reasons that served to protect the individual child in the case and children in general.[67] The Grand Chamber also held the view that these reasons were sufficient, given their focus on the illegality of the situation created through the actions taken by the applicants, and the child's situation as a result.[68]

64 *Ibid,* at [76]-[77].
65 Joint dissenting judgment of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev, at [2]-[5].
66 *Supra* n.1, at [198].
67 *Ibid,* at [196]-[197].
68 *Ibid,* at [198]-[199].

Similarly, the Grand Chamber did consider the child's best interests in is reasoning concerning proportionality in *Paradiso*, but placed greater weight on the general interests of children rather than the best interests of the individual child involved in the case at hand. Again, this owed to the fact the Grand Chamber was considering the matter in the context of the right to respect for private life, not family life, and only that of the applicants (not the child). However, in relation to the individual child's best interests, the Grand Chamber was satisfied with the domestic courts consideration of the child's best interests,[69] and in particular attached importance to the fact that the court which had made the determination that the child's removal from the applicants' care would not cause him grave or irreparable harm was a specialised Minors Court.[70] Given its view of the domestic courts' treatment of the child's best interests, and the significant weight attached to the public interests the impugned measures were seeking to protect, the Grand Chamber found the actions taken in interference with the applicants' right to respect for their private life were proportionate within the States' margin of appreciation.

From a child rights perspective, the alternative provision of care for the child imposed by the State in the *Paradiso* case – namely removal of the child and placement into State care – was arguably a disproportionate measure for the State to take in the case of this one particular child. Disproportionate, because of the evidence before the domestic Courts reflecting that the child was being well-cared for; the applicants clearly wanted to continue caring for the child and provide him with a family environment, (and had been assessed by the Italian authorities' social workers as providing such an environment);[71] and in light of these facts, placing the child into the uncertainty of the State care system should not have been the State's action of first resort.[72] Rather, a more proportionate course of action would have been to impose measures

69 See [202]ff.

70 *Ibid,* at [212].

71 It is unclear to what extent relevant developmental brain science research informed the view that the child would not suffer grave or irreparable harm as a result of his separation and removal from the applicants' care; it is now understood as a result of scientific research that "[a]ttachment patterns develop over the first few years of life and can influence mental health and psychological functioning throughout childhood and the adult years (See: Center on the Developing Child at Harvard University, *The Foundations of Lifelong Health are Built in Early Childhood,* 2010, p.8); and that early childhood development is in part fuelled by reciprocal 'serve and return' interaction between children and the adults who care for them, and that taking this away can have detrimental impacts on the child's developing brain, as well as later in life. (See: Center on the Developing Child at Harvard University, *Applying the Science of Child Development in Child Welfare Systems,* 2016, p.5). Given the young age of the child at the time of his removal from the applicants' care, it would have been of great importance to consider these kinds of factors, which are grounded in developmental brain science.

72 Indeed, it is generally recognised that family care settings are to be preferred to institutional care settings; N.B. Part II, A[3] UN Guidelines for the Alternative Care of Children: "The family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members." Resolution adopted by the General Assembly, [on the report of the Third Committee (A/64/434)] 64/142, 24 February 2010.

to monitor the welfare and care of the child over a reasonable period of time through regular visits and reporting by State social workers, to build up a broader picture of the child's situation in the care of the applicants. This would have more comprehensively enabled future steps regarding the child's care situation to be informed and made in a well-reasoned and proportionate manner. This would have been preferable from a child rights perspective, rather than the State prematurely taking what amounted to an extreme action, arguably affecting both the child and the applicants.

However, the Grand Chamber, by stating in its judgment that "[A]ny measure prolonging the child's stay with the applicants, such as placing him in their temporary care, would have carried the risk that the mere passage of time would have determined the outcome of the case"[73] does not seem to give satisfactory consideration to the alternatives which could have been employed by the Italian authorities, while still enabling the intent and spirit of the relevant domestic laws to be upheld. Indeed, the Grand Chamber was right to emphasise that the laws that the applicants contravened existed to protect "very weighty public interests."[74] However, the measures taken by the Italian authorities did not appear to attach enough weight to the evidence before them about the individual child's situation. Based on the information before them, the child was safe and well-cared for, in the care of adults who – had it not been for the mistake of the Russian surrogacy clinic – would have shared one genetic link with the child. Furthermore, it was not the child's fault that the applicants had acted in contravention of Italian law by commissioning his conception and birth through ICS in a foreign jurisdiction; the Grand Chamber did not appear to consider this point in its reasoning.

Yet by declaring the child to be in a state of abandonment and removing him from the applicants' care without any further contact, the child's first eight months of life were essentially wiped out of existence. This raises fundamental questions regarding the child's right to identity preservation under Article 8 of the CRC, and Article 7 CRC concerning his right to, as far as possible, know and be cared for by his parents. Although the question of who can be said to be the child's parents in this particular case is fraught, arguably the applicants were the only people who could be said to be his parents at the time of his removal into State care. It is worth noting here that in its General Comment No. 14 on the best interests of the child, the Committee on the Rights of the Child states that in decisions concerning the best interests of an individual child, that child's interests should not be understood as being the same as the interests of children in general, but rather the particular child's best interests must be individually assessed.[75] This indicates that when a child's situation is before a decision-making body, that body should give due consideration to the child's best interests in light of the child's individual circumstances in which the decision-making body finds him or her.

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73 *Supra* n.1, at [213].

74 *Ibid,* at [204].

75 Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, CRC/C/GC/14, 2013, at [24].

Because the best interests principle is one of the guiding principles of the CRC, it thereby necessitates a holistic consideration of the child's CRC rights. The CRC Committee elaborates that "[F]or individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child."[76] It is difficult to see, based on the facts of the case, how the protection of the best interests of children in general outweighed the best interests of the individual child concerned, on the basis of the evidence available. Indeed, the dissenting judgment in *Paradiso* argues – based on the Grand Chamber's judgments in *Neulinger and Shuruk v. Switzerland*[77] and *R. and H. v. the United Kingdom*[78] – that two considerations are crucial in identifying what is in the child's best interests in a particular case: namely that it is in the child's best interests that his or her family ties are maintained, except in cases where the family has proved particularly unfit; and it is in the child's best interests to ensure his or her development in a safe and secure environment.[79] However, due to the majority judgment in *Paradiso* that no family life existed, these factors appear to have been not considered relevant by the Grand Chamber majority judges.

c) Treatment of competing interests at stake

While the Grand Chamber judgment certainly raises valid concerns regarding the importance of upholding the general public interest, arguably the Grand Chamber attached too much weight to these considerations, leading it to gloss over the importance of considering the best interests of the individual child in a more holistic manner. However, this is connected to the view the Grand Chamber took at the outset, namely that no family life existed in this case, and also the fact that the child was not an applicant before the Court in this case. Based on the Grand Chamber's decision in *Paradiso,* it will be interesting to see how the ECtHR continues to navigate the terrain of balancing children's rights at the general public interests level and the individual level in future jurisprudence. Especially in future cases where the facts occur in the context of ICS, and given the lack of consensus among the High Contracting Parties to the ECHR on surrogacy as a practice, jurisprudence of the ECtHR in this area is likely to remain a significant source of interest for child rights legal scholars, among others.[80]

6. Concluding remarks

CRC States Parties have an obligation to ensure that decisions concerning individual children consider comprehensively their particular circumstances and what would

76 *Ibid,* at [32].
77 Application no. 41615/07, Judgment (Grand Chamber), 06 July 2010, at [136].
78 Application no. 35348/06, Judgment (Court, Fourth Section, 31 May 2011, at [73]-[74].
79 *Supra* n. 42, at [6].
80 N.B. The Grand Chamber's judgment in *Paradiso* has already been the subject of some legal commentary and analysis, see e.g. A.G. Barnett, '*Paradiso and Campanelli v. Italy*: Application no 25358/12: European Court of Human Rights', *Oxford Journal of Law and Religion*, vol.6:2 (2017) 412–413; and L. Bracken, 'Assessing the best interests of the child in cases of cross-border surrogacy: inconsistency in the Strasbourg approach?', *Journal of Social Welfare and Family Law*, vol.39:3 (2017) 368-379.

serve the child best in light of those circumstances. This remains the case regardless of the individual States Party's position, taken within its margin of appreciation (in the European context) regarding sensitive ethical issues such as surrogacy as a method of family formation. The fact remains that children are continuing to be born through ICS. This will mean that courts and other competent authorities will continue to be confronted with situations where individual children have formed an attachment with those persons who have been responsible for them coming into existence, and in whose care they have lived for differing lengths of time and with whom they have formed a *de facto* family life.

In cases where the individual child has been born through situations contrary to applicable domestic laws, once that individual child's situation is before a court or competent authority, the child's individual best interests should be the primary consideration. If remaining in the care of their commissioning parents (despite those persons' illegal action) is found to be in the child's individual best interests, that child's best interests should outweigh any competing interests (such as the general public interest). Of course, this is not to say that individual States should not remain free to establish their own legislation and policies which take a more or less restrictive position on surrogacy and other sensitive ethical matters; but rather, to say that when an individual child is involved, that individual child's best interests must be accorded appropriate consideration to inform decision-making affecting him or her.