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The Case-Law of the European Court of Human Rights in the Field of Cross-Border Surrogacy:

In the Best Interests of the Child?

JAMM07 Master Thesis

International Human Rights Law

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Supervisor: Anna Bruce

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"The State Parties to the present Convention,

[…]

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".

(The Preamble of the Convention on the Rights of the Child, 20 November 1989).

"Your children are not your children.

They are the sons and daughters of Life's longing for itself.

They come through you but not from you,

And though they are with you yet they belong not to you.

You may give them your love but not your thoughts,

For they have their own thoughts.

You may house their bodies but not their souls,

For their souls dwell in the house of tomorrow […]

For life goes not backward nor tarries with yesterday."

(Khalil Gibran, "On Children", in *The Prophet*, London, 1926).

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Summary

Surrogacy is prohibited in many European states. However, such a ban is not global. This can create problems when individuals from states where surrogacy is prohibited travel to other states where it is allowed and become legally recognised parents of children born through surrogacy in the latter states. The implications of cross-border surrogacy come into reality when the intended parents return with the child to their home state where surrogacy is prohibited and request for the legal recognition of the parent-child relationships. The home state might not recognise the parent-child relationships established abroad, which causes legal uncertainty for the child. Due to conflicting laws of states, children born through cross-border surrogacy are at risk of becoming *de facto* parentless and stateless if their relationships with the intended parents are not legally recognised. This can have severe implications for the child's right to identity, cf. Art. 7 and Art. 8 of the *Convention on the Rights of the Child* (CRC) and Art. 8 of the *European Convention on Human Rights* (ECHR), which includes the legal parent-child relationship, right to nationality and inheritance rights. Furthermore, this situation imposes risks for the best interests of the child, cf. Art. 3(1) of the CRC.

The European Court of Human Rights (ECtHR) has considered several cases in the field of cross-border surrogacy where member states that prohibit surrogacy have refused to recognise parent-child relationships following cross-border surrogacy, which have been legally established abroad. According to the Court's case-law, the child's best interests under Art. 3 of the CRC and the child's right to identity and private life under Art. 8 of the ECHR, require that the parent-child relationships, between the child and both the intended parents, are legally recognised following cross-border surrogacy, where the child has a genetic link with *at least* one of the intended parents. On the contrary, such an obligation does not exist when a child born through cross-border surrogacy is not genetically related to the intended parents. Accordingly, the ECtHR makes a clear distinction between children's legal status with regard to their relationship with the intended parents depending on whether there is a genetic link between them. This leaves children who are not genetically related to *at least* one of their intended parents in a position of legal uncertainty in relation to their right to identity under Art. 7 and Art. 8 of the CRC and Art. 8 of the ECHR.

The thesis examines the leading cases of the ECtHR in the field of cross-border surrogacy from a child's perspective by viewing *whether* and *to what extent* the Court applies the principle of the best interests of the child under Art. 3(1) of the CRC. Furthermore, the thesis examines whether the requirement of a genetic link, between the child born through cross-border surrogacy and *at least* one of the intended parents, for the legal recognition of the parent-child relationships is in accordance with the best interests of the child under Art. 3(1) of the CRC.

The thesis puts forward the main argument that the overall approach of the ECtHR in cross-border surrogacy cases is not centred around children's rights, as it does not protect the best interests of children who do not have a genetic link with *at least* one of their intended parents. Furthermore, the thesis argues that the requirement of a genetic link for the legal recognition of the parent-child relationships following cross-border surrogacy is not in accordance with the best interests of the child, cf. Art. 3(1) of the CRC. The negative impact of the non-recognition of a legal relationship between the child and the intended parents is the same whether or not a genetic link exists between them and affects the child's rights in the CRC, particularly, the right to identity, cf. Art. 7 and Art. 8 of the CRC. Moreover, according to research in the field of psychology, the absence of a genetic link does not seem to interfere with the development of the child. In this regard, the quality of the parent-child relationships seems to have greater importance for children's positive development and well-being than the existence of a genetic link.

The thesis concludes that the ECtHR should abandon its distinction between children born through cross-border surrogacy on the grounds of whether there is a genetic link between them and *at least one* of their intended parents. By broadening the identity concept under Art. 8 of the ECHR, by including the children's relationships with their non-biological intended parents within that concept, the Court could ensure the best interests and rights of all children born through cross-border surrogacy regardless of the existence of a genetic link. Emphasis should be on the children's best interests and their right to identity and private life, irrespective of whether they have a genetic link with one of their intended parents. Children must not be made responsible for the conduct of their intended parents of circumventing domestic prohibitions on surrogacy and the way they were born into this world.

Preface

This thesis is my final chapter in the Master Programme in International Human Rights Law at Lund University. The reason why I decided to write about cross-border surrogacy from the perspective of the best interests of the child is because of my great interest in children's rights, which I wish to engage with further in the future.

Almost three years ago I applied to be a student at Lund University and luckily my application was accepted. Subsequently, my partner and I decided to move to Lund, with our two children. My home country Iceland is perhaps not far away, but it is a big step to move to another country when you have young children. However, it had been a dream of mine to further my education and study human rights abroad at one of the most prestigious universities in the world.

My studies at Lund University have been challenging, but also rewarding. Moreover, it has been intriguing to get to know my classmates who are from all over the world. In short, it has been an absolute privilege to study at Lund University.

I want to express my gratitude to my partner Sigurður for his love, motivation and support. Sigurður has for the last year studied European Business Law at Lund University and is now finishing his studies. I would also like to express my gratitude to our two children, Grétar Már and Ragnheiður Dóra, who not only moved to another country, attended a new school, made new friends and learned a new language, so that their parents could become law students once again, but also showed their parents endless patience and understanding. This journey has truly been one of our greatest adventures.

Finally, I want to express my gratitude to my supervisor Anna Bruce, Senior Researcher at the Raoul Wallenberg Institute, for her good presence, great guidance and enjoyable cooperation.

Margrét María Grétarsdóttir

Lund, 23rd of May 2023

Abbreviations

CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

1. Introduction

1.1. Background

There has been growing debate in the world in recent decades about the controversial issue of surrogacy. Surrogacy is an arrangement where a surrogate mother undertakes to carry and give birth to a child for the purpose of handing it over to the intended parents.[1] Various issues have been raised in relation to surrogacy, such as regarding the human rights of the surrogate mother, the intended parents and the child.[2] Key issues concern women's right to self-determination, the exploitation of women, the sale of children, the right to reproduce and the legal considerations of parenthood.[3] Much has been debated on the various issues and legal, social, psychological, medical, ethical and political arguments have been made for and against the legalisation of surrogacy.[4]

The international community seems far from reaching a consensus on this subject.[5] Different approaches in relation to surrogacy have been taken by states. Although surrogacy is prohibited in many states in Europe such a ban is not global.[6] European states where surrogacy is prohibited have struggled with means of preventing intended parents from using surrogacy abroad.[7] Accordingly, persons have travelled to other states where surrogacy is allowed and have become legally recognised parents of children born through surrogacy in those states despite legal uncertainty regarding their parental status when they return to their home states. The implications of cross-border surrogacy come into reality when the intended parents return with the child to their home state where surrogacy is prohibited and request for the legal recognition of the parent-child relationships (legal parentage) in accordance with the foreign birth certificate.[8] The domestic authorities are faced with a "*fait accompli*", namely a reality where a child has been born as a result of a surrogacy arrangement abroad, which they are required to address.[9] The home state might not recognise the legal parentage established abroad, which causes legal uncertainty for the child. In this regard, the child must not be

[1] Hrefna Friðriksdóttir, "Staðgöngumæðrun milli landa – hugleiðingar um dóm Mannréttindadómstóls Evrópu frá 18. maí 2021", Úlfljótur (2 September 2021), p. 3. The term "intended parents" refers to the person or persons, an individual or a couple, who enters into a surrogacy arrangement with the intention of becoming parents and taking custody of the child after birth. See: Council on General Affairs and Policy of The Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Prel. Doc. No. 3B), (2014), Annex A.

[2] Jens M. Scherpe and Claire Fenton-Glynn, "An Introduction", in Jens M. Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy*, (Intersentia, 2019), p. 2.

[3] Ibid., p. 2, 3.

[4] See, for example, Hrafn Ásgeirsson and Salvör Nordal, *Reproductive Technology and Surrogacy: A Global Perspective*, (Nordic Council of Ministers, 2015).

[5] Claire Fenton-Glynn and Jens M. Scherpe, "Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation", in Jens M. Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy*, (Intersentia, 2019), p. 517. In a resolution from December 2015 the European Parliament of the European Union has condemned all forms of surrogacy, as it undermines the human dignity of the woman since her body and its reproduction functions are used as a commodity. See: European Parliament, *Annual Report on Human Rights and Democracy in the World 2014 and the European Union's Policy on the Matter*, (Strasbourg, 2015/2229(INI)), para. 115.

[6] Jens M. Scherpe and Claire Fenton-Glynn, "An Introduction", in Jens M. Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy*, (Intersentia, 2019), p. 1-2.

[7] Ibid., p. 1.

[8] Ibid., p. 2.

[9] Ibid., p. 3.

punished for the conduct of its intended parents and the way it was brought into this world.[10] However, this is a complicated issue, as recognising the legal parentage of the child may encourage circumventing the law to "reap the benefit" of obtaining a child.[11]

It is a recognised principle of private international law that states do not generally need to accept a decision of another state concerning the personal status of persons where such a decision is considered to be contrary to the basic principles of the former state, i.e. to public order or public policy.[12] However, although it is not obligatory for a state to obey a foreign decision on parental status following cross-border surrogacy, the reality is that a child has been born who has independent rights that must be respected. One of the most important rights of the child in this respect is the right to identity, cf. Art. 7 and Art. 8 of the *Convention on the Rights of the Child* (CRC)[13] and Art. 8 of the *European Convention on Human Rights* (ECHR).[14] Furthermore, in all decisions concerning children the best interests of the child must be a primary consideration, cf. Art. 3 of the CRC. In this regard, it must also be borne in mind that a child who is born through cross-border surrogacy often has no real family ties beyond the persons seeking to become its parents.

As there is no consensus on surrogacy and the legal recognition of the parent-child relationships in Europe, the case-law of the European Court of Human Rights (ECtHR/the Court) on cross-border surrogacy is extremely important. In recent years, the ECtHR has considered several cases where member states that prohibit surrogacy have refused to recognise parent-child relationships following cross-border surrogacy, which have been legally established abroad. According to the Court's case-law, the child's best interests under Art. 3(1) of the CRC and the child's right to identity and private life under Art. 8 of the ECHR, require that the parent-child relationships between the child and both the intended parents are legally recognised following cross-border surrogacy, where the child has a genetic link with *at least one* of the intended parents.[15] On the contrary, such an obligation does not exist when a child born through cross-border surrogacy is not genetically related to the intended parents.[16]

Accordingly, the ECtHR makes a clear distinction between children's legal status with regard to their relationship with the intended parents, depending on whether there is a genetic

[10] Ibid., p. 3.
[11] Ibid., p. 3.
[12] Davíð Þór Björgvinsson, "Réttaráhrif erlendra úrlausna á sviði sifjaréttar", Úlfljótur No. 46(2), (1993), p. 120. See also: Katarina Trimmings and Paul Beaumont, "Parentage and Surrogacy in a European Perspective", in Jens M. Scherpe (eds), *European Family Law: Family Law in a European Perspective*, Vol. III, (Edward Elgar Pub., 2016), p. 269-270.
[13] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989.
[14] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14*, 4 November 1950.
[15] See, for example, ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], Request by the French Court of Cassation, No. P16-2018-001, 10 April 2019, para. 36. Accordingly, if the child has a genetic link with one of the intended parents, the child's legal relationship with the biological parent must be recognised and also the relationship with the non-biological parent. However, this position is premised on the non-biological intended parent's relationship or connection with the biological intended parent, cf. ECtHR, *A.M. v. Norway*, App. No. 30254/18, 24 March 2022, where the non-biological intended mother was refused to adopt a child born through cross-border surrogacy, as the intended parents had separated and the biological intended father did not consent to it.
[16] Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*," European Journal of Health Law, Vol. 29, Issue 2, (May 2022), p. 201.

link between them.[17] It is important to examine further this distinction of the Court on the basis of a genetic link from a child's perspective, as it leaves children who are not genetically related to *at least one* of their intended parents in a vulnerable position. In this respect, the children face legal uncertainty in relation to their right to identity under the broader right to private life, cf. Art. 8 of the ECHR, for example, regarding their right to a legal parent-child relationship, right to nationality and inheritance rights.[18] Furthermore, this situation imposes risks for the best interests of the child, cf. Art. 3(1) of the CRC.

1.2. Purpose and research questions

The purpose of the thesis is to examine the leading cases of the ECtHR in the field of cross-border surrogacy from a child's perspective. These are cases where member states of the Council of Europe that prohibit surrogacy have refused to recognise the legal parent-child relationships, between children born through cross-border surrogacy and their intended parents, which have been legally established abroad. As was mentioned in Chapter 1.1, the Court distinguishes between cross-border surrogacy cases on grounds of whether there is a genetic link between the surrogate-born child and *at least one* of the intended parents.

The thesis raises *firstly*, the question *whether* and *to what extent* the ECtHR applies the principle of the best interests of the child under Art. 3(1) of the CRC in cases concerning the non-recognition of the legal parent-child relationships following cross-border surrogacy.[19] *Secondly*, the thesis raises the question whether the requirement of a genetic link, between the child born through cross-border surrogacy and *at least* one of the intended parents, for the legal recognition of the parent-child relationships is in accordance with the best interests of the child under Art. 3(1) of the CRC. The thesis will reflect on and analyse these questions in light of the case-law of the ECtHR in the field of cross-border surrogacy and the best interests of the child principle in Art. 3(1) of the CRC.

It is imperative to answer these questions because the legal recognition of the parent-child relationship is part of a child's right to identity, cf. Art. 7 and Art. 8 of the CRC and Art. 8 of the ECHR. Furthermore, other important rights follow from legal parentage, such as the right to nationality and inheritance rights. Moreover, states must respect the rights of the child without discrimination of any kind, for example, on grounds of the child's or its parent's "birth" or "other status", cf. Art. 2 of the CRC. The ECtHR has stipulated that the ECHR should be interpreted in light of the CRC,[20] cf. Art. 31(3)(c) of the *Vienna Convention on the Law of*

[17] Hrefna Friðriksdóttir, "Staðgöngumæðrun milli landa – hugleiðingar um dóm Mannréttindadómstóls Evrópu frá 18. maí 2021", Úlfljótur, (2 September 2021), p. 5.

[18] See, for example, ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], Request by the French Court of Cassation, No. P16-2018-001, 10 April 2019, para. 40.

[19] The ECtHR applies the best interests of the child principle under Art. 3(1) of the CRC to varying degrees in these cases, which needs to be explained in order to answer "to what extent" or "how far" the Court applies the principle. In this regard, it will be examined how the Court applies the best interests of the child principle in practice and when it does not apply the principle sufficiently by identifying where the Court's approach is not in accordance with the best interests of the child.

[20] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to the Rights of the Child*, (European Union Agency for Fundamental Rights and Council of Europe, 2022), p. 30. See, for example, ECtHR, *Harroudj v. France*, App. No. 43631/09, 4 October 2012, para. 42.

Treaties (VCLT).[21] In this regard, when determining whether to recognise the parent-child relationships following cross-border surrogacy the best interests of the child must be a primary consideration, cf. Art. 3(1) of the CRC.

The thesis puts forward the main argument that the overall approach of the ECtHR in cross-border surrogacy cases is not centred around children's rights, as it does not protect the best interests of children who do not have a genetic link with *at least* one of their intended parents. Furthermore, the thesis argues that the requirement of a genetic link for the legal recognition of the parent-child relationships following cross-border surrogacy is not in accordance with the best interests of the child, cf. Art. 3(1) of the CRC. The negative impact of the non-recognition of a legal relationship between the child and the intended parents is the same whether or not a genetic link exists between them and affects the child's rights in the CRC, particularly, the right to identity, cf. Art. 7 and Art. 8 of the CRC and Art. 8 of the ECHR, which includes the legal parent-child relationship, right to nationality and inheritance rights.[22] Moreover, according to research in the field of psychology, the absence of a genetic link does not seem to interfere with the development of the child. In this regard, the quality of the parent-child relationships seems to have greater importance for children's positive development and well-being than the existence of a genetic link.[23]

1.3. Methodology and material

The methodology of the thesis is *firstly*, a traditional legal method with a focus on international law on children's rights and the case-law of the ECtHR in the field of cross-border surrogacy. This method will be used to reach a conclusion on the state of law and to suggest how the ECtHR could change its interpretation by applying a broader approach to the concept of identity under the right to respect for private life, cf. Art. 8 of the ECHR. This will be further explained in Chapter 5.4.

Secondly, the thesis will be supplemented by a child's perspective by examining *whether* and *to what extent* the ECtHR applies the principle of the best interests of the child under Art. 3(1) of the CRC in its case-law in this field. As was mentioned above, the ECtHR has stipulated that the ECHR should be interpreted in light of the CRC, cf. Art. 31(3)(c) of the VCLT. In this regard, the ECtHR has frequently referred to the best interests of the child principle in Art. 3(1) of the CRC in cases involving children.[24] This perspective will be applied because it is imperative to take into account children's best interests and needs when determining their legal parentage. The best interests of the child principle will be further explained in Chapter 3.3.

Thirdly, the thesis examines family research in the field of psychology on how children born through surrogacy, by using donor gametes, develop and adjust to their intended parents.

[21] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969.
[22] See, for example, The Concurring Opinion of Judge Lemmens, (para. 4), in ECtHR, *Valdís Fjölnisdóttir and Others v. Iceland*, App. No. 71552/17, 18 May 2021.
[23] See, for example, Susan Golombok, "Love and Truth: What Really Matters for Children Born Through Third-Party Assisted Reproduction", Child Development Perspectives Vol. 15, Issue 2, (2021), p. 103, 106.
[24] Geraldine Van Bueren, "Children's rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edition), (Oxford University Press, 2018), p. 340.

In this regard, Susan Golombok has conducted research on children born through assisted reproduction involving a third party, i.e. children born through either egg donation, sperm donation or surrogacy, through egg *or* sperm donation, to heterosexual couples in the United Kingdom.[25] Furthermore, the thesis looks into research on adopted children and children born through embryo donation where there is no genetic link between the children and either of the parents.[26] The aim of examining this research is to determine the best interests of the child by shedding light on the genetic link and whether the lack of such a link affects the development and well-being of the child. It is imperative to examine such research to seek to understand the reality of children who do not share a genetic link with their parents and their best interests. This research will be examined to seek to answer the question of whether the requirement of a genetic link for the legal recognition of parent-child relationships following cross-border surrogacy is in accordance with the best interests of the child. This will be further discussed in Chapter 3.5 and Chapter 5.3.2.3 Furthermore, the thesis examines psychological research on attachment theory, which will be discussed in relation to the reasoning of the ECtHR in the case of *Paradiso and Campanelli v. Italy* in Chapter 4.7.1.3.

The material used in the thesis is the rights of the child in the CRC, which have relevance in relation to the recognition of the legal parent-child relationships following cross-border surrogacy. In addition, the case-law of the ECtHR in the field of cross-border surrogacy, with a focus on the Court's leading cases, i.e. *Mennesson v. France*,[27] *Paradiso and Campanelli v. Italy*,[28] the Court's Advisory Opinion from 2019,[29] *Valdís Fjölnisdóttir and Others v. Iceland*[30] and *K.K. and Others v. Denmark.*[31] Furthermore, the thesis is based on various academic literature on children's rights, cross-border surrogacy and research in the field of psychology on the development of the child.

1.4. Delimitations and research area

As was mentioned in Chapter 1.1, surrogacy raises many complex legal, social, psychological, medical, ethical, and political issues. From a legal perspective, surrogacy raises questions in relation to civil law, in particular family law and contract law, criminal law, private international law and human rights law. Nevertheless, the thesis will not discuss the relationship between surrogacy and different fields of law beyond international human rights law in relation to the rights of the child. Furthermore, the thesis will not discuss different views

[25] Susan Golombok, "Love and Truth: What Really Matters for Children Born Through Third-Party Assisted Reproduction", Child Development Perspectives Vol. 15, Issue 2, (2021), p. 103.
[26] Statens Offentliga Utredningar, *Olika vägar till föräldraskap: Slutbetänkande av Utredningen om utökade möjligheter till behandling av ofrivillig barnlöshet*, (SOU, 2016:11), p. 51. See also: David M. Brodzinsky and Ellen Pinderhughes, "Parenting and Child Development in Adoptive Families" in Marc H. Bornstein (eds), *Handbook of Parenting*, Volume 1, (Lawrence Erlbaum, 2nd edition, 2002), p. 279-311 and Fiona MacCallum, Peter Brinsden and Susan Golombok, "Parenting and Child Development in Families With a Child Conceived Through Embryo Donation", Journal of Family Psychology, Vol. 21, Issue 2, (2007), p. 284-286.
[27] ECtHR, *Mennesson v. France*, App. No. 65192/11, 26 June 2014.
[28] ECtHR, *Paradiso and Campanelli v. Italy* [GC], App. No. 25358/12, 24 January 2017.
[29] ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], Request by the French Court of Cassation, No. P16-2018-001, 10 April 2019.
[30] ECtHR, *Valdís Fjölnisdóttir and Others v. Iceland*, App. No. 71552/17, 18 May 2021.
[31] ECtHR, *K.K. and Others v. Denmark*, App. No. 25212/21, 6 December 2022.

on surrogacy and the diverse approaches of states regarding the legalisation of surrogacy. In this respect, the thesis will not attempt to provide arguments for and against surrogacy or address whether surrogacy should be prohibited or permitted.

The thesis focuses specifically on the case-law of the ECtHR concerning the legal recognition of the parent-child relationships between children born through cross-border surrogacy and their intended parents, which have been legally established abroad, under the right to respect for private and family life, cf. Art. 8 of the ECHR, in light of the best interests of the child principle, cf. Art. 3(1) of the CRC.

Accordingly, the thesis will focus on cross-border surrogacy cases in Europe. The reason for applying a European approach is that there is a need to find common ground on surrogacy in Europe, as there is no European consensus on surrogacy and the recognition of legal parentage following cross-border surrogacy. Moreover, the ECtHR has in recent years considered several cross-border surrogacy cases, which require examination to establish what obligations rest on states in this field and *whether* and *to what extent* the Court protects the best interests and rights of surrogate-born children. In this regard, the thesis focuses exclusively on international or cross-border surrogacy and does not discuss the case-law of the ECtHR in the field of domestic surrogacy, cf. for example, *A.L. v. France* and *H. v. the United Kingdom.*[32]

As has been mentioned, the thesis examines research in the field of psychology on the development of the child. The thesis will focus on examining research on the development of surrogate-born children who share a genetic link with only one of their intended parents and of adopted children and children born through embryo donation who do not share a genetic link with either of their parents in order to determine the content of the "best interests of the child" principle. This research is relevant to answer the question of whether the requirement of a genetic link for the recognition of legal parentage is in accordance with the best interests of the child. Attachment theory which is also a type of developmental research will mainly be discussed in Chapter 4.7.1.3, in relation to the best interests of the child assessment of the ECtHR in the case of *Paradiso and Campanelli v. Italy*.

As the focus of the thesis is on children's rights in relation to the legal recognition of the parent-child relationships following cross-border surrogacy, the implications of surrogacy for women's rights, i.e. the rights of the surrogate mother, although important, are beyond the scope of this thesis. Furthermore, it is beyond the scope of the thesis to find a permanent solution to cross-border surrogacy and its implications.

[32] ECtHR, *A.L. v. France*, App. No. 13344/20, 7 April 2022 and *H. v. the United Kingdom*, App. No. 32185/20, 31 May 2022. The facts of these cases are different from cross-border surrogacy cases. For example, the former case regards a situation where the applicant, i.e. the biological father, contested the already established legal fatherhood of a surrogate-born child, requiring his own paternity to be established. The applicant did not only struggle against the authorities to get his legal fatherhood recognised, but also against the social parents and the surrogate mother. Therefore, the ECtHR had to balance the competing private interests of the biological father and of the social father, who was the legal father of the child, in light of the best interests of the child. The Court found that French Courts' refusal to legally establish the parentage of the biological father was justified but found a violation in relation to the biological father's right to respect for his private life under Art. 8 of the ECHR due to lengthy domestic proceedings which took six years. It has been considered that this case deviates from the ECtHR's case-law on cross-border surrogacy, which places emphasis on a genetic link when determining legal parenthood. See: Marie-Hélène Peter-Spiess, "A.L. v. France: Domestic Surrogacy, Genetic Fatherhood, and the Best Interests of the Child", Strasbourg Observers, (2023) <https://strasbourgobservers.com/2023/02/10/a-l-v-france-domestic-surrogacy-genetic-fatherhood-and-the-best-interests-of-the-child/> Accessed 17 February 2023.

1.5. Outline

The thesis is divided into six chapters, including the introductory Chapter. The thesis will be structured in the following way. In Chapter 2 the concept of surrogacy will be defined and different types of surrogacy arrangements explained. Furthermore, the chapter will discuss who mainly enters into surrogacy arrangements. The aim of this chapter is to broaden the basic understanding of surrogacy, as it is a complicated issue that needs further explanation.

Chapter 3 will discuss the best interests of the child in relation to the recognition of legal parentage following cross-border surrogacy. The chapter will start with a short discussion on the main legal issues or risks that children born through cross-border surrogacy face in relation to the non-recognition of legal parentage. Next, the chapter will describe the best interests of the child principle under Art. 3(1) of the CRC. Furthermore, the chapter will highlight the main children's rights in the CRC that derive from the recognition of legal parentage. The chapter will also discuss the right of children to know their origins and issues in relation to the sale of children. As will be stipulated, the other rights in the CRC determine the content of the best interests of the child principle. Moreover, the chapter will examine research in the field of psychology on the development of surrogate-born children who are partly conceived with donor gametes and other children who do not share a genetic link with their parents in order to determine the content of the best interests of the child principle. Finally, the chapter will shortly discuss the relationship between the CRC and the ECHR. The main aim of the chapter is to seek to define the content of the best interests of the child principle under Art. 3(1) of the CRC and highlight the risks that the non-recognition of legal parentage has on the child's rights and best interests.

Chapter 4 will discuss the leading cases of the ECtHR in the field of cross-border surrogacy in light of the best interests of the child principle, cf. Art. 3(1) of the CRC. As has been mentioned, the ECtHR has emphasised that the ECHR should be interpreted in light of the CRC and has frequently referred to the best interest of the child principle in its case-law concerning children. The purpose of this chapter is to examine *whether* and *how* the Court applies the best interests of the child principle in practice in each case. Furthermore, to examine what role the genetic link plays in the case-law of the ECtHR in this field. In this regard, the cases will *firstly*, be summarised. *Secondly*, they will be analysed on the one hand with regard to *whether* and *to what extent* the ECtHR applies the best interests of the child principle under Art. 3(1) of the CRC. In this regard, it will both be discussed *whether* and *how* the Court applies the principle and where applicable when the Court does not apply the principle or does not apply it sufficiently by identifying where the Court's approach is not in accordance with the best interests of the child. The ECtHR applies the best interests of the child principle to varying degrees, which needs to be explained in order to answer "to what extent" or "how far" the Court applies the principle. On the other hand, the cases will be analysed with regard to the role that the genetic link plays in the best interests of the child assessment in relation to the legal recognition of the parent-child relationships.

Chapter 5 includes the final analysis of the thesis. The aim of the chapter is to stipulate the main findings of the thesis and reflect on and answer the research questions of the thesis in

light of the ECtHR's leading cases on cross-border surrogacy and the best interests of the child principle. *Firstly*, the question of *whether* and *to what extent* the ECtHR applies the principle of the best interests of the child, cf. Art. 3(1) of the CRC, in cases concerning the non-recognition of the legal parent-child relationships following cross-border surrogacy. In this regard, the thesis seeks to answer the question from a holistic point of view, i.e. when the cases of the ECtHR are taken together as a whole. The thesis will argue that the Court applies the best interests of the child principle as a substantive right and a procedural rule in cross-border surrogacy cases where the child has a genetic link with *at least* one of the intended parents. However, where the genetic link is missing the application of the best interests of the child principle is insufficient or lacking. Furthermore, the chapter will conclude that the genetic link is the determining factor for the obligation to legally recognise the parent-child relationships.

Secondly, the question of whether the requirement of a genetic link, between the child born through cross-border surrogacy and *at least* one of the intended parents, for the legal recognition of the parent-child relationships is in accordance with the best interests of the child under Art. 3(1) of the CRC. In this regard, the chapter will discuss both arguments for a genetic link and arguments against a genetic link. The thesis will argue that the requirement of a genetic link for the recognition of legal parentage is not in accordance with the best interests of the child. In this regard, the chapter will *firstly*, focus on the negative effects that the non-recognition of legal parentage has on the rights of the child in the CRC regardless of the existence of a genetic link. *Secondly*, the chapter will examine research in the field of psychology, according to which the absence of a genetic link does not seem to interfere with the development and well-being of the child. The chapter will also discuss the need for a broader concept of identity under Art. 8 of the ECHR in the context of surrogacy. Furthermore, the chapter will emphasise that children's best interests generally require a possibility of establishing the legal parentage of the intended parents regardless of the existence of a genetic link. Lastly, the chapter will discuss future developments in the field of cross-border surrogacy.

Chapter 6 will summarise and highlight the main conclusions of the thesis.

2. Surrogacy

2.1. General

In this chapter, the concept of surrogacy will be shortly defined and different types of surrogacy arrangements described. Furthermore, it will be explained who mainly enters into surrogacy arrangements. The aim of the chapter is to provide a basic understanding of surrogacy, as it is a complicated issue.

2.2. Definition and categorisation

As described in Chapter 1.1, surrogacy has been defined as an arrangement where a surrogate mother carries and gives birth to a child for the intended parents and has agreed before the pregnancy to hand the child over to them after birth and waive her parental rights in relation to the child.[33] Surrogacy can be divided into *traditional* or *partial surrogacy* on the one hand and *gestational* or *full surrogacy* on the other. Traditional surrogacy is an arrangement where the surrogate mother provides her own genetic gametes (eggs) for the conception of the child. Accordingly, the surrogate mother is both the gestational carrier and is also genetically related to the child.[34] The egg is then fertilised with the sperm of the intended father or a donor and may involve natural conception or artificial insemination.[35] Gestational surrogacy is an arrangement where the surrogate mother does not provide her own genetic gametes for the conception of the child. Accordingly, there is no genetic link between the surrogate mother and the child.[36] Such an arrangement will usually occur through *in vitro* fertilisation. In such a case, the gametes may come from both intending parents, one of them or from donors.[37]

Surrogacy is also distinguished according to whether the arrangement is done for commercial or altruistic reasons. More specifically, commercial surrogacy is an arrangement where the intended parents pay the surrogate mother monetary compensation which goes beyond "reasonable expenses" in connection to the pregnancy.[38] Altruistic surrogacy is an arrangement where the intended parents do not provide the surrogate with monetary compensation or only pay her for "reasonable expenses" in relation to the pregnancy, such as medical costs and payments for loss of work.[39] Sometimes altruistic surrogacy takes place between the intended parents and someone they are close to, such as a relative or friend.[40] Commercial surrogacy is considered much more controversial than altruistic surrogacy and raises concerns about the exploitation of women and the sale of children.[41]

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[33] Council on General Affairs and Policy of The Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Prel. Doc. No. 3B), (2014), Annex A.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Lydia 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, Issue 3, (2017), p. 369. See also: *Report of the*

A further distinction is made between international surrogacy and domestic surrogacy within a state's jurisdiction. An international surrogacy arrangement or cross-border surrogacy entails that the intended parents from one state (receiving state or home state) enter into a surrogacy arrangement with a surrogate mother from another state (state of the child's birth).[42] Such an arrangement can be either traditional or gestational and either commercial or altruistic.[43] The receiving state or home state is the state where the intended parents are residents and which they return to with the child. The birth state is the state where the surrogate mother gives birth to the child.[44]

2.3. Who enters into surrogacy arrangements?

There are a variety of reasons why persons enter into surrogacy arrangements. In some cases, surrogacy may be the only means of fulfilling an individual's or a couple's desire to have a child. Those who have mainly used surrogacy for having children are *firstly*, heterosexual couples who are struggling with infertility and have spent years attempting to have children with the assistance of hormones and *in vitro* fertilisation.[45] Infertility can be related to the man, woman or both parties. For example, if a woman is unable to bear a child herself, whether it is related to infertility issues or other medical reasons, she might consider getting the assistance of a surrogate mother to carry her child.[46] The World Health Organization has defined infertility as a disease.[47] Furthermore, various studies have shown the detrimental psychological and social effects of infertility on the health and well-being of individuals.[48] *Secondly*, individuals who are not able to adopt a child because of age or marital status.[49] For example, it is common for single individuals to enter into surrogacy arrangements, mostly single men.[50] *Thirdly*, homosexual couples who want a child, mostly gay men.[51] Surrogacy can be the only way for gay men and single men to have children, as they can face obstacles in relation to adoption because many states do not allow them to adopt.[52] The reason why persons enter into cross-border surrogacy arrangements is usually because of domestic laws that prohibit surrogacy or strict legal conditions for entering such arrangements.[53]

Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material, 15 January 2018, A/HRC/37/60, paras. 20, 24.

[42] Council on General Affairs and Policy of The Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Prel. Doc. No. 3B), (2014), Annex A.

[43] Ibid.

[44] Ibid.

[45] Kajsa Ekis Ekman, *Being and Being Bought: Prostitution, Surrogacy and the Split Self*, (Spinifex Press, 2013), p. 129.

[46] Valeria Piersanti, Francesca Consalvo, Fabrizio Signore, Alessandro Del Rio and Simona Zaami, "Surrogacy and "Procreative Tourism": What Does the Future Hold from the Ethical and Legal Perspectives?", Medicina, Vol. 57, Issue 47, (2021) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7827900/> Accessed 22 January 2023.

[47] Ibid. See also: *The International Classification of Diseases*, 11th revision. World Health Organization, (2019).

[48] Gabriela Simionescu, Bogdan Doroftei, Radu Maftei, Bianca-Elena Obreja, Emil Anton, Delia Grab, Ciprian Ilea and Carmen Anton, "The Complex Relationship between Infertility and Psychological Distress" (Review), Experimental & Therapeutic Medicine, Vol. 21, Issue 4, (2021) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7885086/> Accessed 22 January 2023.

[49] Rebecca Buffum Taylor, "Using a Surrogate Mother: What You Need to Know", WebMD, (2021) <https://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother> Accessed 22 January 2023.

[50] Kajsa Ekis Ekman, *Being and Being Bought: Prostitution, Surrogacy and the Split Self*, (Spinifex Press, 2013), p. 129.

[51] Ibid., p. 129.

[52] Ibid., p. 129.

[53] Jens M. Scherpe and Claire Fenton-Glynn, "An Introduction", in Jens M. Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy*, (Intersentia, 2019), p. 1.

3. The best interests of the child in relation to the recognition of legal parentage following cross-border surrogacy

3.1. General

This chapter will discuss the best interests of the child in relation to the recognition of legal parentage following cross-border surrogacy. The chapter will start with a short discussion on the main legal issues or risks that children born through cross-border surrogacy face in relation to the non-recognition of legal parentage which affect their rights and best interests. Next, the chapter will describe the best interests of the child principle under Art. 3(1) of the CRC. Furthermore, the chapter will highlight the main children's rights in the CRC that derive from the recognition of legal parentage. The chapter will also discuss the right of children to know their origins and issues in relation to the sale of children, which are public interests that underlie domestic laws that prohibit surrogacy. As will be stipulated, the other rights of the child in the CRC determine the content of the best interests of the child principle. Moreover, the chapter will examine research in the field of psychology on the development of surrogate-born children and other children who do not share a genetic link with their parents in order to determine the content of the best interests of the child principle. Finally, the chapter will shortly discuss the relationship between the CRC and the ECHR.

The main aim of the chapter is to seek to define the content of the best interests of the child principle under Art. 3(1) of the CRC and highlight the risks that the non-recognition of legal parentage has on the child's rights and best interests.

3.2. The main legal issues in relation to the non-recognition of legal parentage

As was mentioned in Chapter 1.1, surrogacy is prohibited in many European states. In face of such domestic prohibitions' persons have travelled to states where surrogacy is permitted and have become legally recognised parents of children born through surrogacy in those states. This can create problems when the intended parents travel back with the child to the receiving state and request for the legal recognition of the parent-child relationships in accordance with the foreign birth certificate. The receiving state, which prohibits surrogacy, often does not recognise the parent-child relationships established abroad, which causes uncertain legal status for the child.[54] According to the laws of the birth state, the intended parents are the legal parents of the child. However, under the laws of the receiving state, the legal parents of the child are generally considered to be the surrogate mother and her husband/registered partner in accordance with traditional rules on parentage.[55]

Due to conflicting domestic laws of states, children born through cross-border surrogacy are *firstly*, at risk of becoming *de facto* parentless if the intended parents do not have

[54] Ibid., p. 1-2.
[55] Katarina Trimmings and Paul Beaumont, "Parentage and Surrogacy in a European Perspective", in Jens M. Scherpe (eds), *European Family Law: Family Law in a European Perspective*, Vol. III, (Edward Elgar Pub., 2016), p. 251.

a possibility of being recognised as the legal parents of the child in the receiving state.[56] In this regard, it must be borne in mind that the surrogate mother is usually not recognised as the legal mother of the child under the law of the birth state and will not take on the responsibility of raising the child.[57] Legal parentage determines many other rights and interests of children, for example, the right to identity, nationality, inheritance rights and parental responsibility.[58]

Secondly, children born through cross-border surrogacy are at risk of becoming stateless if the state of nationality of the intended parents refuses to recognise them as the legal parents of the child and consequently hinders the child from obtaining their nationality.[59] As the surrogate mother is usually not considered the legal parent of the child under the law of the birth state, the child will generally not acquire the nationality of the surrogate mother.[60] Nationality is a prerequisite for other rights and interests, such as the right to citizenship, the right to vote and to receive a passport.[61] Accordingly, the non-recognition of the legal parent-child relationships can have severe implications for the rights and best interests of the child, cf. Art. 3(1) of the CRC.[62]

3.3. The best interests of the child principle

According to Art. 3(1) of the CRC, the best interests of the child shall be a primary consideration 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 principle is one of the fundamental values of the CRC and should be used to interpret and implement all the other rights in the CRC.[63] The principle has to be applied in all actions concerning children, including administrative and judicial decisions, in relation to the legal recognition of parent-child relationships following cross-border surrogacy.

According to the CRC Committee, the concept of the "best interests of the child" has three aspects. *Firstly*, it is a substantive right, i.e. the right of the child to have its best interests assessed and taken as "a primary consideration" when different interests are being evaluated in order to reach a decision. In this regard, the principle creates an obligation for states and is directly applicable before the courts.[64] *Secondly*, it is an interpretative principle according to which the interpretation that "most effectively serves the child's best interests" should be

[56] Council of General Affairs and Policy of The Hague Conference, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, (Prel. Doc. No. 10), (2012), p. 4.
[57] Julian W. März, "What Makes a Parent in Surrogacy Cases? Reflections on the Fjölnisdóttir et al. v. Iceland Decision of the European Court of Human Rights", Medical Law International, Vol. 21, Issue 3, (2021), p. 284.
[58] Katherine Wade, "The Regulation of Surrogacy: A Children's Rights Perspective", Child Family Law Quarterly, Vol. 29, Issue 2, (2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/> Accessed 27 January 2023.
[59] Julian W. März, "What Makes a Parent in Surrogacy Cases? Reflections on the Fjölnisdóttir et al. v. Iceland Decision of the European Court of Human Rights", Medical Law International, Vol. 21, Issue 3, (2021), p. 283-284.
[60] However, the law of the United States provides an exception to this as the child can acquire nationality on grounds of the *jus soli*, which refers to the right of anyone born in the territory of a state to nationality or citizenship.
[61] Katherine Wade, "The Regulation of Surrogacy: A Children's Rights Perspective", Child Family Law Quarterly, Vol. 29, Issue 2, (2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/> Accessed 27 January 2023.
[62] Council of General Affairs and Policy of The Hague Conference, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, (Prel. Doc. No. 11), (2011), p. 11.
[63] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 1.
[64] Ibid., para. 6.

selected.[65] *Thirdly*, it is a rule of procedure which entails that whenever a decision will affect a specific child or children in general, an assessment must be made on the impact of the decision on the child or children more generally. Furthermore, the decision must show that the right of the child to have its best interests assessed has been taken into account. In this regard, the decision must explain what has been considered to be in the child's best interests, what criteria this is built on and how the child's interests have been weighed against other interests at stake.[66] The aim of the best interests of the child principle is to ensure the "full and effective" enjoyment of the rights in the CRC and the "holistic development" of the child.[67]

The term "a primary consideration" means that the child's best interests may not be considered on the same level as other considerations, but must be given greater weight.[68] However, when the best interests of the child conflict with other interests or rights, for example, those of other children or public interests, the former interests do not automatically override those other interests.[69] Nevertheless, the child's interests shall have high priority in such situations.[70] The CRC Committee has stated that considering the best interests of the child as "primary" requires a willingness to give priority to those interests in all situations, particularly when an action has an "undeniable impact" on the children concerned.[71] In comparison, when the best interests of the child are described as a "paramount consideration", such as in Art. 21 of the CRC on adoption, they are to be "the determining factor" in the decision making.[72]

The "best interests of the child" is a "dynamic" and "flexible" concept that requires an assessment of the specific context in each case.[73] In this regard, there is no general definition of what the best interests of the child entail. The content of the best interests of the child principle must be determined in each case in accordance with the other rights in the CRC and by taking into consideration the situation and needs of the particular child.[74] Furthermore, the CRC Committee has formulated a non-exhaustive list of elements that have to be taken into account when assessing the child's best interests as appropriate according to each situation. These elements are the child's views; the child's identity; the preservation of the family environment and maintaining of relations; the care, protection and safety of the child; the situation of vulnerability; the child's right to health and the child's right to education.[75] The other rights in the CRC and the above-mentioned elements should be used to determine the content of the child's best interests.[76] Consideration of the other rights in the CRC and the list of elements stipulated by the CRC Committee in accordance with the particular situation of the

[65] Ibid., para. 6.
[66] Ibid., paras. 6, 97.
[67] Ibid., paras. 4, 51.
[68] Ibid., para. 37.
[69] Lydia Bracken, *Same-sex Parenting and the Best Interests Principle*, (Cambridge University Press, 2020), p. 21.
[70] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 39.
[71] Ibid., para. 40.
[72] Geraldine Van Bueren, "Children's rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edition), (Oxford University Press, 2018), p. 330.
[73] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), paras. 1, 11, 32, 48.
[74] Ibid., para. 32.
[75] Ibid., paras. 50-79.
[76] Lydia Bracken, *Same-sex Parenting and the Best Interests Principle*, (Cambridge University Press, 2020), p. 25, 34.

child ensures "a rights-based approach" when determining the concept of the "best interests of the child".[77] In this respect, a decision will not be in the best interests of a child if it is contrary to the rights in the CRC.[78] The CRC Committee has also stipulated that when assessing the circumstances of each child there is, *inter alia*, a need to take into account the social context in which children find themselves, such as the presence and absence of parents, whether the child lives with them, the quality of the relationships between the child and its family or caregivers and the safety of the environment.[79]

In the next chapter, the main rights of the CRC that have relevance in relation to the recognition of legal parentage following cross-border surrogacy will be discussed. As has been mentioned, the rights in the CRC further determine the content of the "best interests of the child" principle under Art. 3(1) of the CRC.

3.4. The main rights of the CRC deriving from the recognition of legal parentage

The CRC does not contain a provision on children born through surrogacy, but several of its provisions are important for the rights of such children.[80]

The recognition of legal parentage of children born through cross-border surrogacy is a prerequisite for the child's enjoyment of other rights.[81] *Firstly*, the right to non-discrimination under Art. 2 of the CRC. According to the article, states must "respect and ensure the rights [in the CRC] to each child within their jurisdiction without discrimination of any kind", including discrimination based on "birth" or "other status", which can entail being born through surrogacy.[82] The CRC Committee has encouraged states to combat discrimination that children may encounter due to being born in "circumstances that deviate from traditional values".[83] Accordingly, children should not be disadvantaged in the enjoyment of their rights due to the fact that they were born through cross-border surrogacy.[84] In this regard, a child's legal status should not be any more unclear after surrogacy than after natural birth or other types of assisted reproduction.[85]

Secondly, the right to preserve one's identity under Art. 8(1) of the CRC which stipulates that states shall respect the right of the child to preserve his or her identity, including

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[77] Ibid., p. 38. See also: Geraldine Van Bueren, "Children's rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edition), (Oxford University Press, 2018), p. 330.
[78] Geraldine Van Bueren, "Children's rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edition), (Oxford University Press, 2018), p. 330.
[79] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 48.
[80] Paula Gerber and Katie O'Byrne, "Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy", in Paula Gerber and Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Ashgate, 2015), p. 83.
[81] Council on General Affairs and Policy of The Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Prel. Doc. No. 3B), (2014), para. 19.
[82] Paula Gerber and Katie O'Byrne, "Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy", in Paula Gerber and Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Ashgate, 2015), p. 85.
[83] Committee on the Rights of the Child, *General Comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, (CRC/C/GC/7/Rev.1), para. 12.
[84] As has previously been concluded by Katherine Wade, "The Regulation of Surrogacy: A Children's Rights Perspective", Child Family Law Quarterly, Vol. 29, Issue 2, (2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/> Accessed 27 January 2023.
[85] Ibid.

nationality, name and family relations as recognised by law without unlawful interference. Where a child has been illegally deprived of elements of its identity, states shall provide assistance with a view to re-establishing the child's identity, cf. Art. 8(2) of the CRC. The article not only requires states to refrain from unlawful interference with a child's right to identity but also demands states to take positive measures to ensure the effective fulfilment of the right.[86] A child's right to identity under the article includes its "family relations". There is nothing in the text of Art. 8(1) that requires that the meaning of the term "family relations" is restricted to genetic ties. Such an approach would not be in accordance with the CRC Committee's broad interpretation of family[87] nor the reality of children who build their identity on the persons who raise them.[88] Although the article refers to family relations "as recognised by law", domestic law must be in accordance with international human rights law and the best interests of the child.[89] Accordingly, states have a positive obligation to legally recognise information about the child's gestational, genetic and non-biological parents.[90]

Thirdly, the right to birth registration under Art. 7(1) of the CRC, which stipulates that a child shall be registered immediately after birth. If a child is not registered in a state, it is most likely not recognised as a person before the law, which can affect the access of the child to other rights, such as health care and education.[91] The right to birth registration is closely linked to Art. 8 of the CRC on the right to identity. The CRC Committee has stipulated that information on the "elements of the child's identity" must be included in the registration.[92] It has also been noted that the absence of information, such as family affiliations, can hinder the fulfilment of the child's other rights.[93] The effective fulfilment of a child's right to birth registration demands that the law recognises the real family environment of a child and includes information about the persons who have taken on the role of the parents of a child.[94] In this regard, children deserve to know that their relationships with their intended parents are stable and legally recognised.[95] Furthermore, birth registration should contain information on the surrogate mother and the genetic parents of the child to protect the right of the child to know its origins.[96]

Fourthly, the right to acquire a nationality under Art. 7(1) of the CRC and to preserve one's nationality under Art. 8(1) of the CRC. The right to nationality is a part of a child's

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[86] John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction*, (Victorian Law Reform Commission, 2004), p. 29-30.
[87] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 59.
[88] John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction*, (Victorian Law Reform Commission, 2004), p. 33.
[89] Ibid., p. 33.
[90] As has previously been noted by John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction*, (Victorian Law Reform Commission, 2004), p. 34.
[91] Jaap E. Doek, "The CRC and the Right to Acquire and to Preserve a Nationality", Refugee Survey Quarterly, Vol. 25, Issue 3, (2006), p. 26-32.
[92] Committee on the Rights of the Child, Guidelines for Periodic Reports, 20 November 1996, CRC/C/58, para. 51.
[93] John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction*, (Victorian Law Reform Commission, 2004), p. 29.
[94] Ibid., p. 29-30.
[95] Ibid., p. 30.
[96] Mia Dambach and Nigel Cantwell, "Child's Right to Identity in Surrogacy" in Katarina Trimmings, Sharon Shakargy and Claire Achmad (eds), *Research Handbook on Surrogacy*, (Edward Elgar Publishing, 2023) <https://www.child-identity.org/images/files/chip-surrogacy-md-nc.pdf> Accessed 11 March 2023.

identity, cf. Art. 8(1) of the CRC. Furthermore, under Art. 7(2) of the CRC states have special obligations to prevent children from becoming stateless. The right to nationality is also connected to other rights, such as the right to birth registration[97] and is a prerequisite for other rights and interests, such as the right to citizenship, the right to vote and to obtain a passport. The denial of children from accessing their intended parents' nationality can also affect their immigration status and make it difficult for them to remain in their parents' country of residence.[98] This can also affect a child's right to access public services, such as health care and education.[99]

Fifthly, the right to know and be cared for by one's parents under Art. 7(1) of the CRC, which is also a part of the child's right to identity.[100] Since the development of surrogacy and other forms of assisted reproduction, the concept of parentage has evolved. In the context of surrogacy, parentage entails not only a genetic and gestational aspect but also an intentional aspect.[101] The right "to know one's parents" includes the right to know who one's biological and gestational parents are.[102] As the concept "parents" is not defined in the CRC the right "to be cared for by one's parents", in the context of surrogacy, could also refer to the intended parents who have the intention of raising the child.[103] Accordingly, the concept can be interpreted as the right to know and be cared for by one's genetic, gestational or non-biological intended parents.[104] In this regard, the CRC Committee has stipulated that the concept of "family" under Art. 16 of the CRC on the right to private and family life must be interpreted broadly as to include "biological, adoptive or foster parents or, where applicable, […] members of the extended family or community".[105]

Sixthly, the right to survival and development of the child under Art. 6(2) of the CRC. The CRC Committee has stipulated that the term "development" is to be interpreted as a holistic concept, entailing the child's physical, mental, spiritual, moral, psychological, emotional and social development.[106] In this regard, circumstances that could lead to distress for young children, for example, the separation of the child from its parents or caregivers, must be

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[97] Jaap E. Doek, "The CRC and the Right to Acquire and to Preserve a Nationality", Refugee Survey Quarterly, Vol. 25, Issue 3, (2006), p. 27.
[98] ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], Request by the French Court of Cassation, No. P16-2018-001, 10 April 2019, para. 40.
[99] Katherine Wade, "The Regulation of Surrogacy: A Children's Rights Perspective", Child Family Law Quarterly, Vol. 29, Issue 2, (2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/> Accessed 27 January 2023.
[100] Paula Gerber and Katie O'Byrne, "Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy", in Paula Gerber and Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Ashgate, 2015), p. 91.
[101] Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", Medical Law Review, Vol. 26, Issue 3, (2018), p. 471.
[102] Paula Gerber and Katie O'Byrne, "Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy", in Paula Gerber and Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Ashgate, 2015), p. 93-94.
[103] Ibid., p. 94.
[104] Katherine Wade, "The Regulation of Surrogacy: A Children's Rights Perspective", Child Family Law Quarterly, Vol. 29, Issue 2, (2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/> Accessed 27 January 2023. See also: Council on General Affairs and Policy of The Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Prel. Doc. No. 3B), (2014), para. 19.
[105] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 59.
[106] Committee on the Rights of the Child, *General Comment No. 5 (2003)*: *General Measures of Implementation of the Convention on the Rights of the Child*, 27 November 2003, (CRC/GC/2003/5), para. 12.

considered on the basis of a child's right to development.[107] The CRC Committee has emphasised that under normal circumstances, babies form strong attachments with their parents or caregivers. These relationships provide children with physical and emotional security and influence the development of their personal identity.[108]

If the parent-child relationships are not legally recognised following cross-border surrogacy, the above-mentioned rights of the child are at risk of being negatively affected. However, there are other interests and rights of children at stake that underlie domestic laws that prohibit surrogacy. *Firstly*, the right of children to know their origins. With respect to the right of a child to "know one's parents" under Art. 7(1) of the CRC and to "preserve one's identity" under Art. 8(1) of the CRC, surrogacy brings into question whether a child should be provided with information about the way it was born and of the identity of the surrogate mother and of possible gamete donors. The CRC Committee has considered that children have the right under Art. 7(1) to access the identity of their biological parents.[109] Accordingly, children should generally have a right to be informed of the identity of their gestational mother and of possible gametes donors.[110] However, this right is not absolute and must be balanced against the genetic parents' right to respect for private life. Furthermore, the disclosure of such information must be in accordance with the child's best interests, cf. Art. 3 of the CRC.[111] In some states, it is possible to use gametes from anonymous donors in surrogacy arrangements. It is argued that such a practice is not in accordance with a child's right to know its parents.[112] Accordingly, cross-border surrogacy raises concerns in relation to the extent to which children's right to know about their genetic origins can be protected.[113]

Secondly, the right of children not to be sold, cf. Art. 35 of the CRC. According to the article, states shall take all appropriate measures to prevent the sale of or traffic in children for any purpose or in any form. The Special Rapporteur on the sale and sexual exploitation of children (Special Rapporteur) has stated that unregulated commercial and altruistic surrogacy can amount to the sale of children as defined by Art. 2(a) of the *Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography*.[114] According to Art. 1 of the Protocol states shall prohibit the sale of children. According to Art. 2(a) of the Protocol, the sale of children means any act or transaction where a child is transferred by a person or a

[107] Katherine Wade, "The Regulation of Surrogacy: A Children's Rights Perspective", Child Family Law Quarterly, Vol. 29, Issue 2,(2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/> Accessed 27 January 2023.
[108] Committee on the Rights of the Child, *General Comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, (CRC/C/GC/7/Rev.1), para. 16.
[109] Katherine Wade, "The Regulation of Surrogacy: A Children's Rights Perspective", Child Family Law Quarterly, Vol. 29, Issue 2, (2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/> Accessed 27 January 2023.
[110] Ibid.
[111] John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction*, (Victorian Law Reform Commission, 2004), p. 35.
[112] Katherine Wade, "The Regulation of Surrogacy: A Children's Rights Perspective", Child Family Law Quarterly, Vol. 29, Issue 2,(2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/> Accessed 27 January 2023.
[113] Ibid.
[114] UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001. See: *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Sexual Abuse Material*, 15 January 2018, A/HRC/37/60, paras. 8, 41, 67.

group to another for remuneration or any other consideration. The CRC Committee has expressed similar concerns as the Special Rapporteur in this field.[115]

The Special Rapporteur has issued that commercial surrogacy can be regulated in a way that does not amount to the sale of children. *Firstly*, the surrogate mother must be considered the mother at the birth of the child and must be under no legal obligation to transfer the child if she chooses to maintain parentage.[116] *Secondly*, all payments must be made to the surrogate prior to the legal or physical transfer of the child and must be non-refundable.[117] Furthermore, such regulation should include necessary safeguards and protection for children, including assessments of the best interests of the child, evaluation of the intended parents and protection of the child's right to know one's origins.[118] Moreover, as there can be a thin line between commercial and altruistic surrogacy, the latter must also be appropriately regulated to avoid the sale of children.[119] Regulation of altruistic surrogacy should ensure that payments to the surrogate mother are reasonable and subject to overview by a court or a competent authority.[120] The Special Rapporteur has stipulated that states should prohibit commercial surrogacy until properly regulated.[121]

As has been stipulated, the rights in the CRC guide the content of the best interests of the child principle under Art. 3(1) of the CRC. In this regard, it has been emphasised that an action cannot be considered in the best interest of the child if it is contrary to the child's rights in the CRC.[122] Nevertheless, in the context of surrogacy, there is a need to balance the private interests of the surrogate-born child that is directly affected by a decision on legal parentage against the public interests that underlie legislation that prohibits surrogacy. These public interests regard the exploitation of surrogate mothers and the interests of children more generally, i.e. the sale of children and the right to know one's origins.[123]

As has been mentioned, the best interests of the child as "a primary consideration" do not automatically override other interests. Accordingly, public interests may prevail over the private interests of the child concerned.[124] However, when it comes to making a decision on the recognition of legal parentage following cross-border surrogacy, the private interests of the particular child must be considered and given weight. It must be emphasised that the non-recognition of the parent-child relationship has an "undeniable impact" on the child concerned.[125] Accordingly, the child's interests should be given high priority. In this regard,

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[115] See, for example, Committee on the Rights of the Child, *Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India*, 13 June 2014, (CRC/C/IND/CO/3-4), (2014), para. 57(b).
[116] *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Sexual Abuse Material*, 15 January 2018, A/HRC/37/60, para. 72.
[117] Ibid., paras. 41, 72, 77(c).
[118] Ibid., para. 73.
[119] Ibid., para. 41.
[120] Ibid., paras. 76, 77(d).
[121] Ibid., para. 75.
[122] Geraldine Van Bueren, "Children's rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edition), (Oxford University Press, 2018), p. 330.
[123] ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], Request by the French Court of Cassation, No. P16-2018-001, 10 April 2019, para. 41.
[124] UN Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child*, (E/CN.4/1989/48), (2 March 1989), paras. 121-122.
[125] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 40.

the surrogate-born child is in an extremely vulnerable position, as the child risks becoming *de facto* parentless and stateless. Furthermore, there are risks to the child's right to identity, cf. Art. 7 and Art. 8 of the CRC, and of maintaining family relations. These are elements that the CRC Committee has emphasised that should be taken into consideration when assessing the child's best interests.[126]

The term "best interests of the child" has been criticised for being too vague and giving too much discretion to the decision maker.[127] Accordingly, it is imperative to examine research in the field of psychology on the development of surrogate-born children who are partly conceived with donor gametes and other children who do not share a genetic link with their parents to further determine the content of the "best interests of the child" principle in relation to the recognition of legal parentage in cross-border surrogacy cases.[128]

3.5. Research in the field of psychology

Susan Golombok has conducted research on children born through assisted reproduction involving a third party, i.e. children born through either egg donation, sperm donation or surrogacy, through egg *or* sperm donation, to heterosexual couples in the United Kingdom.[129] According to the research, children born through surrogacy generally do well, grow up in stable and safe family environments and show high levels of family functioning and adjustment from early childhood to young adulthood.[130] The children did not view their surrogate mothers as their "real" mothers, even in situations where there was a genetic link between them and were not negatively affected by being born through surrogacy.[131] According to the research, a genetic link between a child and a parent is less important for the well-being of children born through surrogacy than positive parent-child relationships.[132] Furthermore, the absence of a gestational or genetic link between parents and their children does not appear to interfere with the development of positive relationships between them.[133] However, although the absence of a genetic link between children and their parents does not appear to cause difficulties for the

[126] Ibid., paras. 55-70.
[127] Lydia Bracken, *Same-sex Parenting and the Best Interests Principle*, (Cambridge University Press, 2020), p. 15, 22.
[128] Ibid., p. 38.
[129] Susan Golombok, "Love and Truth: What Really Matters for Children Born Through Third-Party Assisted Reproduction", Child Development Perspectives Vol. 15, Issue 2, (2021), p. 103. It should be mentioned that in the research conducted by Susan Golombok on surrogate-born children in the United Kingdom, the children had a genetic link with *one* of their intended parents. Accordingly, it could be said that the research demonstrates that a genetic link with *both* parents is not required for the positive development of the child. However, although the research applies to *domestic* surrogacy in the United Kingdom and the surrogate-born children had a genetic link with *at least* one of their intended parents, conclusions can be drawn from the research in relation to the genetic link more broadly in cross-border surrogacy cases where surrogate-born children do not share a genetic link with either of the intended parents. Furthermore, research on adopted children and children born through embryo donation, where there is *no* genetic link between the children and the parents, points to the same results. All research to date challenges the idea that a genetic link is a prerequisite for children to thrive. See: Lydia Bracken, "Surrogacy and the Genetic Link", Child and Family Law Quarterly, Vol. 32, Issue 3, (2020), p. 306.
[130] Susan Golombok, "Love and Truth: What Really Matters for Children Born Through Third-Party Assisted Reproduction", Child Development Perspectives Vol. 15, Issue 2, (2021), p. 106. See also: Susan Golombok, Catherine Jones, Poppy Hall, Sarah Foley, Susan Imrie and Vasanti Jadva, "A Longitudinal Study of Families Formed Through Third-Party Assisted Reproduction: Mother-Child Relationships and Child Adjustment from Infancy to Adulthood", Developmental Psychology, (13 April 2023), p. 10-12.
[131] Susan Golombok, *We Are Family: What Really Matters for Parents and Children*, (Scribe, 2020), p. 171, 184.
[132] Susan Golombok, "Love and Truth: What Really Matters for Children Born Through Third-Party Assisted Reproduction", Child Development Perspectives Vol. 15, Issue 2, (2021), p. 103, 106.
[133] Ibid., p. 104.

children, not telling them about their origins or delaying disclosure beyond the preschool years is associated with less positive outcomes for adolescents' well-being and family relationships.[134]

Other studies have shown that families created by third-party reproduction, including surrogacy, with two mothers, two fathers or single mothers or fathers, function well regardless of the number, gender and sexual orientation of the parents.[135] Research on adopted children that are placed with their adopted families from birth and children born through assisted reproduction, by using embryo donations, where there is no genetic link between the children and the parents demonstrate the same results.[136] In such circumstances, provided that the child is raised in a stable and supportive family environment and is given information about its origins, the fact that there is no genetic link between the child and its parents seems to be of little importance for the child's welfare and development.[137]

The conclusions that can be drawn from current research is that the quality of the parent-child relationship is the core factor for children's psychological well-being, including children born through surrogacy.[138] Warm, caring and supportive relationships between parents and their children, and early disclosure about the children's origins, seem most important for the children's positive development.[139]

Surrogacy challenges the traditional understanding of parentage as it allows for a broader range of individuals to become parents. Many states in Europe follow the *mater semper certa est* rule to determine who is a mother. According to the rule, the woman who gives birth to the child is the child's legal mother, even if donor eggs were used. Therefore, legal motherhood is determined according to a traditional gestational link and where applicable a genetic link.[140] The legal status of the father is determined by the *pater est* rule or the "marital presumption", i.e. the husband/registered partner of the woman giving birth to a child is the legal father of the child.[141] Fatherhood can also be recognised, in some states, by a paternity recognition if the mother is not married or in a registered partnership.

However, surrogacy entails something completely different. The woman who gives birth to the child is not the same as the woman who raises the child and the man who plays the role of the father is not the husband of the surrogate mother. In view of the above, surrogacy provides an opportunity to question traditional understandings of what it means to be a

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[134] Ibid., p. 106.
[135] Ibid., p. 107.
[136] Statens Offentliga Utredningar, *Olika vägar till föräldraskap: Slutbetänkande av Utredningen om utökade möjligheter till behandling av ofrivillig barnlöshet*, (SOU, 2016:11), p. 51. See, for example, David M. Brodzinsky and Ellen Pinderhughes, "Parenting and Child Development in Adoptive Families" in Marc H. Bornstein (eds), *Handbook of Parenting*, Volume 1, (Lawrence Erlbaum, 2nd edition, 2002), p. 279-311 and Fiona MacCallum, Peter Brinsden and Susan Golombok, "Parenting and Child Development in Families With a Child Conceived Through Embryo Donation", Journal of Family Psychology, Vol. 21, Issue 2, (2007), p. 284-286.
[137] Statens Offentliga Utredningar, *Olika vägar till föräldraskap: Slutbetänkande av Utredningen om utökade möjligheter till behandling av ofrivillig barnlöshet*, (SOU, 2016:11), p. 51.
[138] Susan Golombok, *We Are Family: What Really Matters for Parents and Children*, (Scribe, 2020), p. 302.
[139] Susan Golombok, "Love and Truth: What Really Matters for Children Born Through Third-Party Assisted Reproduction", Child Development Perspectives Vol. 15, Issue 2, (2021), p. 107. See also: *Olika vägar till föräldraskap: Slutbetänkande av Utredningen om utökade möjligheter till behandling av ofrivillig barnlöshet*, Statens Offentliga Utredningar, 2016:11, p. 51.
[140] Alice Margaria, "Parenthood and Cross-Border Surrogacy: What is "New"? The ECtHR's First Advisory Opinion", Medical Law Review, Vol. 28, Issue 2, (2020), p. 422.
[141] Ibid., p. 422.

parent.[142] In this context, it is important to examine the field of psychology. From the perspective of psychology, a "parent" is an individual who fulfils the child's needs, whether or not the person has a genetic link with the child and regardless of the person's sexual orientation or whether the person has been recognised by the law as a "legal parent".[143] A "parent" in this regard, whether biological or not, plays a role in the identity of the child.[144] Therefore, from a psychological perspective, neither genetic nor gestational connections between children and their parents are necessary for successful parenting.[145] Accordingly, what is important from a psychological perspective is the quality of the parenting and the parent-child relationships regardless of whether there is a genetic link between the child and the intended parents.

Furthermore, according to psychological research on attachment theory, a child needs to be in a close relationship with another person, i.e. the primary caregiver, to develop properly and such an attachment must be persistent in order to provide the child with a stable family environment.[146] This research will be further discussed in Chapter 4.7, in relation to the ECtHR's assessment of the best interests of the child in the case of *Paradiso and Campanelli v. Italy*.[147]

The findings of psychological research on children's development combined with the rights in the CRC[148] that are at stake in cross-border surrogacy cases in relation to the recognition of legal parentage can be used to determine the content of the "best interests of the child" principle, cf. Art. 3(1) of the CRC. Such research can reduce the vagueness of the best interests of the child concept by providing a better understanding of the reality of children born through surrogacy and other children who don't share a genetic link with their parents.[149]

[142] Ibid., p. 422-423.
[143] Isabelle Roskam, "Psychological Insights: Parent-Child Relationships in the Light of Psychology", in Jehanne Sosson, Geoffrey Willems, Gwendoline Motte (eds), *Adults and Children in Postmodern Societies: A Comparative Handbook and Multidisciplinary Handbook*, (Intersentia, 2019), p. 665.
[144] Ibid., p. 664.
[145] Rachel Cook, "Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation" in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *What is a Parent? A Socio-Legal Analysis*, (Hart Publishing, 1999), p. 129, 136.
[146] Committee on the Rights of the Child, *General Comment No. 14 (2013), on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 72.
[147] ECtHR, *Paradiso and Campanelli v. Italy* [GC], App. No. 25358/12, 24 January 2017.
[148] The CRC Committee has stipulated that the other rights in the CRC determine the content of the best interests of the child principle. See: Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 32.
[149] As has been previously stated by Lydia Bracken in relation to research in the field of same-sex parenting. According to Lydia Bracken, psychological research can be used to determine the content of the best interests of the child principle in relation to parenting rights of same-sex couples. See: Lydia Bracken, *Same-sex Parenting and the Best Interests Principle*, (Cambridge University Press, 2020), p. 60. Furthermore, the CRC Committee has stated that the assessment of the impact that decisions have on children must be based on general knowledge, for example, in the field of psychology. See: Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 95.

3.6. The relationship between the CRC and the ECHR

The ECHR is a regional human rights convention ensuring civil and political rights to everyone within the jurisdiction of the member states, including children, cf. Art. 1 of the ECHR.[150] However, the ECHR is not a specialised children's rights convention and its articles that expressly refer to children are few, cf. Art. 5(1)(d) and Art. 6(1).[151]

The ECtHR has accepted applications by and on behalf of children and has a vast case-law concerning children's rights.[152] The Court has emphasised the need to interpret the ECHR in accordance with the CRC and has frequently applied the best interests of the child principle in Art. 3(1) of the CRC in its case-law dealing with children's rights in various contexts.[153] Furthermore, the Court "takes particular note" of the CRC Committee's general comments in its case-law regarding children.[154] In this regard, the Court has stipulated that the ECHR cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law.[155] Account should be taken of "any relevant rules of international law applicable in the relations between the parties", cf. Art. 31(3)(c) of the VCLT. More specifically, the Court has stated that the positive obligations that the ECHR lays on the member states in relation to children's rights must be interpreted in the light of the CRC.[156] In this regard, it has been argued that the CRC has a "higher status" in the case-law of the ECtHR than other international conventions, in light of the fact that all member states of the ECHR are parties to the CRC.[157]

Article 8 of the ECHR, on the right to respect for private and family life, has particular importance for children in the case-law of the ECtHR, including in the field of cross-border surrogacy.[158] The next chapter will examine *whether* and *to what extent* the ECtHR applies the best interests of the child principle in Art. 3(1) of the CRC in practice when interpreting Art. 8 of the ECHR in relation to the recognition of legal parentage following cross-border surrogacy.

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[150] Aida Grgić, "Jurisprudence of the European Court of Human Rights on the Best Interests of the Child in Family Affairs", *The Best Interests of the Child – A Dialogue Between Theory and Practice*, (Council of Europe, 2016), p. 105.
[151] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to the Rights of the Child*, (European Union Agency for Fundamental Rights and Council of Europe, 2022), p. 24-25.
[152] Ibid., p. 20, 25, 31-32.
[153] Geraldine Van Bueren, "Children's rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edition), (Oxford University Press, 2018), p. 340.
[154] Aida Grgić, "Jurisprudence of the European Court of Human Rights on the Best Interests of the Child in Family Affairs", *The Best Interests of the Child – A Dialogue Between Theory and Practice*, (Council of Europe, 2016), p. 116. See, for example, ECtHR, *Simona Mihaela Dobre v. Romania*, App. No. 8361/21, 21 March 2023, paras. 41-44, 61-62, and ECtHR, *Darboe and Camara v. Italy*, App. No. 5797/17, 21 July 2022, paras. 58-63.
[155] See, for example, ECtHR, *Harroudj v. France*, App. No. 43631/09, 4 October 2012, para. 42.
[156] Ibid., para. 42.
[157] Ursula Kilkelly, "The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child", Human Rights Quarterly, Vol. 23, Issue 2, (2001), p. 308-326.
[158] Aida Grgić, "Jurisprudence of the European Court of Human Rights on the Best Interests of the Child in Family Affairs", *The Best Interests of the Child – A Dialogue Between Theory and Practice*, (Council of Europe, 2016), p. 105.

4. The European Court of Human Rights leading cases in the field of cross-border surrogacy

4.1. General

In recent years, the ECtHR has considered several cross-border surrogacy cases where member states that prohibit surrogacy have refused to recognise the legal parent-child relationships between surrogate-born children and their intended parents, which have been legally established abroad.[159]

In this chapter the ECtHR's leading cases in the field of cross-border surrogacy will be discussed, i.e. the case of *Mennesson v. France*, the Court's Advisory Opinion from 2019 requested by France, the case of *Paradiso and Campanelli v. Italy*, the case of *Valdís Fjölnisdóttir and Others v. Iceland* and the case of *K.K. and Others v. Denmark*. The purpose of this chapter is to examine *whether* and *how* the Court applies the best interests of the child principle under Art. 3(1) of the CRC in practice in each case. Furthermore, to examine what role the genetic link plays in the case-law of the ECtHR in this field.

The cases will *firstly*, be summarised. *Secondly*, they will be analysed on the one hand with regard to *whether* and *to what extent* the ECtHR applies the best interests of the child principle under Art. 3(1) of the CRC. In this regard, it will both be discussed *whether* and *how* the Court applies the principle and where applicable when the Court does not apply the principle or does not apply it sufficiently by identifying where the Court's approach is not in accordance with the best interests of the child. The ECtHR applies the best interests of the child principle to varying degrees, which needs to be explained in order to answer "to what extent" or "how far" the Court applies the principle. On the other hand, the cases will be analysed with regard to the role that the genetic link plays in the best interests of the child assessment in relation to the legal recognition of the parent-child relationships.

4.2. The case of Mennesson v. France[160]

4.2.1. The facts

In the case, the applicants A and B, a married French couple, were unable to conceive a child on their own because B (the wife) was infertile (para. 7). After unsuccessful attempts to conceive a child using *in vitro* fertilisation they went to California where they entered into a

[159] See, for example, *Mennesson v. France*, App. No. 65192/11, 26 June 2014, *Labassee v. France*, App. No. 65941/11, 26 June 2014, *D. and Others v. Belgium*, App. No. 29176/13, 8 July 2014, *Paradiso and Campanelli v. Italy* [GC], App. No. 25358/12, 24 January 2017, *C. and E. v. France*, App. No. 1462/18 and 17348/18, 19 November 2019, *D. v. France*, App. No. 11288/18, 16 July 2020, *Valdís Fjölnisdóttir and Others v. Iceland*, App. No. 71552/17, 18 May 2021, *S.-H. v. Poland*, App. No. 56846/15 and 56849/15, 16 November 2021, *A.L. v. France*, App. No. 13344/20, 7 April 2022, *D.B. and Others v. Switzerland*, App. No. 58817 and 58252/15, 22 November 2022, *A.M. v. Norway*, App. No. 30254/18, 24 March 2022 and *K.K. and Others v. Denmark*, App. No. 25212/21, 6 December 2022. Cross-border surrogacy was also considered in an Advisory Opinion issued by the ECtHR at the request of France, see: *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], Request No. P16-2018-001, 10 April 2019.

[160] ECtHR, *Mennesson v. France*, App. No. 65192/11, 26 June 2014.

surrogacy arrangement where the male gametes of A were used and an egg from a donor (para. 8). The surrogate mother became pregnant with twins. According to a judgment of the Supreme Court of California, A was the "genetic father" and B the "legal mother" of the children to whom the surrogate was to give birth (para. 9). The twins, applicants C and D, were born in October 2000 (para. 10). The French Consulate in Los Angeles refused A's request to have the twins' birth certificates registered in the French register and to have their names registered in his passport (para. 11), as A could not establish that B had given birth to them (para. 12). After the US Federal Administration issued US passports for the twins where A and B were named their parents, the four applicants were able to travel to France (para. 13). In France, proceedings to recognise the parent-child relationships established abroad went through all stages of the judicial system. At last, the Court of Cassation dismissed an appeal made by the applicants and stipulated that the state authorities' refusal to recognise the family ties between the children and the intended parents was justified since the surrogacy arrangement was contrary to French public policy (para. 27).

4.2.2. The applicants' complaint

Before the ECtHR, the applicants submitted that the refusal of the French authorities to recognise the parent-child relationships legally established abroad violated their right to private and family life under Art. 8 of the ECHR and the children's best interests (para. 43).

4.2.3. The decision and reasoning of the Court

The ECtHR found the non-recognition of the parent-child relationships to be an interference with the applicants' right to respect for their "family life" and "private life" under Art. 8 of the ECHR. Such interference would be in breach of Art. 8 of the ECHR, unless it could be justified under Art. 8(2) of the Convention as being in accordance with the law, pursuing legitimate aims and being necessary in a democratic society (paras. 48-50).

The ECtHR found that the interference with Article 8 of the ECHR was in accordance with the law, as according to the French Civil Code, surrogacy arrangements were null and void on grounds of public policy (para. 58). Furthermore, the Court considered that the interference pursued legitimate aims under Art. 8(2) of the ECHR, i.e. to protect the health and rights of children and surrogate mothers (para. 62).

The ECtHR stated, in relation to the assessment of whether the interference was necessary in a democratic society, that in the context of surrogacy, the state had a wide margin of appreciation in light of the lack of consensus in Europe on the legality of surrogacy arrangements and the legal recognition of the parent-child relationships. Furthermore, the margin was wide since surrogacy raised moral and ethical questions. However, where a particularly important aspect of an individual's identity was at stake, the margin would be restricted (paras. 77-79). In this regard, the Court stated that "an essential aspect of the identity of individuals [was] at stake where the legal parent-child relationship [was] concerned". Accordingly, the margin of appreciation in the case needed to be reduced (para. 80). The Court

considered that it had to determine whether a fair balance had been struck between the competing interests of the state and those directly affected by the interference. The Court stated that in doing so, it "must have regard to the essential principle according to which, whenever the situation of a child [was at] issue, the best interests of that child [were] paramount" (paras. 81, 84).

The ECtHR made a distinction between all the applicants' right to respect for their family life and the right of the children (C and D) to respect for their private life (para. 86). The Court applied a broad margin of appreciation in relation to the applicants' right to family life. In this regard, the Court considered that the lack of recognition of the legal parent-child relationship, between the children and the intended parents, had affected the applicants' right to family life (para. 87). The Court acknowledged that the applicants had faced practical difficulties due to the non-recognition of the parent-child relationship, but that the applicants had not claimed that it had been impossible to overcome them and had not shown that the non-recognition prevented them from enjoying their right to respect for their family life in France. In this regard, the Court noted that the applicants were able to live together in conditions broadly comparable to those of other families and there was no indication that the children would be removed from the intended parents (para. 92). The Court concluded that the state had struck a fair balance between the interests of the applicants and those of the state in relation to their right to respect for family life (para. 94).

The ECtHR restricted the margin of appreciation concerning the children's (C and D's) right to private life. In this regard, the Court reiterated that the right to private life required that everyone should be able to establish details of their identity as individual human beings, which included the legal parent-child relationship. The Court stated that as the domestic law currently stood, the children were in a position of legal uncertainty. Although the children had been recognised in another state as the children of A and B, they were denied that status under French law. The Court considered that this contradiction undermined the children's identity within French society (para. 96). The Court further stated that nationality was an element of a person's identity. Although the children's father was French, they faced uncertainty as to the possibility of obtaining French nationality. That uncertainty was liable to have negative consequences for the children's personal identity (para. 97). The Court also found that the non-recognition of legal parentage had negative consequences for the children's inheritance rights, which were also a part of their identity (para. 98).

The ECtHR accepted that the French authorities wished to deter its nationals from seeking surrogacy arrangements abroad, which were prohibited on their own territory. However, the effects of the non-recognition of the legal parent-child relationship were not limited to the parents who had chosen this method of assisted reproduction prohibited by French law. The refusal also affected the children, whose right to respect for their private life, which included their right to identity and the legal parent-child relationship, was substantially affected. Accordingly, a serious question arose as to the compatibility of the situation with the children's best interests (para. 99).

At last, the Court emphasised another factor, a "special dimension", i.e. one of the intended parents, the father, was also the children's biological parent. As biological parentage

was an important component of an individual's identity, it could not be in the interests of the children to deprive them of a legal relationship with a biological parent where the biological reality of that relationship was established and the children and the parent sought its full recognition. In this regard, the Court noted that not only was the parent-child relationship between the children and their biological father not recognised through registration, but formal recognition by means of a declaration of paternity, adoption or through other means seemed not to be possible. In light of the serious consequences of this restriction on the identity and right to respect for private life of the children, the Court found that France had overstepped its margin of appreciation (para. 100). In its conclusion, the Court stressed that "[h]aving regard […] to the importance to be given to the child's interests when weighing up the competing interests at stake, […] the right of the [children] to respect for their private life [under Art. 8 of the ECHR] was infringed" (paras. 101-102).[161]

4.3. Analysis of Mennesson v. France

4.3.1. The assessment of the best interests of the child

In the case of *Mennesson v. France*, the ECtHR applied the best interests of the child principle under Art. 3(1) of the CRC and gave the children's interests a high priority in relation to the recognition of their legal relationships with their biological intended father when weighing the different interests at stake (para. 101). In this regard, the Court stressed that the children's best interests were "paramount" when assessing whether the state struck a fair balance between the public interests of prohibiting surrogacy and the private interests of the children concerned (paras. 81, 84). As Art. 3(1) of the CRC only stipulates that the best interests of the child are to be "a primary" consideration, this could indicate that the ECtHR is, in some instances, ready to go beyond the requirements of the CRC when examining cases involving children.[162] In any case, by referring to the children's interests as "paramount" the Court stipulates that they should have significant weight in the balancing exercise.

The ECtHR stated that as there was no European consensus on surrogacy and its legal implications, which regarded sensitive moral and ethical questions, the margin of appreciation afforded to states would generally be wide in this field. However, as the case regarded particularly important aspects of the children's identity, the Court applied a narrow margin of appreciation (paras. 77-80, 100). The best interests of the child and the children's right to identity under the broader right to private life, cf. Art. 8 of the ECHR, outweighed the public interests of protecting surrogate mothers and children more generally.[163] The Court's emphasis

[161] The ECtHR reached the same conclusion in *Labassee v. France*, App. No. 65941/11, 26 June 2014, a case decided at the same time as a parallel case, where the facts of the case were similar as in *Mennesson v. France*. See also ECtHR, *Foulon and Bouvet v. France*, App. No. 9063/14 and 10410/14, 21 July 2016 and *Laborie v. France*, App. No. 44024/13, 19 January 2017 where the Court relied on its conclusions in *Mennesson v. France* and *Labassee v. France*. *Foulon and Bouvet v. France* concerned single men who had a genetic link with children born through cross-border surrogacy.

[162] Lydia 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, Issue 3, (2017), p. 371.

[163] Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", Medical Law Review, Vol. 26, Issue 3, (2018), p. 460.

on the children's best interests as "paramount" and its restriction of the margin of appreciation when examining the children's right to identity are important contributions on behalf of the Court in ensuring the best interests of the children concerned in relation to the recognition of their legal relationship with their biological intended father.

The ECtHR examined how the domestic courts had assessed the best interests of the children. In this regard, the domestic courts had found that the non-recognition of legal parentage had not violated the children's right to private life or their best interests, as the applicants had been able to live together in France (para. 85). The ECtHR did not agree with this assessment and emphasised the harmful effects that the non-recognition of legal parentage of the biological intended father had on the children's right to respect for private life by placing them in a position of legal uncertainty and undermining their right to identity within society (para. 96). In this regard, the Court stressed that the non-recognition impacted the children's right to obtain their intended father's nationality, a legal parent-child relationship and inheritance rights (paras. 97-99) but all these components were a part of the children's identity. Accordingly, the Court considered that the children's best interests and their right to identity and private life required that domestic law provided a possibility of the recognition of the legal parentage of the biological intended father (paras. 100-101).

In this regard, the thesis argues that the ECtHR applied the best interests of the child principle, cf. Art. 3(1) of the CRC, as a substantive right by focusing on the right of the children to identity under the broader right to private life and assessing the children's best interests on grounds of that right.[164] Furthermore, by giving the children's best interests significant weight when assessing the different interests at stake. Moreover, the Court applied the principle as a rule of procedure *firstly*, by considering how the domestic courts assessed the best interests of the child.[165] *Secondly*, by assessing the negative impact of the non-recognition of legal parentage of the biological intended father on the children's right to identity under Art. 8 of the ECHR, which includes a legal parent-child relationship, the right to nationality and inheritance rights. This approach of the Court safeguards the right of the children to identity, cf. Art. 7 and Art. 8 of the CRC. Furthermore, the Court ensures to some extent that the children are not disadvantaged because of the way they were born, cf. Art. 2 of the CRC.[166] In this respect, the CRC Committee has stipulated that the rights in the CRC determine the content of the best interests of the child principle.[167] In addition, this approach of the Court is in accordance with the CRC Committee's recommendations, which stipulate that account should be taken of the child's identity and the preservation of family relations when determining the child's best interests.[168]

[164] Milka Sormunen, "Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights", Human Rights Law Review, Vol. 20, Issue 4, (2020), p. 752, 754.
[165] Ibid., p. 754.
[166] Lydia 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, Issue 3, (2017), p. 372-373.
[167] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), paras. 1, 4, 32.
[168] Ibid., paras. 52, 55-70.

4.3.2. The role of the genetic link for the recognition of legal parentage

The case of *Mennesson v. France* has its shortcomings in relation to the best interests of the child assessment. A significant feature of the case was that there was a genetic link between the children and one of the intended parents, i.e. the biological intended father (para. 100). The importance of legally recognising "biological parentage" seems to have been decisive for the ECtHR to conclude that there was a violation of the children's rights to identity and private life under Art. 8 of the ECHR.[169] In this regard, the ECtHR applied a narrow interpretation of the children's right to identity by limiting it to biological parentage or genetic identity as will be further discussed in Chapter 5.4.[170]

According to the ECtHR, the children's best interests and right to identity are secured if their relationship with the biological father is recognised. In light of the ECtHR's emphasis on biological parentage or the genetic link, the Court did not address the issue of whether or by what means the state should recognise the children's relationship with the intended mother, i.e. the wife of the biological father who had no genetic link with the children. Nevertheless, as the Court later acknowledged in its Advisory Opinion, the non-recognition of the parent-child relationships between the children and their non-biological intended mother had a negative impact on the children's right to identity and private life under Art. 8 of the ECHR. In this regard, there were risks for the children in relation to obtaining a legal parent-child relationship with their intended mother and regarding inheritance rights (para. 40). As has been mentioned, the right to identity is contained in Art. 7 and Art. 8 of the CRC and the rights in the CRC determine the content of the best interests of the child principle.[171] A decision cannot be considered in the best interests of the child if it is contrary to the rights of the CRC.[172] Therefore, it can be said that the ECtHR in *Mennesson v. France* did not ensure the best interests of the children insofar as regards not addressing their legal parent-child relationships with their non-biological intended mother. In this regard, the Court did not even apply the best interests of the child principle, neither as a substantive right nor as a rule of procedure.

Accordingly, the genetic link was the determining factor of the ECtHR's decision to find a violation of the children's right to identity and private life, as there was no possibility under domestic law to recognise the children's legal relationship with their biological intended father. As has been mentioned, the issue concerning the recognition of the legal parent-child relationships between the children in *Mennesson v. France* and their non-biological intended mother was later addressed by the ECtHR in its Advisory Opinion from 2019, cf. the following chapter.

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[169] Lydia 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, Issue 3, (2017), p. 373.

[170] Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", Medical Law Review, Vol. 26, Issue 3, (2018), p. 468.

[171] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 32.

[172] Geraldine Van Bueren, "Children's rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edition), (Oxford University Press, 2018), p. 330.

4.4. The Advisory Opinion requested by France[173]

4.4.1. General

Subsequent to the case of *Mennesson v. France*, the ECtHR delivered its first Advisory Opinion following a request from the French Court of Cassation under Art. 1 of Protocol No. 16 to the ECHR.[174] The request was made to eliminate the uncertainty that had arisen after the case of *Mennesson v. France*, as the ECtHR had not addressed the issue of whether or by what means the French authorities should recognise the legal relationship between the children and their non-biological intended mother, i.e. the wife of the biological father.[175]

The function of advisory opinions under Protocol No. 16 to the ECHR is to allow domestic courts to request guidance from the ECtHR on the interpretation or application of the rights in the ECHR in cases pending before them without transferring the cases to the ECtHR, cf. Art. 1 of the Protocol. Although advisory opinions are non-binding, cf. Art. 5 of the Protocol, they are a part of the case-law of the ECtHR. They have significant consequences for the member states, as they reflect the views of the Court that will likely be applied in similar cases in the future.[176]

4.4.2. The recognition of the legal parentage of the non-biological intended mother

The first issue raised concerned whether the right to private life under Art. 8 of the ECHR of a child born through cross-border surrogacy required domestic law to provide for a possibility of the recognition of the relationship between the child and the intended mother, who was not the child's biological mother (paras. 32, 37). In this regard, the ECtHR noted that it had to some extent placed emphasis in its case-law on the existence of a biological link with *at least* one of the intended parents. The Court observed that the question to be addressed explicitly included the factual element of a father with a biological link to the children (para. 36). Furthermore, the father's legal relationship with the children had been recognised under domestic law (para. 32). In order to answer the first issue, two factors would carry particular weight, i.e. the children's best interests and the scope of the margin of appreciation (para. 37). In this regard,

[173] ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], Request by the French Court of Cassation, No. P16-2018-001, 10 April 2019.
[174] Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, 2 October 2013 (entry into force 1 August 2018).
[175] Lydia Bracken, *Same-sex Parenting and the Best Interests Principle*, (Cambridge University Press, 2020), p. 205.
[176] Council of Europe, *Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms: Explanatory Report*, (2013), para. 27. The ECtHR has applied the reasoning in its Advisory Opinion in subsequent cases, for example, in *C. and E. v. France*, App. No. 1462/18 and 17348/18, 19 November 2019, revealing that the opinion can be used in an interpretative way. The case concerned the refusal to register the details of a birth certificate of children born through cross-border surrogacy using the gametes of the intended father and an egg from a donor, in so far as the birth certificate designated the intended mother as the legal mother. The Court declared the application inadmissible as the refusal was not disproportionate because domestic law provided a possibility of recognising the parent-child relationships between the children and the non-biological intended mother by means of adoption.

the Court stressed that "whenever the situation of a child [was at] issue, the best interests of that child [were] paramount" (para. 38).

The ECtHR stated that the lack of recognition of a legal relationship between a child born through cross-border surrogacy and the intended mother had a negative impact on several aspects of the child's right to respect for its private life, i.e. it placed the child in a position of legal uncertainty regarding his or her identity within society as is further explained in the Advisory Opinion (para. 40).

The ECtHR further stated that in the context of surrogacy, the child's best interests included other components that did not necessarily weigh in favour of the recognition of the legal parent-child relationship with the intended mother, such as protection against the risk of abuse of surrogacy arrangements and the possibility to know one's origins (para. 41). However, the Court considered that the absolute impossibility of obtaining recognition of the relationship between the child and the intended mother was contrary to the child's best interests (para. 42). In this regard, the Court emphasised the negative impact that the lack of recognition of the parent-child relationship had on the children and the fact that the child's best interests also entailed the legal identification of the persons responsible for raising the child, meeting the child's needs and ensuring the child's welfare, as well as the possibility for the child to live and develop in a stable environment (para. 42).

The ECtHR stipulated that generally, the margin of appreciation would be wide where there was no European consensus on an issue, such as in the field of surrogacy and in relation to the legal recognition of the parent-child relationship (para. 43). However, the Court stressed that where an important aspect of an individual's identity was at stake, such as the legal parent-child relationship, the margin of appreciation would be restricted (para. 44). In reality, the issues at stake went beyond the question of the children's identity. Other essential aspects of their private life came into play where the matter concerned the environment in which they lived and developed and the persons responsible for meeting their needs and ensuring their welfare. According to the Court, this gave further support to its finding to reduce the margin of appreciation (para. 45).

In light of the children's best interests and the reduced margin of appreciation, the ECtHR concluded that the right to respect for private life under Art. 8 of the ECHR of a child born through cross-border surrogacy required that domestic law provided a possibility of the recognition of a legal parent-child relationship with the intended mother (para. 46). The Court further stressed that when a child was born through cross-border surrogacy, where the eggs of the intended mother were used, the need to provide a possibility of the recognition of the legal parent-child relationship applied with even "greater force" (para. 47).

4.4.3. The mechanism required to recognise the legal parentage of the non-biological intended mother

The second issue raised concerned what kind of mechanism was required under Art. 8 of the ECHR to recognise the legal relationship between the children and the non-biological intended mother. In this regard, the ECtHR found that there was no obligation on states to register the

details of the birth certificate legally established abroad (paras. 33, 53). Instead, the choice of means by which to allow recognition of the legal parent-child relationship fell within the state's margin of appreciation (paras. 48, 51). According to the Court, Art. 8 of the ECHR did not impose a general obligation on states to recognise the relationship between the child and the intended mother from the beginning or *ab initio*. However, the best interests of the child required that a mechanism existed enabling the recognition of the relationship once it had become "a practical reality" (paras. 52, 54). This mechanism must include an assessment by the domestic courts of the child's best interests considering the circumstances of the case (para. 54). Adoption by the intended mother or another mechanism could be used for this purpose as long as the process could be implemented "promptly and effectively" to ensure that the child was not kept in a vulnerable position of legal uncertainty regarding the relationship for a long time (paras. 49, 54-55).[177]

4.5. Analysis of the Advisory Opinion[178]

4.5.1. The assessment of the best interests of the child

In the Advisory Opinion, the ECtHR applied the best interests of the child principle under Art. 3(1) of the CRC and gave the children's interests a high priority in relation to the recognition of their relationship with their non-biological intended mother when weighing the different interests at stake, including the more general interests of children (paras. 38, 41). In this respect, the Court, as in *Mennesson v. France*, stressed that the best interests of the child were "paramount" stipulating that the children's best interests had significant weight (para. 38).

Similarly, as in the case of *Mennesson v. France*, the ECtHR stated in the Advisory Opinion that as there was no European consensus on surrogacy or on whether the legal parent-child relationship following cross-border surrogacy should be recognised states would usually have a wide margin of appreciation in this area (para. 43). However, the Court found that the margin of appreciation should be reduced in the case because the issue at stake involved particularly important aspects of the children's identity (paras. 40, 44) as well as "essential aspects of their private life" (para. 45). As a result, the best interests of the children and their right to identity and private life, cf. Art. 8 of the ECHR, outweighed the public interests

[177] On 4 October 2019, the French Court of Cassation recognised the legal relationships between Mrs. Mennesson and her children. The Court excluded adoption in this specific case and found that the recognition of the foreign birth certificates that stipulated the intended mother as the "legal mother" of the children could no longer be denied, see Cour de Cassation, Assemblée plénière, No. 648, 4 Octobre 2019.

[178] The reasoning of the ECtHR in the Advisory Opinion has been applied in the case of a male same-sex couple who entered into a surrogacy arrangement abroad where one of the intended fathers had a genetic link to the child, cf. ECtHR, *D.B. and Others v. Switzerland*, App. No. 58817/15 and 58252/15, 22 November 2022. In the case, the applicants, a same-sex couple, who were in a registered partnership in Switzerland, entered into a surrogacy arrangement in the United States and became legal parents of a child born through surrogacy in the latter state. The Swiss authorities refused to recognise the parent-child relationship established by a US Court between the child and the non-biological intended father. However, the authorities had recognised the legal relationship between the child and the biological intended father. The ECtHR held that there had been a violation of the child's right to respect for private life under Art. 8 of the ECHR because, at the time when the child was born, there was no possibility in domestic law of the recognition of the parent-child relationship between the child and the non-biological intended parent. For almost eight years, adoption had only been possible for married couples, to the exclusion of those in registered partnerships. The Court found that the refusal to recognise the parent-child relationship lawfully established abroad, without providing for alternative means of recognising the relationship, had not been in the best interests of the child.

underlying the prohibition of surrogacy, i.e. to prevent risks of abuse which surrogacy arrangements might entail and to protect the right to know one's origins (paras. 41, 46).

The ECtHR emphasised the harmful effects that the non-recognition of the legal relationship between the children and the non-biological intended mother had on the children's right to respect for private life, by placing them in a position of legal uncertainty regarding their identity within society (para. 40). In this regard, the Court stressed that the non-recognition impacted the children's right to their intended mother's nationality, their right to remain in their intended mother's state of residence and their right to inheritance. Furthermore, the non-recognition risked the children's continued relationship with the intended mother if the intended parents were to separate[179] or if the intended father died (para. 40). Accordingly, the Court considered that the children's best interests and right to private life also required that domestic law provided a possibility of the recognition of the legal parent-child relationship with the non-biological intended mother once it had become "a practical reality" (paras. 42, 46, 52, 54).

In this regard, the thesis argues that the ECtHR applied the best interests of the child principle, cf. Art. 3(1) of the CRC, as a substantive right by focusing on the rights of the children to identity and private life and assessing their best interests on grounds of those rights.[180] Furthermore, by giving their best interests significant weight when assessing the different interests at stake. In addition, the Court applied the principle as a rule of procedure by assessing the negative impact that the non-recognition of the legal parentage of the non-biological intended mother had on the children's right to identity and right to private life under Art. 8 of the ECHR. This approach of the Court safeguards the right of the children to a legal parent-child relationship with their non-biological intended mother and their right to preserve

[179] This was the situation in ECtHR, *A.M. v. Norway,* App. No. 30254/18, 24 March 2022. In the case, the intended parents, a former couple who had dealt with infertility for many years, entered into a surrogacy arrangement in the United States, despite they had separated. A child was born via a surrogate mother using the gametes of the intended father and a donor egg. The non-biological intended mother was recognised as the legal mother according to a court ruling in the United States. When back in Norway, the intended parents shared the responsibility for raising the child for the first 17 months of his life. However, they disagreed on where the child was to live and on contact rights. The biological intended father was registered as the legal father in Norway. However, according to Norwegian law, the woman who gave birth to the child was to be regarded as the mother. Accordingly, the intended mother could not be registered as the child's legal mother unless she adopted him. Due to a disagreement between the intended parents, the biological father, who had the sole parental responsibility for the child under Norwegian law, cut off further contact between the intended mother and the child. The state authorities refused the intended mother's request to recognise her as the legal mother through adoption, as the intended father had not consented to it. According to Section 7 of the Adoption Act, it was a condition for adoption that persons with parental responsibility consented to the adoption. The Court found no violation of the intended mother's right to private life under Art. 8 of the ECHR. The Court did not consider the child's right to private life, as the child was not an applicant in the case. The case confirms the importance of the genetic link for the recognition of legal parentage in cross-border surrogacy cases. Furthermore, the case demonstrates that the emphasis on the genetic link appears to be male-centric because generally if a child is born to an unmarried surrogate the biological intended father can claim paternity solely on the basis of his genetic link. However, the intended mother, whether she is biologically related to the child or not, usually has to adopt the child as according to the *mater est* rule the mother is the woman who gives birth to the child. As the present case demonstrates, this can have serious consequences if a couple separates before the intended mother acquires legal parenthood, as the biological father will be the only one to have the legal status of a parent. As the intended mother and biological father had separated in the case, the mother had no right to be recognised as the legal mother of the child against the refusal of the biological father. Accordingly, there is an imbalance of power between the biological father, who is able to make life-changing decisions over the non-biological intended mother on grounds of his genetic link with the child. This has been considered discriminatory and not in accordance with the best interests of the child. See: The Dissenting Opinion of Judge Jelić in the case, paras. 45-46. See also: Claire Fenton-Glynn and Jens M. Scherpe, "Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation", in Jens M. Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy*, (Intersentia, 2019), p. 588-589.

[180] Milka Sormunen, "Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights", Human Rights Law Review, Vol. 20, Issue 4, (2020), p. 752, 754.

their identity, which are rights contained in Art. 7 and Art. 8 of the CRC. Furthermore, the Court ensures that children are not disadvantaged due to how they are born, cf. Art. 2 of the CRC. As has been mentioned, the rights in the CRC determine the content of the best interests of the child principle.[181] Moreover, this approach of the Court is in accordance with the CRC Committee's recommendations, which stipulate that the child's identity and the preservation of family relations should be taken into account when determining the child's best interests.[182]

4.5.2. The role of the genetic link for the recognition of legal parentage

The ECtHR stated in the Advisory Opinion that the children's best interests also entailed the legal identification and recognition of the persons responsible for raising them, meeting their needs and ensuring their welfare, i.e. of the non-biological intended mother (para. 42). Accordingly, the Court seems to apply a broader identity concept or at least the Court seems ready to give weight to "[o]ther essential aspects of [the children's] private life" (para. 45). Therefore, the Court moves beyond the traditional gestational/biological view of motherhood and recognises that legal motherhood is also about taking care of the children and ensuring their welfare.[183] In this regard, the Court applies a progressive interpretation of Art. 8 of the ECHR in accordance with the "living instrument" doctrine.[184]

Some scholars are of the opinion that the reasoning and conclusion of the Advisory Opinion entail that the ECtHR does not place as much significance as before on the genetic link in relation to the recognition of the parent-child relationships in cross-border surrogacy cases.[185] However, the Advisory Opinion in fact continues to place emphasis on the genetic link in several ways. *Firstly*, the recognition of the non-biological intended mother as a legal parent is based on her relationship with the biological intended father who had been recognised as the legal father under domestic law (paras. 32, 36).[186] *Secondly*, the Court mentions that where an intended mother is genetically related to the child, the need to provide a possibility of recognition of the legal relationship between the child and the intended mother "applies with even greater force" (para. 47).[187] *Thirdly*, according to the Court, Art. 8 of the ECHR does not

[181] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 32.
[182] Ibid., paras. 52, 55-57, 58-70.
[183] Alice Margaria, "Parenthood and Cross-Border Surrogacy: What is "New"? The ECtHR's First Advisory Opinion", Medical Law Review, Vol. 28, Issue 2, (2020), p. 423, 425.
[184] Ibid., p. 425.
[185] Lydia Bracken, "The ECtHR's First Advisory Opinion: Implications for Cross-Border Surrogacy Involving Male Intended Parents", Medical Law International, Vol. 21, Issue 1, (2021), p. 4, 11.
[186] Ibid., p. 11-12, 17. See also: ECtHR, *A.M. v. Norway*, App. No. 30254/18, 24 March 2022, which confirms that the recognition of the non-biological intended mother as the legal mother of a child is based on her relationship with the biological intended father who had been recognised as the legal father. In that case, the intended parents had separated and the intended mother was not able to adopt the child because the biological father did not consent to it.
[187] Alice Margaria, "Parenthood and Cross-Border Surrogacy: What is "New"? The ECtHR's First Advisory Opinion", Medical Law Review, Vol. 28, Issue 2, (2020), p. 423-424. However, it is unclear what the ECtHR means by "even greater force" in relation to the recognition of the legal relationships between children and their biological mothers. In ECtHR, *D. v. France*, App. No. 11288/18, 16 July 2020, the Court did not find the refusal of the French authorities to register the details of a birth certificate of a child born through cross-border surrogacy, in so far as the certificate designated the intended mother, who was also the child's genetic mother, as the mother, violated Art. 8 of the ECHR because the intended mother had the possibility to adopt the child. However, the French authorities had registered the intended father, who was also the biological

entail an obligation on states to recognise the relationship between the children and the non-biological intended mother from the beginning (*ab initio*). However, the relationship must be recognised when it has become a "practical reality" after an assessment of the child's best interests (paras. 52, 54). In comparison, although the case of *Mennesson v. France* stipulates that states have discretion in relation to the choice of means by which the relationship with the biological intended father is recognised, for example, through registration *ab initio* or adoption (para. 100), the effects of the case are that states have in practice recognised the legal relationship between the child and the biological father *ab initio* by registration in the state's registry without an individual assessment of the best interests of the child.[188] The genetic link seems to exclude the necessity for such an assessment.[189]

Accordingly, a genetic link with either of the intended parents who are in a stable relationship seems to be of great importance in relation to the obligation of states to recognise the legal parent-child relationships in the context of cross-border surrogacy. Nevertheless, despite that the ECtHR still seems to give high priority to the genetic link the Advisory Opinion reflects the Court's realisation that being a mother, and more generally a parent, entails something more than just contributing genetic material to conceive a child and/or gestating a pregnancy.[190]

What is significant in relation to both *Mennesson v. France* and the Advisory Opinion, is that despite surrogacy being illegal in France, the ECtHR found that the children's best interests and their right to identity and private life under Art. 8 of the ECHR entailed an obligation to recognise the parent-child relationships arising from cross-border surrogacy with the biological intended father and the intended mother regardless of whether the mother is genetically related to the children, cf. the Advisory Opinion (paras. 46-47).[191] The Court has also stated that there is an obligation to recognise the child's relationship with the non-biological intended father who is in a same-sex relationship with the biological intended father, cf. *D.B. and Others v. Switzerland*.[192] However, the state seems to have discretion in relation to the choice of means by which the relationship with both the biological intended father and non-biological intended mother is recognised, whether it is through, for example, registration

father, as the legal father of the child. The Court noted that according to its case-law, the existence of a genetic link did not mean that the child's right to respect for private life required that the legal relationship with the genetic parent was to be established by automatic registration of the details of the foreign birth certificate. According to the Court, adoption had similar effects as registration when it came to recognising the legal parent-child relationship. Accordingly, the same rules seem to apply regarding the recognition of the legal parentage of the intended mother regardless of whether she has a genetic link to the child.

[188] This is due to domestic legislation in many European states that allows for the automatic registration of the biological intended father. However, according to domestic legislation in many states in Europe, the mother is the person who gives birth to the child. Accordingly, as the intended mother does not give birth to the child in surrogacy, there is usually a need to recognise her legal parentage through adoption regardless of whether she is genetically related to the child or not.

[189] Lydia Bracken, "The ECtHR's First Advisory Opinion: Implications for Cross-Border Surrogacy Involving Male Intended Parents", Medical Law International, Vol. 21, Issue 1, (2021), p. 11.

[190] Alice Margaria, "Parenthood and Cross-Border Surrogacy: What is "New"? The ECtHR's First Advisory Opinion", Medical Law Review, Vol. 28, Issue 2, (2020), p. 413.

[191] These cases of the ECtHR have been criticised for entailing a "backdoor" acceptance of surrogacy by depriving states of the opportunity to decide whether to permit surrogacy, while also creating a double standard, cf. as within the same state, domestic surrogacy is illegal, however the consequences of cross-border surrogacy must be recognised. See: Marianna Iliadou, "Surrogacy and the ECtHR: Reflections on *Paradiso and Campanelli v. Italy*", Medical Law Review, Vol. 27, Issue 1, (2019), p. 153.

[192] ECtHR, *D.B. and Others v. Switzerland*, App. No. 58817/15 and 58252/15, 22 November 2022.

or adoption, cf. *Mennesson v. France* (para. 100) and the Advisory Opinion (paras. 50-51, 53, 55).[193]

Accordingly, the effects of these cases are that states that prohibit surrogacy must recognise the parent-child relationships where there is a genetic link between the child and *at least* one of the intended parents.[194] However, as the following judgment of the ECtHR in the case of *Paradiso and Campanelli v. Italy* reveals, the Court takes a different view when the genetic link is lacking.

4.6. The case of Paradiso and Campanelli v. Italy[195]

4.6.1. The facts

In the case, the applicants A and B, a married Italian couple, had tried to conceive a child and had undergone assisted reproduction techniques and applied to become adoptive parents without success (paras. 9-10). The applicants entered into a surrogacy arrangement in Russia using male gametes from B and donor eggs (paras. 11-12). In February 2011, a child was born via surrogacy and the surrogate mother gave her consent to the child being registered as the applicants' son (para. 14). In March 2011, the applicants were registered as the child's parents by the authorities in Moscow and a birth certificate was issued with the same information (para. 16). The Italian Consulate in Moscow issued documents enabling the child to travel to Italy (para. 17).

In Italy, the applicants requested their son's birth certificate to be registered (para. 20). Later, the Italian Consulate in Moscow notified the authorities in Italy that the documents of the child's birth included false information (para. 19). The Italian prosecutor started criminal proceedings against the applicants for the use of falsified documents and for not following the procedure required for international adoption in violation of Italian law (para. 21). The child was appointed a legal guardian. Furthermore, the state authorities issued legal proceedings to make the child available for adoption, as he was considered to be in a state of abandonment because he had been abandoned by his legal mother according to Italian law, i.e. the surrogate mother (paras. 22-23, 37). An Italian court ordered that DNA testing would be carried out in order to establish whether B was the child's biological father. The results of the test showed that there was no genetic link between them (paras. 28, 30). Apparently, a mistake had been made on behalf of the Russian surrogacy clinic regarding the use of B's gametes (para. 31).

[193] This has been confirmed in ECtHR, *D. v. France*, App. No. 11288/18, 16 July 2020, para. 49, where the Court cited *Mennesson v. France* and stated that the existence of a genetic link between a surrogate-born child and its intended father did not mean that the child's right to respect for private life required that the legal relationship with the biological father was established by automatic registration. In this regard, adoption produced similar effects as the registration of legal parentage.

[194] Claire Fenton-Glynn, "International Surrogacy Before the European Court of Human Rights", Journal of Private International Law, Vol. 13, Issue 3, (2017), p. 555. However, this position is premised on the non-biological intended parent's relationship or connection with the biological intended parent, cf. ECtHR, *A.M. v. Norway*, App. No. 30254/18, 24 March 2022, where the non-biological intended mother was refused to adopt a child born through cross-border surrogacy, as the intended parents had separated and the biological intended father did not consent to it.

[195] ECtHR, *Paradiso and Campanelli v. Italy* [GC], App. No. 25358/12, 24 January 2017.

In October 2011, the Minors Court ruled that despite the child would likely suffer harm from being separated from the applicants, he was to be removed from them, taken into the care of social services and placed in a children's home (paras. 36-37). The Minors Court based its decision on the absence of a genetic link between the applicants and the child and the necessity to put an end to an unlawful situation according to the legislation on international adoption and medically assisted reproduction (paras. 188-190). The Minors Court considered that the child's trauma caused by the separation would not be irreparable in light of his young age and the short time (eight months) he had spent with the applicants (paras. 37, 190).

The Minors Court's decision was confirmed by the Court of Appeal in February 2012 (paras. 40, 191). The child was placed in a children's home for 15 months before being placed in foster care with another family with the aim of adopting him (paras. 49-50). After the state authorities refused to give recognition to the Russian birth certificate, the Court of Appeal confirmed in 2013 that the refusal was legitimate. Subsequently, a new birth certificate was issued for the child and he was given a new name (para. 48).

4.6.2. The applicants' complaint

Before the ECtHR, the applicants submitted that the measures taken by the state authorities to permanently remove the child from them had violated their right to respect for family and private life under Art. 8 of the ECHR (para. 95).

4.6.3. The Chamber judgment[196]

The case was first ruled by a Chamber of the Second Section of the ECtHR which found that there had existed *de facto* family life between the applicants and the child under Art. 8 of the ECHR, as the applicants had taken on the role of the child's parents (para. 98). The Chamber held that the removal of the child from the applicants amounted to an interference in the *de facto* family life existing between the applicants and the child (para. 98). The Chamber considered that the interference had been in accordance with the law and pursued legitimate aims, i.e. to prevent disorder and to protect the child's rights (paras. 99-100). The Chamber assessed the private interests of the applicants and the best interests of the child and weighed them against the public interests at stake. The Chamber considered that the removal of a child from a family setting was an extreme measure that should only be applied as a last resort to fulfil the aim of protecting a child from immediate danger. In this regard, the Chamber noted that the domestic courts had removed the child without an assessment of the child's living conditions with the applicants and of his best interests (para. 101).

The Chamber concluded that there had been a violation of the applicants' right to family life under Art. 8 of the ECHR, as the state authorities had failed to strike a fair balance between the public and private interests at stake (para. 101). However, as the child had formed emotional bonds with his foster family, the finding of a violation in the applicants' case could not be

[196] ECtHR, *Paradiso and Campanelli* [Chamber judgment], App. No. 25358/12, 27 January 2015.

understood as obliging the state to return the child to the applicants.[197] The Government of Italy requested a referral of the case to the Grand Chamber which was accepted (para. 4).

4.6.4. The Grand Chamber judgment – decision and reasoning

The Grand Chamber (ECtHR/Court) only examined whether the removal of the child from the applicants entailed a violation of their right to private and family life under Art. 8 of the ECHR (para. 134).[198] The ECtHR pointed out that the child was not an applicant in the case and that the complaints of the applicants (the intended parents) would only be examined (para. 135).

As there was no legally recognised family life between the applicants and the child, the ECtHR examined whether there existed *de facto* family life between them (para. 148). The Court accepted that, in certain circumstances, there could exist *de facto* family life between individuals and a child in the absence of biological ties or a recognised legal tie, provided that there were genuine personal ties (paras. 148-150). The Court found that the applicants had established close emotional bonds with the child. However, the Court concluded that there had not existed *de facto* family life between them (paras. 151, 157-158). In this regard, the Court emphasised the absence of a biological tie between the child and the intended parents, the short duration of the relationship (eight months) and the uncertainty of the ties from a legal perspective, cf. the parents had created the legal uncertainty themselves by engaging in conduct contrary to Italian law (paras. 156-157).

The ECtHR observed that the concept of private life had a broad meaning and that the facts of the case fell within the scope of the applicants' right to private life as it concerned their genuine intention and decision to become parents (paras. 159-161, 163-164). The Court considered that the measures taken by the state authorities to remove the child from the applicants and place him in a children's home amounted to an interference with the applicants' private life (para. 166). The Court assessed whether the interference could be justified under Art. 8(2) of the ECHR. In this regard, the measures must be in accordance with the law, pursue legitimate aims and be necessary in a democratic society (paras. 167, 181).

The ECtHR considered the measure to remove the child from the applicants in accordance with the law, as it was foreseeable under the Italian Adoption Act (paras. 171-174). The measure also pursued legitimate aims, i.e. to prevent disorder and to protect the rights of others (paras. 175-178). When assessing whether the measure was "necessary in a democratic society" the Court emphasised that it was not its task to substitute the national authorities in determining the appropriate policy for regulating the complex and sensitive matter of the relationship between the intended parents and a child born through cross-border surrogacy which was prohibited in Italy (para. 180). The Court stressed that the state had a wide margin of appreciation, as the matter raised sensitive moral and ethical questions on which there was no consensus in Europe (paras. 184, 194). Furthermore, the Court added that contrary to the case of *Mennesson v. France* the questions of the child's identity and recognition of genetic

[197] Ibid., para. 88.
[198] The ECtHR dismissed the complaint concerning the registration of the birth certificate because domestic remedies were not exhausted, paras. 84, 134.

descent did not arise in the present case, as the child was not a party to the proceedings and there was no biological link between the child and the applicants (para. 195).

The ECtHR found that the reasons for the removal of the child, i.e. the illegality of the situation and the urgency of taking measures in respect of the child, whom the authorities had considered in a state of "abandonment", were relevant and sufficient and directly linked to the legitimate aims to prevent disorder and to protect the rights of others, i.e. of children more generally (paras. 196-199). In the Court's assessment of whether a fair balance had been struck between the competing interests, it found the public interests very weighty ones, which aimed to put an end to an illegal situation, to protect the rights of children and surrogate mothers and to deter Italian nationals from entering surrogacy arrangements abroad which were forbidden in Italy (paras. 200-204). The private interests at stake were both the interests of the applicants and of the child (para. 205).

In respect of the child's interests, the ECtHR reiterated that the Minors Court had regard to the fact that there was no biological link between the applicants and the child. Given the child's young age and the short period spent with the applicants, the domestic court had not agreed with a report by a psychologist indicating that the separation would have devastating consequences for the child. Referring to the literature on the subject, the Minors Court noted that the mere separation from the caregivers, without any other factor being present, would not cause irreparable harm to the child (para. 206). The ECtHR reiterated that the child was not an applicant in the case nor a member of the applicants' family within the meaning of Art. 8 of the ECHR. Furthermore, the ECtHR added, that "this [did] not mean […] that the child's best interests and the way in which [they] were addressed by the domestic courts [were] of no relevance". In this regard, the Court observed that Art. 3 of the CRC required that "in all actions concerning children […] the best interests of the child [should] be a primary consideration", but [the article] did not define the term "best interests of the child" (para. 208).

The ECtHR did not consider that the domestic courts were obliged to give priority to the preservation of the relationship between the applicants and the child. Instead, the courts 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 to provide the child with a family in accordance with the legislation on adoption (para. 209). The Court considered that the domestic courts' assessment of the best interests of the child had not been automatic or stereotyped. The domestic courts had considered it desirable to place the child for adoption with another couple and had also assessed the impact that the separation from the applicants would have. They had concluded that the separation of the child from the applicants would not cause the child "grave or irreparable harm" (paras. 210-213).

The ECtHR did not underestimate the impact which the separation from the child must have had on the applicants' private life (para. 215). While the ECHR did not recognise a right to become a parent, the Court could not ignore the emotional hardship suffered by those whose desire to become parents had not been fulfilled. However, the public interests outweighed the applicants' interests in a continued relationship with the child. Agreeing to let the child stay with the applicants would have been "tantamount to legalising the situation" created by them

in breach of domestic law (para. 215). The Court concluded that the domestic courts, having assessed that the removal would not cause the child grave or irreparable harm, had struck a fair balance between the different interests at stake and remained within their margin of appreciation. Accordingly, the Court concluded that there had been no violation of Art. 8 of the ECHR (paras. 215-216).

4.7. Analysis of Paradiso and Campanelli v. Italy

4.7.1. The assessment of the best interests of the child

4.7.1.1. General

In the case of *Paradiso and Campanelli v. Italy* (*Paradiso*), the ECtHR noted that it took into consideration the best interests of the child under Art. 3(1) of the CRC, which requires that in all actions regarding children, the best interests of the child shall be "a primary consideration" (paras. 87, 208).

Although the ECtHR stated in the case that it applied the best interests of the child principle under Art. 3(1) of the CRC it is questionable whether the child's best interests were in fact sufficiently assessed as "a primary consideration" and given greater weight than other considerations on grounds of the substantive aspect of the best interests principle. The reason for this is the Court's excessive emphasis on the illegality of the applicants' conduct which "obscured" the best interests of the child assessment,[199] cf. the discussion in Chapter 4.7.1.3.

As was stipulated in Chapter 3.3, the best interests of the child may conflict with other interests or rights, for example, with the rights of other children and other public interests. Such conflicts must be resolved in each case by balancing the interests of all parties.[200] The best interests of the child do not automatically override other considerations. Nevertheless, the right of the child to have its interests taken as "a primary consideration" entails that the child's interests should have "high priority" and be given greater weight.[201] Viewing the best interests as "primary" requires a willingness to give priority to children's interests in all circumstances, especially when an action has an "undeniable impact" on the children concerned.[202]

According to the procedural aspect of the best interests of the child principle, the impact of a decision on the child must be evaluated. Furthermore, it must be explained how the right of the child to have its best interests assessed has been taken into account in the decision, i.e. what has been considered to be in the child's best interest, what criteria the evaluation is based on and how the child's interests have been weighed against other considerations.[203] However,

[199] Lydia 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, Issue 3, (2017), p. 375-376.
[200] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have his or her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14,), para. 39.
[201] Ibid., para. 39.
[202] Ibid., para. 40.
[203] Ibid., para. 6.

it is not clear in the case what criteria were applied when evaluating the child's best interests or how the balancing exercise was implemented,[204] cf. the discussion in Chapter 4.7.1.2.

4.7.1.2. The Court did not sufficiently explain how the best interests of the child were assessed

In the case, the applicants had been assessed fit by the state authorities to adopt a child (para. 10). Furthermore, the applicants were visited by social workers at the request of a domestic court to examine the circumstances of the child. Their report stated that the applicants were "viewed positively and respected by their fellow citizens, and that they had a comfortable income and lived in a nice house". According to the report, "the child was in excellent health and his well-being was self-evident, since he was being cared for by the applicants to the highest standards" (para. 25). In addition, a child psychologist issued a report at the request of the applicants, which stated that the applicants "were attentive to the child's needs [and] had developed a deep emotional bond with him". The report also stated that the "grandparents and other family members […] surrounded the child with affection, and that he was healthy, lively and responsive". Furthermore, the report stated that the applicants "were suitable parents for the child, both from a psychological perspective and in terms of their ability to educate him and bring him up". The psychologist concluded that removing the child from the applicants would have "devastating consequences for the child" as he would go through "a depressive phase on account of a sense of abandonment and the loss of the key persons in his life". According to the psychologist this could lead to "somatic symptoms and compromise the child's […] development, and, in the long term, symptoms of psychotic pathology could emerge" (para. 34).

Despite these reports stating, that the intended parents were taking good care of the child and that the removal of the child from them would cause him harm, the potential detrimental consequences of the removal for the child were not sufficiently addressed by the domestic courts and the ECtHR in accordance with the procedural aspect of the best interests of the child principle, cf. Art. 3(1) of the CRC.[205] The ECtHR examined the domestic courts' reasoning in respect of the child's best interests and found it sufficient. When evaluating the child's situation, the domestic courts had assessed the impact that the separation from the applicants would have on the child. The domestic courts recognised that the child would suffer harm from the separation but given the short time he had lived with the applicants and his young age the trauma caused by the removal would not be "grave" or "irreparable" (paras. 190, 206, 210). Accordingly, the domestic courts did not agree with the report of the psychologist, which stated that the removal of the child would have "devastating consequences" for the child.

Nevertheless, the judgment does not sufficiently explain how the child's best interests were assessed when reaching this conclusion and weighed against other considerations in accordance with the procedural aspect of the best interests of the child principle.[206] The

[204] Lydia 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, Issue 3, (2017), p. 376.
[205] Ibid., p. 376.
[206] Ibid., p. 376.

domestic courts referred to "literature on the subject" according to which a "mere separation from the caregivers, without any other factors being present" would not cause irreparable trauma for the child (para. 206). However, there is no further description of the literature referred to or an indication that the domestic courts had consulted other specialists to evaluate how the removal would affect the child.[207] In this regard, it should be mentioned that the CRC Committee has emphasised that a multidisciplinary team of professionals should be involved as far as possible in assessing the child's best interests.[208] In light of the above, the thesis argues that the domestic courts and the ECtHR did not sufficiently address the impact that the removal would have on the child's well-being.[209]

4.7.1.3. The Court did not assess the best interests of the child sufficiently as "a primary consideration"

In the case, the ECtHR explicitly stated that the domestic courts' primary concern had been "to put an end to an illegal situation" (para. 204). Moreover, the Court stressed in its conclusion that "to let the child stay with the applicants, possibly with a view to becoming his adoptive parents, would have been tantamount to legalising the situation created by them in breach of important rules of Italian law" (para. 215).

The excessive focus on the illegality of the situation and the lack of a genetic link between the child and the intended parents (paras. 188, 196) prevented the ECtHR from assessing the child's best interests sufficiently as "a primary consideration" in accordance with the substantive aspect of the best interests of the child principle leaving the child in a state of legal limbo.[210] In this regard, the domestic courts issued the removal of the child from the intended parents without an assessment of the child's living conditions with them and without even considering the possibility of whether it was in the child's best interests to remain with them.[211]

In light of the above and taking into account the reports of the specialists which stated that the child was being well cared for by the intended parents, it is difficult to agree with the ECtHR that the removal of the child from them, the only caregivers he had ever known, and his placement in an institution for 15 months (para. 49) before being placed in the permanent care of new foster parents, served the child's best interests.[212] In this regard, it should be mentioned that according to the Public Prosecutor in Italy, "the child seemed destined for another separation, [i.e. from his caregivers at the children's home], even more painful than

[207] Ibid., p. 376.
[208] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), paras. 64, 94.
[209] As previously stated in the Joint Dissenting Opinion of Judges Lazarova, Trajkovska, Bianku, Laffranque, Lemmens and Grozev, in *Paradiso and Campanelli v. Italy*, ECtHR, [GC], App. No. 25358/12, 24 January 2017, para. 12.
[210] Lydia 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, Issue 3, (2017), p. 376-377.
[211] Joint Dissenting Opinion of Judges Lazarova, Trajkovska, Bianku, Laffranque, Lemmens and Grozev, in *Paradiso and Campanelli v. Italy*, ECtHR, [GC], App. No. 25358/12, 24 January 2017, para. 12.
[212] Marianna Iliadou, "Surrogacy and the ECtHR: Reflections on *Paradiso and Campanelli v. Italy*", Medical Law Review, Vol. 27, Issue 1 (2019), p. 152 and Lydia 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, Issue 3, (2017), p. 376.

that from the mother who had given birth to him and then from the woman who claimed to be his mother" (para. 45).

As was mentioned in Chapter 3.5, research in the field of psychology on children's development can be used to determine the content of the "best interests of the child" principle under Art. 3(1) of the CRC. In this regard, the CRC Committee has stated that the assessment of the impact that decisions have on children must be based on general knowledge, for example, in the field of psychology.[213] In this respect, both the domestic courts and the ECtHR seem to underestimate psychological research that demonstrates the importance of attachment security for a child's development in the first important months of its life and the negative impact that multiple transitions in family structure and the disconnection of the bonds established can have on a child's development and mental health.[214]

According to literature on attachment theory, a child needs to be in a close relationship with another person, i.e. the primary caregiver to develop properly and such an attachment must be persistent in order to provide the child with security and a stable family environment.[215] The nature of the attachment is connected to the quality of the parenting.[216] These attachment bonds develop when the child is about six months of age.[217] Newborn babies can recognise their parents or other caregivers soon after birth. Normally, they form strong attachments with their parents or caregivers. These relationships provide children with physical and emotional security and influence the development of their identity.[218] Young children are especially vulnerable to the consequences of separation from their parents or caregivers because of their strong physical and emotional attachment to them.[219]

Furthermore, it is clear from the literature that the needs of the child are better fulfilled in a stable family environment rather than in institutional care.[220] In this regard, it is difficult to see how the removal of the child from the intended parents and placement in an institution for 15 months was in accordance with the child's right to development under Art. 6 of the CRC, the right "to know and be cared for by [one's] parents" under Art. 7 of the CRC and the right to identity under Art. 8 of the CRC. Moreover, this approach of the Court is hardly in accordance with the CRC Committee's recommendations, which stipulate that the child's identity and the preservation of family relations should be taken into account when determining

[213] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 95.
[214] Isabelle Roskam, "Psychological Insights: Parent-Child Relationships in the Light of Psychology", in Jehanne Sosson, Geoffrey Willems, Gwendoline Motte (eds), *Adults and Children in Postmodern Societies: A Comparative Handbook and Multidisciplinary Handbook*, (Intersentia, 2019), p. 660-662.
[215] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 72.
[216] Fiona MacCallum, Peter Brinsden and Susan Golombok, "Parenting and Child Development in Families With a Child Conceived Through Embryo Donation", Journal of Family Psychology, Vol. 21, Issue 2, (2007), p. 278.
[217] Lara Walker, "Intercountry Adoption and the Best Interests of the Child: The Hague Convention of 1993 and the Importance of Bonding", Child and Family Law Quarterly, Vol. 27, Issue 4, (2015), p. 357.
[218] Committee on the Rights of the Child, *General Comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, (CRC/C/GC/7/Rev.1), para.16.
[219] Ibid., para. 18.
[220] Lara Walker, "Intercountry Adoption and the Best Interests of the Child: The Hague Convention of 1993 and the Importance of Bonding", Child and Family Law Quarterly, Vol. 27, Issue 4, (2015), p. 357-358, 375. See also: Committee on the Rights of the Child, *General Comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, (CRC/C/GC/7/Rev.1), para. 36(b).

the child's best interests.[221] The ECtHR has stipulated that the ECHR should be interpreted in light of the CRC. The other rights of the child in the CRC guide the content of the best interests of the child principle, cf. Art. 3(1) of the CRC.[222] In this regard, a decision cannot be considered in the best interests of the child if it is contrary to the child's rights in the CRC.[223] As the removal of the child from the intended parents most likely had an "undeniable impact" on him, the best interests of the child should have had high priority in the case and be given greater weight.[224] In light of the above, the thesis reiterates that the domestic courts and the ECtHR did not sufficiently assess the best interests of the child as "a primary consideration". Furthermore, the thesis argues that the courts did not provide sufficient reasons to justify that the removal of the child from the intended parents served his best interests.[225]

4.7.1.4. The Court did not assess the child's right to identity

As the ECtHR reiterated several times in *Paradiso,* the child was not an applicant in the case. In light of the fact that the applicants did not have a genetic connection to the child and were not his guardians under domestic law, the ECtHR considered that they did not have a standing to submit complaints on behalf of the child before the Court (paras. 86, 135, 195, 208).[226] Therefore, the private interests that were assessed in the proportionality analysis were mostly the interests of the applicants rather than those of the child.[227] Despite this, the Court stated that it assessed the best interests of the child on grounds of Art. 3 of the CRC (para. 208). However, as the child was not an applicant in the case and was not genetically related to the applicants, the Court did not consider arguments in relation to the child's right to identity (para. 195).

Nevertheless, as the Chamber noted, the child's right to identity was greatly affected by the measures of the state authorities as he did not have an official identity in Italy for more than two years.[228] Moreover, there was legal uncertainty regarding the child's nationality and the state authorities considered the child to be a foreign minor (paras. 171-172). Consequently, the child did not have a public existence in the state during this time and his access to public services was affected as he was only entitled to emergency medical services (para. 51). In this respect, the Chamber noted that it was necessary to ensure that a child was not disadvantaged on the basis that it was born through surrogacy, especially in terms of identity and citizenship, which were of crucial importance.[229] The thesis argues that this situation of the child was not in accordance with the rights in the CRC, cf. for example, Art. 7 and Art. 8, on the right to birth

[221] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), paras. 52, 55-57, 58-70.
[222] Ibid., para. 32.
[223] Geraldine Van Bueren, "Children's rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edition), (Oxford University Press, 2018), p. 330.
[224] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have his or her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 40.
[225] Marianna Iliadou reaches a similar conclusion in her article, "Surrogacy and the ECtHR: Reflections on *Paradiso and Campanelli v. Italy*", Medical Law Review, Vol. 27, Issue 1 (2019), p. 154.
[226] Claire Fenton-Glynn, "International Surrogacy Before the European Court of Human Rights", Journal of Private International Law, Vol. 13, Issue 3, (2017), p. 561.
[227] Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", Medical Law Review, Vol. 26, Issue 3, (2018), p. 468.
[228] ECtHR, *Paradiso and Campanelli* [Chamber judgment], App. No. 25358/12, 27 January 2015, para. 85.
[229] Ibid., para. 85.

registration, right to nationality and right to identity. As has been stated, a decision cannot be considered in the best interests of the child if it is contrary to the child's rights in the CRC.[230] Furthermore, this approach of the Court is not in accordance with the CRC Committee's recommendations, which stipulate that the best interests of the child must be assessed and determined in relation to the other rights in the CRC.[231] Nevertheless, the ECtHR did not even assess the harmful effects of the state authorities' decisions on the child's right to identity.

It is not excluded that the ECtHR would have reached a different conclusion had the child been an applicant in the case, particularly in light of the Court's emphasis on the child's right to identity in previous cases, such as in *Mennesson v. France*, where the children were applicants in the case.[232] Emphasis on the child's right to identity under the broader right to private life, cf. Art. 8 of the ECHR, would have resulted in a reduced margin of appreciation and stricter scrutiny on behalf of the Court. However, although the child had been an applicant in the case it is questionable whether the Court would have considered his right to identity concerning his relationship with the intended parents, as there was no genetic link between them (para. 195).[233] The reason for this is the Court's restrictive interpretation of the identity concept under Art. 8 of the ECHR as only entailing genetic identity.[234] This will be further discussed in Chapter 5.4.

4.7.1.5. The assessment of family life

The ECtHR in *Paradiso* did not recognise that *de facto* family life existed between the applicants and the child under Art. 8 of the ECHR because of the absence of a genetic link, the short duration of their cohabitation and the uncertainty of the ties between them from a legal perspective based on the applicants own illegal actions (paras. 157-158). In this regard, the Court's approach is not in accordance with its previous case-law where it has recognised the existence of *de facto* family life even though there was not a genetic link between the individuals concerned by focusing on the quality of their ties, i.e. whether there existed genuine personal ties between them (paras. 149-151).[235]

Five judges submitted a Joint Dissenting Opinion in the case.[236] They found that the applicants' right to respect for their family life under Art. 8 of the ECHR had been violated. In the opinion, it was noted that "[w]hile biological ties between those who act as parents and a child may be a very important indication of the existence of family life, the absence of such ties does not necessarily mean that there is no family life" (para. 3). In the case, the applicants

[230] Geraldine Van Bueren, "Children's rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edition), (Oxford University Press, 2018), p. 330.
[231] Committee on the Rights of the Child, *General Comment No. 14 (2013): On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 32.
[232] Lydia 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, Issue 3, (2017), p. 375.
[233] See ECtHR, *Valdís Fjölnisdóttir and Others v. Iceland*, App. No. 71552/17, 18 May 2021, where the child was an applicant in the case, but the Court did not analyse the case on grounds of the child's right to identity and private life as there was no genetic link between the child and the intended parents.
[234] Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", Medical Law Review, Vol. 26, Issue 3, (2018), p. 468.
[235] Lydia 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, Issue 3, (2017), p. 369, 377.
[236] Joint Dissenting Opinion of Judges Lazarova, Trajkovska, Bianku, Laffranque, Lemmens and Grozev.

and the child had lived together for eight months and close emotional bonds had developed between them (para. 4). The dissenting judges were of the view, considering these circumstances, that *de facto* family life had been established between the applicants and the child, although the time they had lived together was "relatively short" (para. 5). [237] In this regard, the thesis argues that emphasis on the emotional bond that had developed between the applicants and the child should have led to the recognition of *de facto* family ties between them.[238] If the Court had found that family life existed between the applicants and the child, the removal of the child from them would most likely have violated the applicants' right to family life under Art. 8 of the ECHR. Such an approach would have been in better accordance with the best interests of the child, cf. Art. 3(1) of the CRC.[239]

4.7.2. The role of the genetic link

The ECtHR attached great weight to the lack of genetic link in its reasoning in relation to its assessment of the right to family life under Art. 8 of the ECHR, which it found to be non-existing between the applicants and the child. Moreover, the lack of genetic link had the impact that the Court did not consider the child's right to identity and applied a wide margin of appreciation when assessing the different interests at stake. This approach eventually impacted the Court's conclusion that the removal of the child from the applicants did not violate their right to private life under Art. 8 of the ECHR and the best interests of the child, cf. Art. 3(1) of the CRC. In this regard, the Court applied a very narrow approach towards the concept of identity under Art. 8 of the ECHR as only entailing genetic identity. This will be further discussed in Chapter 5.4.

In accordance with the Court's previous case-law in *Mennesson v. France* and the Advisory Opinion, had there been a genetic link between the child and either of the intended parents in *Paradiso*, it seems unlikely that the focus on illegality and the public interests at stake would have had such high priority.[240] The ECtHR in *Paradiso* focused far more on the illegality of the applicants' conduct rather than the interests of the child, which negatively affected the assessment of the best interests of the child.[241] Accordingly, unlike in the former

[237] For opposing views that criticise the view that there existed family life under Art. 8 of the ECHR between the applicants and the child see: Paul Beaumont and Katarina Trimmings, "Surrogacy Before the European Court of Human Rights" in Jens M. Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy*, (Intersentia, 2019), p. 332-354 and Claire Fenton-Glynn, "International Surrogacy Before the European Court of Human Rights", Journal of Private International Law, Vol. 13, Issue 3, (2017), p. 555-562.

[238] As previously noted by Marianna Iliadou, "Surrogacy and the ECtHR: Reflections on *Paradiso and Campanelli v. Italy*", Medical Law Review, Vol. 27, Issue 1 (2019), p. 151-152. See also: Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 213.

[239] In ECtHR, *D. and Others v. Belgium*, App. No. 29176/13, 8 July 2014, the Court held that family life under Art. 8 of the ECHR had existed between a Belgian couple and a child born through cross-border surrogacy in Ukraine which had existed for only two months before the applicants' temporary separation from the child who was initially not allowed into Belgium. However, in that case the child had a genetic link with one of the parents and was eventually permitted to enter Belgium and the applicants' cohabitation subsequently continued. The case confirms the importance of the genetic link for the establishment of family life. See: ECtHR, *Paradiso and Campanelli*, App. No. 25358/12, 24 January 2017, para. 154.

[240] Lydia 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, Issue 3, (2017), p. 376.

[241] Ibid., p. 376.

cases, the public interests prevailed over the private interests of the individuals directly affected in the case.

According to the case of *Paradiso*, it seems that states that prohibit surrogacy have discretion to take extreme measures, such as removing a child born through cross-border surrogacy from the intended parents when certain conditions are fulfilled, i.e. where there is no genetic link between the child and the intended parents *and* their relationship has lasted for a short time.[242] Therefore, even though the present case did not concern the recognition of legal parentage (para. 133) it can be assumed that in the above-mentioned situation, states are not required to recognise parent-child relationships where there is no genetic link between the child and the intended parents.[243]

In the next chapter, another case will be examined which regards the non-recognition of legal parentage where a child born through cross-border surrogacy had no genetic link with the intended parents, i.e. the case of *Valdís Fjölnisdóttir and Others v. Iceland*.

4.8. The case of Valdís Fjölnisdóttir and Others v. Iceland[244]

4.8.1. The facts

In the case, the applicants A and B, Icelandic nationals, were a married same-sex couple (two women) who paid for the services of a surrogacy agency in California, the United States. In February 2013, the third applicant C was born in California via a surrogate mother. The child was conceived using *in vitro* fertilisation with donor gametes and is not biologically related to either A or B. A and B were registered in California as the child's parents and a birth certificate to that effect was issued and a US passport for the child. According to the documents, the surrogate mother had waived any claim to legal parenthood in relation to C (para. 5).

After arriving in Iceland, A and B applied to Registers Iceland for C's registration in the national register. Registers Iceland denied the request. A and B appealed against the decision to the Ministry of the Interior (para. 7). In the meantime, the state authorities considered C to be a foreign national and an unaccompanied minor in Iceland. Therefore, the child protection authority took legal custody of C and appointed him a legal guardian. An agreement was made with A and B to place C in their foster care until a permanent foster agreement was made with them (para. 8). Subsequently, the Ministry of the Interior confirmed Registers Iceland's decision to deny C's registration in the national register. The decision stated, that according to Icelandic law, the woman who gave birth to a child was always considered its mother. Furthermore, as the legal parentage of A and B was not recognised the

[242] However, it has been considered that too broad conclusions should not be drawn from the case in light of its exceptional circumstances, cf. for example, the child had only lived with the intended parents for eight months. See: Julian W. März, "Challenges Posed by Transnational Commercial Surrogacy: The Jurisprudence of the European Court of Human Rights", European Journal of Health Law, Vol. 28, Issue 3, (2021), p. 276.
[243] Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", Medical Law Review, Vol. 26, Issue 3, (2018), p. 469.
[244] ECtHR, *Valdís Fjölnisdóttir and Others v. Iceland*, App. No. 71552/17, 18 May 2021.

child was not automatically entitled to Icelandic citizenship (para. 9). A and B sought judicial review of that decision (para. 10).

While the proceedings before the District Court were pending, C was granted Icelandic citizenship by an Act of the Parliament. Subsequently, he was entered into the national register as an Icelandic citizen, but A and B were still not registered as his parents (para. 11). Additionally, while the proceedings were pending, A and B got divorced. As a result, a new foster arrangement was made under which C was fostered by A and her new spouse for one year while enjoying equal access to B. Later, C was fostered by B and her new spouse for one year while enjoying equal access to A (para. 12). The child protection authority later decided that C would be permanently fostered by A and her spouse, as domestic law only allowed for temporary foster care arrangements for up to two years. C continued to enjoy equal access to B and her spouse (para. 12). Furthermore, the child continued to have a separate legal guardian (para. 25). Before their divorce, A and B had applied to adopt C (para. 14) but withdrew their application for adoption after their divorce (paras. 14-16).

The District Court rejected the applicants' claims for the ministry's decision to be annulled (paras. 17-21). The applicants appealed against the judgment to the Supreme Court, which upheld the District Court's decision (para. 22). The Supreme Court, like the District Court, found that the authorities had been entitled to refuse to recognise family ties that had been established in a manner contrary to fundamental principles of Icelandic family law, according to which a woman who gives birth to a child is considered its mother. In this respect, neither A nor B could be considered to have been C's mother at the time of his birth. The Supreme Court also emphasised that surrogacy was explicitly banned under Icelandic law (para. 23).

4.8.2. The applicants' complaint

Before the ECtHR, the applicants submitted that the refusal to register them as parents of C and to recognise the foreign birth certificate, legally issued in California, violated their right to respect for private and family life under Art. 8 of the ECHR. In this regard, the refusal deprived them of a stable and legal parent-child relationship. All three of the applicants had been affected by this, since A and B did not have legal custody of C, whom they regarded as their son (paras. 43-44). The applicants argued that the domestic authorities had not taken the best interests of the child sufficiently into account and that the child's relationship with A and B was not adequately protected by the foster care arrangement (paras. 46-47).

Furthermore, the applicants complained that they had been discriminated against in the enjoyment of their right to respect for private and family life on account of their status in breach of Art. 14 of the ECHR, taken in conjunction with Art. 8 (para. 77). In this regard, they submitted that there were known instances in Iceland where other children born through cross-border surrogacy had been allowed to have the parentage of their intended parents registered (paras. 36, 78).

4.8.3. The decision and reasoning of the Court

The ECtHR assessed whether the relationship between the first two applicants and C came within the sphere of family life within the meaning of Article 8 of the ECHR at the point in time when the Supreme Court of Iceland delivered its judgment on 30 March 2017 (para. 58). The Court stated that "family life" depended on the existence of close personal ties (paras. 56-57). The Court noted that there was no biological link between the three applicants. Therefore, the situation was comparable to that in the case of *Paradiso and Campanelli v. Italy*. As the ECtHR had explained in that case, the Court did accept the existence of *de facto* family life between persons in the absence of biological ties or a recognised legal tie, if there were genuine personal ties. Therefore, the Court considered the quality of the ties, the role played by the intended parents towards the child and the duration of their cohabitation in the present case (para. 59). In this regard, the Court noted that unlike in *Paradiso and Campanelli v. Italy*, the relationship between the three applicants had not been severed by decisions of the authorities. On the contrary, C had been placed in A and B's foster care in accordance with national law and had been in their uninterrupted care since he was born, i.e. for over four years (paras. 60-61). The Court noted that A and B had argued that they had undertaken the role of C's parents and that he regarded them as such. Furthermore, the applicants had formed close emotional bonds with the child during the first stages of his life. Accordingly, the Court found that family life within the meaning of Art. 8 of the ECHR existed between the applicants (para. 62).

The ECtHR considered that the refusal to recognise A and B as the child's parents, despite the Californian birth certificate to that effect, amounted to an interference with all the applicants' right to respect for family life under Art. 8 of the ECHR. Under Art. 8(2) of the Convention such interference must be in accordance with the law, pursue legitimate aims and be necessary in a democratic society (para. 63). The ECtHR found that the interference was in accordance with the law as there was a legal ban on surrogacy in Iceland and according to domestic family law, only the woman who gave birth to a child could be considered its mother. The Court also found that the interference pursued legitimate aims to protect the rights of others, i.e. those of surrogate mothers and children's rights to know their origins (para. 65).

The ECtHR stated, in relation to the assessment of whether the interference was necessary in a democratic society, that in the context of surrogacy, the state had a wide margin of appreciation since the issue raised moral and ethical questions on which there was no European consensus (para. 70). The Court noted that the applicants' actual enjoyment of their family life had not been interrupted by an intervention by the state. On the contrary, the state had taken measures to have C fostered by A and B and it seemed that their joint adoption of C was an option open to them until their divorce. Although the Court recognised that the non-recognition of legal parentage had affected the applicants' family life, the enjoyment of that family life was also safeguarded by the permanent foster care arrangement, which must be considered to ease the uncertainty and anguish cited by the applicants (para. 71). Additionally, the Court noted that the state had granted the child citizenship by an Act of the Parliament, which had the effect of securing his stay and rights in the country. Actual, practical obstacles to the enjoyment of family life seemed to have been limited (para. 72). Furthermore, the Court

took into account the Government's submission that either A or B might still apply to adopt C, as individuals or together with their new spouses, in its holistic examination of the necessity of the interference, "in particular as regards the [Art.] 8 rights of the child". In this regard, the Court stated that it was mindful of the practical problems that might arise due to the fact that only one of the first two applicants could be permitted to adopt the child (para. 74).

The ECtHR concluded, considering all the above, in particular the absence of actual, practical hindrances in the enjoyment of family life and the steps taken by the state to secure the bond between the applicants, that the non-recognition of a formal parental link, struck a fair balance between the applicants' right to respect for their family life and the general interests which the state sought to protect by the ban on surrogacy. Therefore, the state acted within the margin of appreciation which is afforded to it in matters that raise moral and ethical questions on which there is no consensus in Europe (paras. 70, 75). Accordingly, the Court found no violation of Art. 8 of the ECHR in relation to the applicants' right to respect for their family life (para. 75). Furthermore, the Court found no violation of Art. 8 of the ECHR regarding the applicants' right to respect for their private life (para. 76).

In relation to the alleged violation of Art. 14 of the ECHR, taken in conjunction with Art. 8, the ECtHR stated that the case documents did not disclose any appearance of a violation. The Court rejected this part of the application as manifestly ill-founded (paras. 77-79).

4.9. Analysis of Valdís Fjölnisdóttir and Others v. Iceland

4.9.1. The assessment of the best interests of the child

4.9.1.1. General

The ECtHR did not analyse the case of *Valdís Fjölnisdóttir and Others v. Iceland* (*Valdís Fjölnisdóttir*) on grounds of the best interests of the child principle. The Court did not even refer to the best interests principle in Art. 3(1) of the CRC in the case when considering the position of the child. Accordingly, the Court did not apply the best interests of the child principle in the case, neither as a substantive right nor procedural rule.

The ECtHR only assessed the case on grounds of the applicants' right to family life under Art. 8 of the ECHR. The Court was satisfied with *de facto* family life existing between the applicants, which was secured through the foster care arrangement (paras. 62, 75). However, there is no positive obligation on behalf of the state to recognise the parent-child relationships between the child and the intended parents by law.[245] Unlike in the case of *Mennesson v. France* and the Advisory Opinion from 2019, the Court did not consider the case under the child's right to identity and private life under Art. 8 of the ECHR, which would have restricted the margin of appreciation. Moreover, the Court did not consider the applicants'

[245] Ralf Michaels, "Conversations on Transnational Surrogacy and the ECtHR Case Valdís Fjölnisdóttir and Others v. Iceland: Comments by Ivana Isailovic and Alice Margaria", Conflict of Laws.net (2021) <https://conflictoflaws.net/2021/conversations-on-transnational-surrogacy-and-the-ecthr-case-valdis-fjolnisdottir-and-others-v-iceland-2021/> Accessed 20 February 2023.

claim that they had been subjected to discrimination under Art. 14 of the ECHR, taken in conjunction with Art. 8 of the Convention. [246]

As was mentioned in Chapter 3.3, the CRC Committee has stated that the procedural aspect of the best interests of the child principle demands that when a decision affects a particular child, it must be assessed what impact the decision has on the child.[247] Moreover, it must be explained in the decision how the right of the child to have its best interests assessed has been taken into account, i.e. what has been considered to be in the child's best interest, what criteria it is based on and how the child's interests have been weighed against other considerations.[248] However, the ECtHR did not explain in the case how the right of the child to have its best interests assessed had been considered and weighed against other considerations. In this regard, the state authorities submitted that the prohibition of surrogacy had, *inter alia*, the aim to protect the right of children to know their origins (paras. 51, 65). However, as the ECtHR did not explicitly assess the child's best interests, it is unclear how the Court evaluated the interests of the child concerned against the interests of children in general.[249]

Furthermore, the CRC Committee has stated that the best interests of the child must be assessed and determined in relation to the other rights in the CRC.[250] Therefore, there is a need to consider the other rights of the child in the CRC when assessing the child's best interests, including the child's right to identity, cf. Art. 7 and Art. 8 of the CRC, and the right to non-discrimination, cf. Art. 2 of the CRC.[251] Accordingly, if the ECtHR had considered the best interests of the child in the case, it would have required consideration of the child's right to identity under the broader right to private life, cf. Art. 8 of the ECHR, and the child's right to non-discrimination, cf. Art. 14 of the ECHR, taken in conjunction with Art. 8.[252]

4.9.1.2. The Court did not consider the child's right to identity and private life

As has been mentioned, the ECtHR did not consider adequately the case on grounds of the child's right to identity under the broader right to respect for private life, cf. Art. 8 of the ECHR. In his Concurring Opinion, Judge Lemmens draws attention to this fact.[253] In this regard, the judge points out that the ECtHR simply stated that the applicants' arguments regarding their right to "private life" were in principle the same as those submitted in relation to their right to

[246] Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 201.
[247] Committee on the Rights of the Child, *General Comment No. 14 (2013): On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 6.
[248] Ibid., para. 6.
[249] Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: *Analysis of Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 206.
[250] Committee on the Rights of the Child, *General Comment No. 14 (2013): On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 32.
[251] Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: *Analysis of Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 204.
[252] Ibid., p. 205, 207-209.
[253] Concurring Opinion of Judge Lemmens, in *Valdís Fjölnisdóttir and Others v. Iceland*, para. 2.

"family life". Therefore, the Court saw no reason to reach a different conclusion in relation to the applicants' complaint concerning their right to private life (para. 76).

However, as Judge Lemmens notes, the concepts of "family life" and "private life" under Art. 8 of the ECHR are different and should be analysed independently of each other.[254] The concept "family life" generally includes relationships and recognition of family ties, while the concept "private life" is broader entailing, *inter alia*, the right to establish and develop relationships, the right to personal development and the right to identity.[255] As Judge Lemmens further notes, the right to respect for private life is concerned with the right of the child born through cross-border surrogacy to have the legal parent-child relationship with the intended father recognised, cf. *Mennesson v. France*, as well as with the intended mother, cf. the Advisory Opinion from 2019.[256] In the view of the judge, the right to recognition of the legal parent-child relationships is a "part of the child's right to establish details of its identity as an individual human being".[257] However, as Judge Lemmens points out, the ECtHR has limited the child's right to recognition of the legal parent-child relationship to relationships where the child has a genetic link with *at least* one of the intended parents.[258]

As the ECtHR did not consider the child's right to private life under Art. 8 of the ECHR, the Court did not assess the negative impact that the non-recognition of legal parentage of the intended parents had on the child's right to identity,[259] which includes the legal parent-child relationship, the right to nationality and inheritance rights. As Judge Lemmens emphasised in his Concurring Opinion, the lack of recognition of a legal parent-child relationship has a negative impact on several aspects of the child's right to private life.[260] In this regard, the ECtHR has highlighted in previous cases that the non-recognition of the parent-child relationship is disadvantageous to the child, as it places it in a position of legal uncertainty regarding its identity within society. For example, there is a risk that such children will be denied access to their intended parents' nationality[261] and their right to inherit their intended parents might be impaired.[262] According to Judge Lemmens, the negative impact of the non-recognition of legal parentage applied to all children born through cross-border surrogacy, irrespective of whether there existed a genetic link between them and one of their intended parents. In this regard, the judge questioned whether the "legal limbo" in which a child finds itself could be justified on the basis of the conduct of its intended parents or the moral views of society.[263] However, Judge Lemmens considered that this was not the right case to address

[254] Ibid., para. 2.
[255] Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 201-202.
[256] Concurring Opinion of Judge Lemmens, in *Valdís Fjölnisdóttir and Others v. Iceland*, para. 4.
[257] Ibid., para. 4.
[258] Ibid., para. 4.
[259] Ralf Michaels, "Conversations on Transnational Surrogacy and the ECtHR Case Valdís Fjölnisdóttir and Others v. Iceland: Comments by Ivana Isailovic and Alice Margaria", Conflict of Laws.net (2021) <https://conflictoflaws.net/2021/conversations-on-transnational-surrogacy-and-the-ecthr-case-valdis-fjolnisdottir-and-others-v-iceland-2021/> Accessed 20 February 2023.
[260] Concurring Opinion of Judge Lemmens, in *Valdís Fjölnisdóttir and Others v. Iceland*, para. 4.
[261] However, in *Valdís Fjölnisdóttir and Others v. Iceland*, the child was granted citizenship by an Act of the Parliament.
[262] ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], requested by the French Court of Cassation, No. P16-2018-001, 10 April 2019, para. 40.
[263] Concurring Opinion of Judge Lemmens, in *Valdís Fjölnisdóttir and Others v. Iceland*, para. 4.

the child's right to private life, as the applicants had relied explicitly on the right to family life in their application instead of their right to private life.[264]

Although the state authorities in *Valdís Fjölnisdóttir* provided the child with Icelandic citizenship and placed him in foster care with the intended parents, the child's right to identity was significantly affected in the case by the non-recognition of legal parentage.[265] The child's legal relationship with his intended parents has not been recognised, beyond the foster care arrangement, even though the intended parents have cared for him since birth.[266]

In this respect, the question arises of whether the foster care arrangement protects the child's rights and best interests sufficiently.[267] According to the foster care arrangement, the child is permanently fostered by the first applicant and enjoys equal access to the second applicant. However, the intended parents do not have legal custody of the child, as the child was appointed a special legal guardian. Furthermore, the foster care arrangement does not provide the child with a legal parent-child relationship and the child has no inheritance rights with regard to his intended parents according to Icelandic law (paras. 35, 47).

In this regard, the thesis argues that the situation of the child in the case hinders his right "to know and be cared for by his […] parents" under Art. 7 of the CRC and his right "to preserve his […] identity" under Art. 8 of the CRC.[268] As has been mentioned, the ECtHR has stipulated that the ECHR should be interpreted in light of the CRC. The other rights in the CRC determine the content of the best interests of the child.[269] A decision cannot be considered in the best interests of the child if it is contrary to the child's rights in the CRC.[270] Nevertheless, as has been mentioned, the Court did not even consider these negative impacts of the foster care arrangement on the child's right to identity in accordance with the procedural aspect of the best interests of the child principle.[271]

The best interests of the child principle under Art. 3(1) of the CRC requires that the other rights of the child are considered when assessing the child's best interests.[272] Accordingly, the ECtHR should have assessed the child's right to identity which includes, *inter*

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[264] Ibid., para. 5. This conclusion of Judge Lemmens is unconvincing, as the applicants explicitly mentioned that the refusal of the recognition of legal parentage violated their right to private life by depriving them of a stable and legal parent-child relationship (paras. 43-44).

[265] Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 202.

[266] Ibid., p. 205.

[267] Marianna Iliadou, "Valdís Fjölnisdóttir and Others v. Iceland: Cross-border Surrogacy and Foster Care. What About the Best Interests of the Child?", Strasbourg Observers, (2021) <https://strasbourgobservers.com/2021/06/30/valdis-fjolnisdottir-and-others-v-iceland-cross-border-surrogacy-and-foster-care-what-about-the-best-interests-of-the-child/> Accessed 20 February 2023.

[268] The CRC does not define the concept "parent" and therefore it can mean either a genetically related or non-genetically related parent. See Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 203, 205.

[269] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 32.

[270] Geraldine Van Bueren, "Children's rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edition), (Oxford University Press, 2018), p. 330.

[271] Marianna Iliadou, "Valdís Fjölnisdóttir and Others v. Iceland: Cross-border Surrogacy and Foster Care. What About the Best Interests of the Child?", Strasbourg Observers, (2021) <https://strasbourgobservers.com/2021/06/30/valdis-fjolnisdottir-and-others-v-iceland-cross-border-surrogacy-and-foster-care-what-about-the-best-interests-of-the-child/> Accessed 20 February 2023.

[272] Committee on the Rights of the Child, *General Comment No. 14 (2013): On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 32.

alia, the legal parent-child relationship and inheritance rights. If the Court had considered the child's right to identity as a part of the broader right to private life, cf. Art. 8 of the ECHR, as in *Mennesson v. France*, the margin of appreciation would have been narrower and the balancing exercise would have been more nuanced.[273] It is not excluded that such an approach would have led to a finding of a violation of the child's right to identity under Art. 8 of the ECHR when considered from the best interests of the child principle, cf. Art. 3(1) of the CRC.[274] In this regard, the Court did not apply an approach that is in accordance with the best interests of the child.[275]

4.9.1.3. The Court did not consider the applicants' complaint in relation to discrimination

Furthermore, the ECtHR did not consider potential discrimination that the applicants' claimed they were subject to under Art. 14 of the ECHR, taken in conjunction with Art. 8 of the Convention (para. 79). The applicants submitted that there was another case in Iceland where the biological intended father was registered as the legal father of twins born through cross-border surrogacy (paras. 77-78). In that case, the state authorities initially refused to register the intended mother, who had no genetic link with the children, as the legal mother because she had not given birth to the children. However, the District Court of Iceland later found that the refusal had unlawfully interfered with the family's right to private and family life under the Icelandic Constitution. Subsequently, the non-biological intended mother was registered as the children's legal mother without having to adopt the children first (para. 36).

In this regard, it has been argued that the child in *Valdís Fjölnisdóttir* was subject to discrimination under Art. 14 of the ECHR, taken in conjunction with Art. 8 of the Convention, and Art. 2 of the CRC based on his "birth" or "status" when compared to the children in the other case whose intended mother was recognised as their legal mother, despite she had no genetic link with them.[276] The principle of non-discrimination entails that none of the rights of the child should be affected by the way a child was born. Children born through cross-border surrogacy should have the same rights as other children. Accordingly, their right to legal parent-child relationships, right to identity and inheritance rights should not be negatively affected.[277]

As has been mentioned, the best interests of the child principle under Art. 3(1) of the CRC requires that the other rights of the child are considered when assessing the child's best interests.[278] Therefore, the ECtHR should have considered the child's right to non-discrimination in relation to the child's best interests. If the Court had considered the

[273] Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 206.
[274] Ibid., p. 206.
[275] As previously stated by Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 195-196, 216.
[276] Ibid., p. 208-209.
[277] *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material,* 15 July 2019, A/74/162/, para. 23.
[278] Committee on the Rights of the Child, *General Comment No. 14 (2013): On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 32.

applicants' claim based on Art. 14 of the ECHR it is not excluded that the Court would have found a violation of the article, taken in conjunction with Art. 8 of the ECHR, when considered from the child's best interests.[279] In this regard, the Court did not apply an approach that is in accordance with the best interests of the child.[280]

4.9.1.4. The possibility of adoption

As was mentioned in Chapters 4.9.1.2 and 4.9.1.3, if the ECtHR had considered the child's right to identity and private life under Art. 8 of the ECHR and the child's right to non-discrimination under Art. 14 of the ECHR, taken in conjunction with Art. 8 of the Convention, it is not excluded that the Court would have found a violation of these articles when considered from the child's best interests, cf. Art. 3(1) of the CRC.

However, if the case of *Valdís Fjölnisdóttir* is put in context of the ECtHR's previous case-law in the field of cross-border surrogacy it might be unrealistic to expect a different conclusion as the Court took into account the possibility of either the first or second applicant to adopt the child in its holistic examination of the necessity of the interference in the applicants' right to family life under Art. 8(2) of the ECHR (para. 74). In this regard, the Court seems to view adoption as an adequate means of legally recognising parent-child relationships following cross-border surrogacy, even where there is a genetic link between the child and one of the intended parents, cf. for example, *Mennesson v. France* (para. 100) and *D. v. France*.[281] In this respect, the situation in *Valdís Fjölnisdóttir* was different than in *Mennesson v. France*, as in the latter case there was no possibility for the recognition of the children's relationship with the biological intended father, even through adoption.

Nevertheless, although adoption is a way of recognising parent-child relationships, it is not always a solution for all the difficulties that a child may be experiencing.[282] In the present case, adoption was in fact, unavailable or inappropriate, as the parents had divorced and a joint adoption was no longer available.[283] In such a situation, the adoption of one parent would have the effect of severing the child's legal ties with the other parent (para. 40). Furthermore, it remains to be seen whether and by what means adoption can be applied following cross-border

[279] Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 209.
[280] As previously stated by Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 195-196, 216.
[281] See ECtHR, *D. v. France*, App. No. 11288/18, 16 July 2020. In the case, both intended parents were genetically related to their child born through cross-border surrogacy. However, only the father was allowed to be registered as a legal parent, while the mother had to adopt the child. The ECtHR referred to its case-law on cross-border surrogacy, cf. *Mennesson v. France*, and stated that the existence of a genetic link did not mean that the child's right to respect for private life required that the legal relationship with the biological intended father was to be established by means of registration of the details of the foreign birth certificate. The Court saw no reason to reach a different conclusion regarding the recognition of the legal relationship with the intended mother, who was the child's biological mother. The Court also referred to its conclusion in its Advisory Opinion from 2019 according to which adoption produces similar effects to registration when it comes to recognising the legal relationship between the child and the intended mother. The Court considered that having a distinct way of recognising the legal relationship between children born through surrogacy and their genetic mother, as compared to the genetic father, had an objective and reasonable justification. Accordingly, the Court found no violation of Art. 8 of the ECHR nor Art. 14, taken in conjunction with Art. 8 of the Convention.
[282] See Concurring Opinion of Judge Lemmens, in *Valdís Fjölnisdóttir and Others v. Iceland*, para. 4.
[283] Julian W. März, "What Makes a Parent in Surrogacy Cases? Reflections on the *Fjölnisdóttir et al. v. Iceland* Decision of the European Court of Human Rights", Medical Law International, Vol. 21, Issue 3, (2021), p. 272, 284.

surrogacy in Iceland under the Icelandic Adoption Act.[284] In light of the above, the recognition of the legal parentage of the intended parents as it was established under the domestic surrogacy laws in California, where the child was born, was in fact the only way to sufficiently protect the best interests of the child.[285] As the surrogate mother is not recognised as the legal parent of the child in California and in light of the fact that adoption by only one of the intended parents is really not an option, it has been argued that the child will remain "*de facto* parentless" under domestic law.[286] In any event, without the legal recognition of the parent-child relationships, the child in the case was left in a vulnerable position that is not in accordance with the best interests of the child.[287]

In this regard, the child protection authority had considered that it was in the child's best interests to be cared for by the intended parents who had been found competent to care for him (paras. 13, 46). Furthermore, the District Court stated that the adoption application would likely have been approved if the intended parents had not divorced (para. 20). This indicates that it would have been in the best interests of the child to have his relationships with both the intended parents legally recognised.[288]

As adoption was *de facto* unavailable in the case, the thesis argues that adequate consideration of the child's best interests and right to identity and non-discrimination may demand, on grounds of positive obligations on states, that the parent-child relationships are legally recognised by other means, even where there is a lack of a genetic link.[289] In this respect, the child cannot be held responsible for the conduct of his intended parents of circumventing domestic prohibitions on surrogacy nor for their decision to divorce.

4.9.2. The role of the genetic link for the recognition of legal parentage

Unlike in the case of *Paradiso and Campanelli v. Italy*, the ECtHR considered in *Valdís Fjölnisdóttir*, that there existed family life under Art. 8 of the ECHR between the applicants, despite the lack of a genetic link between the child and the intended parents (para. 62). The quality of the bond between the applicants and the duration of their relationship seem to override the lack of a genetic link.

However, as there was no genetic link between the child and his intended parents, the ECtHR did not even consider the child's right to identity and private life in the case. Such an approach would have reduced the margin of appreciation and led to stricter scrutiny on behalf

[284] Hrefna Friðriksdóttir, "Staðgöngumæðrun milli landa – hugleiðingar um dóm Mannréttindadómstóls Evrópu frá 18. maí 2021", Úlfljótur, (2 September 2021), p. 10.
[285] Julian W. März, "What Makes a Parent in Surrogacy Cases? Reflections on the *Fjölnisdóttir et al. v. Iceland* decision of the European Court of Human Rights", Medical Law International, Vol. 21, Issue 3, (2021), p. 284.
[286] Ibid., p. 285.
[287] Ralf Michaels, "Conversations on Transnational Surrogacy and the ECtHR Case Valdís Fjölnisdóttir and Others v. Iceland: Comments by Ivana Isailovic and Alice Margaria", Conflict of Laws.net (2021) <https://conflictoflaws.net/2021/conversations-on-transnational-surrogacy-and-the-ecthr-case-valdis-fjolnisdottir-and-others-v-iceland-2021/> Accessed 20 February 2023.
[288] Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 206.
[289] As has previously been argued by Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 201.

of the Court. It is noteworthy, that the Court did not reiterate what it stipulated in its Advisory Opinion that the child's best interests and right to identity and private life also entailed the legal identification of the persons, who were not genetically related to the children, but were responsible for raising them, meeting their needs and ensuring their welfare (para. 42). In this regard, the Court applies a narrow approach towards the concept of identity under Art. 8 of the ECHR by limiting it exclusively to genetic identity as will be further discussed in Chapter 5.4.[290]

The case confirms that states enjoy a wide margin of appreciation in relation to regulating surrogacy and the recognition of the parent-child relationships where there is a lack of a genetic link between the child and both of the intended parents.[291] In such instances, the public interests underlying domestic law on the prohibition of surrogacy prevail over the private interests of the individuals directly affected by the non-recognition of legal parentage. Furthermore, the case preserves traditional filiation rules, in particular the *mater semper certa est* rule, which links legal motherhood to gestation and birth.[292]

Accordingly, the case reinforces the importance of the genetic link in relation to the recognition of legal parentage following cross-border surrogacy. Only in situations where there is a genetic link between the child and *at least* one of the intended parents is the state required to legally recognise the parent-child relationships,[293] cf. the following case of *K.K. and Others v. Denmark.*

4.10. The case of K.K. and Others v. Denmark[294]

4.10.1. The facts

In the case, the first applicant A and her husband, Danish nationals, entered into a surrogacy arrangement with a surrogate mother in Ukraine who gave birth to twins in December 2013, i.e. the second and third applicants, B and C. A was not genetically related to the children, as donor eggs were used, but her husband was the biological father. The Ukrainian authorities issued birth certificates for the children, according to which A and her husband were the children's mother and father (paras. 5-6). The intended parents brought the children to Denmark in February 2014 (para. 7). According to Danish law, a woman who gives birth to a child is the legal parent of the child, even if donor eggs are used. Therefore, the birth certificates stating that A was the mother of the children had no legal effect in Denmark. However, the

[290] Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", Medical Law Review, Vol. 26, Issue 3, (2018), p. 468.
[291] Ralf Michaels, "Conversations on Transnational Surrogacy and the ECtHR Case Valdís Fjölnisdóttir and Others v. Iceland: Comments by Ivana Isailovic and Alice Margaria", Conflict of Laws.net (2021) Accessed 20 February 2023.
[292] Ibid.
[293] Julian W. März, "What Makes a Parent in Surrogacy Cases? Reflections on the *Fjölnisdóttir et al. v. Iceland* Decision of the European Court of Human Rights," Medical Law International, Vol. 21, Issue 3, (2021), p. 282. However, this position is premised on the non-biological intended parent's relationship or connection with the biological intended parent, cf. ECtHR, *A.M. v. Norway*, App. No. 30254/18, 24 March 2022, where the non-biological intended mother was refused to adopt a child born through cross-border surrogacy, as the intended parents had separated and the biological intended father did not consent to it.
[294] ECtHR, *K.K. and Others v. Denmark*, App. No. 25212/21, 6 December 2022.

children obtained Danish nationality because of their family ties with their biological father. Furthermore, in March 2018 the state authorities gave A and her husband joint custody of the children. In the meantime, A applied for the adoption of the children (step-child adoption) (paras. 8-9).

In July 2016, the state authorities refused A's application for adoption as it would be contrary to Section 15 of the Adoption Act since the surrogate mother had been paid to consent to the adoption. A brought the case before the Danish courts, including the Supreme Court, which upheld the decision to refuse adoption on the same grounds (paras. 12-16).

4.10.2. The applicants' complaint

Before the ECtHR, the applicants complained that the state authorities' refusal to let A adopt the children violated their right to respect for private and family life under Art. 8 of the ECHR (para. 1). In this regard, the applicants submitted that they had been refused the possibility of having a legal parent-child relationship despite them having lived together as a family for more than eight years. The applicants stated that it would be in the best interests of the children to be adopted by A since they had lived together for so long (para. 39).

4.10.3. The decision and reasoning of the Court

The ECtHR stated that the refusal to let A adopt B and C amounted to an interference in the applicants' right to respect for family and private life, cf. Art. 8(1) of the ECHR. The Court considered that the interference had been prescribed by law, cf. Section 15 of the Adoption Act, and had pursued the legitimate aim of protecting the rights of others, cf. Art. 8(2) of the ECHR (para. 42).

When determining whether the interference was "necessary in a democratic society" under Art. 8(2) of the ECHR the Court referred to the case of *Mennesson v. France* and considered that a distinction had to be made between the applicants' right to respect for their family life and their right to respect for their private life (para. 48). The Court considered that the applicants had not pointed out any obstacles or practical difficulties in enjoying their family life on grounds of the refusal of adoption. In this regard, the Court noted that the applicants had lived together since February 2014, the children had obtained Danish nationality and the state authorities had granted A and her husband joint custody of the children. According to the ECtHR, the Supreme Court had struck a fair balance between the interests of the applicants and those of the state in so far as the applicants' right to respect for family life was concerned. Accordingly, there had been no violation of the applicants' right to family life under Art. 8 of the ECHR (paras. 49-51).

The ECtHR when evaluating whether there was a violation of the applicants' right to private life referred to its previous case-law and stated that when there was no European consensus on an issue, particularly where a case raised sensitive moral or ethical issues, such as in the field of surrogacy, the margin of appreciation would be wide. However, where a particularly important aspect of an individual's identity was at stake, the margin would be restricted (para. 52).

The ECtHR did not consider that there had been a violation of Art. 8 of the ECHR regarding A's right to respect for her private life (para. 55), as the public interests outweighed her private interests in continuing her relationship with the children. In relation to the children's right to private life, the Court examined the reasoning of the Supreme Court, which had assessed whether the refusal to let A adopt the children was in accordance with Art. 8 of the ECHR. The Supreme Court had found that Section 15 of the Adoption Act contained an absolute ban on granting adoption if the person required to consent had been paid. Accordingly, the act did not allow for a consideration of the best interests of the child. Therefore, the Supreme Court found that the Adoption Act needed to be amended and until then the authorities should in all cases conduct an individual assessment of whether a refusal of adoption would be contrary to Art. 8 of the ECHR and the best interests of the child (para. 56).

The ECtHR accepted that the aim of Section 15 of the Adoption Act was to seek to prevent the exploitation of surrogate mothers and the risk of children being turned into a commodity. However, an individual assessment had to be made in each case on whether refusing adoption would be contrary to Art. 8 of the ECHR (paras. 60-61). The ECtHR noted that the Supreme Court had found that it would be in the children's best interests to be adopted by the intended mother in order for their identity as her children to be legally recognised. However, the Supreme Court found that there was nothing to suggest that it would have a significant impact on the private life of the children if A was not granted permission to adopt them (para. 62). In this regard, the Supreme Court stated that the children had obtained Danish nationality at birth and were therefore entitled to reside in Denmark. A had been granted shared custody with the biological father and would be able to maintain custody under Danish law in the event of a divorce or the death of the biological father. Furthermore, A could make provision for the children in her will according to the Inheritance Act (paras. 57, 62). The Supreme Court concluded on the basis of an overall assessment that the refusal to grant adoption did not entail a violation of Art. 8 of the ECHR (paras. 57, 62).

The ECtHR noted that besides adoption, domestic law did not provide for other possibilities of recognition of a legal parent-child relationship with the intended mother. Consequently, when the children were refused adoption, they were *de facto* denied having a legal parent-child relationship with the intended mother. Such lack of recognition *per se* had a negative impact on the children's right to respect for their private life, in particular, because it placed them in a position of legal uncertainty regarding their identity within society as is further explained in the case (paras. 72-73). Moreover, the children had lived with A and their biological father for seven years. Therefore, the children had considered them both to be their parents and it was clearly in their best interest to obtain the same legal relationship with A as they had with their father. Furthermore, the Court stated that there were no opposing parental interests between A and the biological father, which may be the case in situations where the intended parents break up (para. 74).[295] Therefore, the Court was not convinced, considering the circumstances of the case, that the solutions provided for by Danish law could make up for the refusal to let A adopt the children (para. 75).

[295] This was the situation in, ECtHR, *A.M. v. Norway*, App. No. 30254/18, 24 March 2022.

The Court stipulated that "whenever the situation of a child [was at] issue, the best interests of that child [were] paramount." In this regard, two factors carried particular weight, i.e. "the primary interests of the child" and consequently, the reduced margin of appreciation. The Court was not satisfied that the state authorities had struck a fair balance between the children's interests in obtaining a legal parent-child relationship with the intended mother and the rights of others. Accordingly, the Court found a violation of Art. 8 of the ECHR regarding the children's right to respect for their private life (paras. 76-77).

4.11. Analysis of K.K. and Others v. Denmark

4.11.1. The assessment of the best interests of the child

In the case of *K.K. and Others v. Denmark*, the ECtHR applied the best interests of the child principle under Art. 3(1) of the CRC and gave the children's best interests a high priority in relation to the recognition of their legal relationship with their non-biological intended mother through adoption when weighing the different interests at stake. In this regard, the Court as in *Mennesson v. France* and the Advisory Opinion emphasised that the best interests of the child were "paramount" giving significant weight to the children's interests (para. 76).

The ECtHR referred to the general principles set out in *Mennesson v. France* which stated, *inter alia*, that as there was no European consensus on surrogacy and as it raised sensitive moral and ethical questions, the margin of appreciation would generally be wide. However, where an important aspect of an individual's identity was at stake, the margin would be reduced (para. 52). As in *Mennesson v. France* and the Advisory Opinion, the Court assessed the case on grounds of the children's right to private life and identity and restricted the margin of appreciation (paras. 56, 72, 76). The best interests of the children and their right to private life and identity outweighed the public interests underlying domestic law on the prohibition of adoption in a commercial context (paras. 76-77).

The ECtHR examined how the Supreme Court had assessed the best interests of the children. In this regard, the Supreme Court had considered that because the intended mother had been given joint custody of the children, the refusal of adoption would not have a significant impact on the children's right to private life (para. 62). However, the ECtHR did not agree with this assessment. Similarly, as in the Advisory Opinion, the Court stressed the harmful effects that the non-recognition of a legal relationship between the children and the non-biological intended mother had on the children's right to private life under Art. 8 of the ECHR. In this regard, the Court stated that the non-recognition placed the children in a position of legal uncertainty in relation to their identity within society (para. 72). Furthermore, even though the intended mother could make a will so that the children could inherit her they would not be her heirs by virtue of a legal parent-child relationship, as applied to other children in Denmark (para. 73). In this regard, the Court seems to shed light on the fact that the children concerned did not enjoy the same rights as other children in the state due to the way they were born. In light of the above, and as the children had lived with the intended parents for almost seven years and viewed them as their parents, the Court considered that it was in the best

interests of the children to obtain the same legal relationship with their non-biological intended mother as with their biological father (para. 74).

In this regard, the thesis argues that the ECtHR applied the best interests of the child principle, cf. Art. 3(1) of the CRC, as a substantive right by emphasising the rights of the children to private life and identity and assessing the children's best interests on grounds of those rights.[296] Furthermore, by giving the children's best interests significant weight when assessing the different interests at stake. Moreover, the Court applied the principle as a rule of procedure by considering how the Supreme Court assessed the best interests of the child[297] and by evaluating the negative impact of the refusal of adoption on the children's right to private life and identity under Art. 8 of the ECHR. This approach of the Court safeguards the rights of the children to a legal parent-child relationship with their non-biological intended mother and to preserve their identity, which are rights contained in Art. 7 and Art. 8 of the CRC. Furthermore, the Court ensures that the children are not disadvantaged due to the way they were born, cf. Art. 2 of the CRC. As has been noted, the rights of the CRC determine the content of the best interests of the child principle.[298] In addition, this approach of the Court is in accordance with the CRC Committee's recommendations, which stipulate that the child's identity and the preservation of family relations should be taken into account when determining the child's best interests.[299]

What is significant in relation to the case is that although the case concerned a commercial surrogacy arrangement, which can entail the sale of children unless properly regulated,[300] a provision in domestic law that absolutely excludes adoption because the surrogate mother has been paid and thereby prevents the recognition of the legal parent-child relationships is not in accordance with the best interests of the child, cf. Art. 3(1) of the CRC, and the children's right to identity and private life under Art. 8 of the ECHR. An individual assessment of whether a refusal of adoption is contrary to Art. 8 of the ECHR and the child's best interests, cf. Art. 3(1) of the CRC, must be implemented in each case (para. 61).

4.11.2. The role of the genetic link for the recognition of legal parentage

The ECtHR by stipulating that the refusal to allow the non-biological mother to adopt the children violated their right to private life and identity and best interests moves beyond the traditional gestational/biological view of motherhood and recognises that being a mother means something more than just contributing genetic material to conceive a child and/or gestating a pregnancy. Legal motherhood, and parenthood more generally, is also about taking care of the

[296] Milka Sormunen, "Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights", Human Rights Law Review, Vol. 20, Issue 4, (2020), p. 752, 754.
[297] Ibid., p. 754.
[298] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), paras. 4, 32.
[299] Ibid., paras. 52, 55-57, 58-70.
[300] *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Sexual Abuse Material*, 15 January 2018, A/HRC/37/60, paras. 8, 41, 67.

children and ensuring their welfare.[301] Accordingly, the Court seems to apply a broader approach to the concept of identity under Art. 8 of the ECHR as entailing something more than just genetic identity, cf. the discussion in Chapter 5.4.

In light of the above, it could be assumed that the ECtHR does not place as much importance as before on the genetic link in relation to the legal recognition of the parent-child relationships in cross-border surrogacy cases. However, it is argued that as in the Advisory Opinion, the conclusion in *K.K. and Others v. Denmark* was premised on the fact that the non-biological intended mother was married to the biological father who had already been recognised as the legal father of the children (para. 74). Accordingly, the relationship of the non-biological intended mother with the biological father determined the outcome of the case. Therefore, the Court continues to give great importance to a genetic link between the children and *at least* one of the intended parents for the recognition of legal parentage following cross-border surrogacy.

It is interesting to compare this case to the case of *Valdís Fjölnisdóttir and Others v. Iceland* (*Valdís Fjölnisdóttir*) where there was no genetic link between the child and the intended parents. As has been mentioned, in the latter case the ECtHR did not examine sufficiently the case on grounds of the child's right to private life and identity, which would have restricted the margin of appreciation. Furthermore, in that case, the Court considered that the foster care arrangement was sufficient to protect the child's right to family life and did not consider its effects on the child's right to private life. For comparison, in *K.K. and Others v. Denmark*, the Court considered that the fact that the intended mother had shared custody of the children, which provided much better protection for the parent-child relationships than the foster care arrangement in *Valdís Fjölnisdóttir*, did not make up for the refusal of letting the intended mother adopt the children. In this regard, the intended mother in *K.K. and Others v. Denmark* could, for example, maintain custody of the children in the event of a divorce or the death of the biological father. Despite this, the ECtHR considered that the shared custody of the intended mother was not enough to protect the best interests of the children and their right to private life and identity. However, the foster care arrangement in *Valdís Fjölnisdóttir* did not even provide the intended parents with legal custody of the child, as a legal guardian was appointed to protect the interests of the child.[302]

When these two cases are compared, it is evident how the balancing of interests is different on grounds of whether there is a genetic link between the children and one of the intended parents or not. Both cases concerned commercial surrogacy arrangements. However, unlike in *Valdís Fjölnisdóttir,* the best interests of the children in *K.K. and Others v. Denmark* were "paramount" and outweighed the public interests of preventing the sale of children and the exploitation of surrogate mothers. It is argued that the latter case demonstrates that the foster care arrangement in *Valdís Fjölnisdóttir* was in fact not sufficient to protect the best interests of the child concerned and his right to private life and identity. Like the children in

[301] As has been previously stated by Alice Margaria in relation to the ECtHR's Advisory Opinion. See: Alice Margaria, "Parenthood and Cross-Border Surrogacy: What is "New"? The ECtHR's First Advisory Opinion", Medical Law Review, Vol. 28, Issue 2, (2020), p. 413, 423, 425.

[302] ECtHR, *Valdís Fjölnisdóttir and Others v. Iceland*, App. No. 71552/17, 18 May 2021, paras. 25, 43.

K.K. and Others v. Denmark, the child in *Valdís Fjölnisdóttir* did not have a possibility of a legal parent-child relationship with his intended parents, whom he had bonded with his entire life and whom he viewed as his parents,[303] as adoption was *de facto* unavailable in the case because of his intended parents divorce.[304] Furthermore, the child in *Valdís Fjölnisdóttir* like the children in *K.K. and Others v. Denmark* could not inherit his intended parents unless a will was made to that effect.[305]

In this chapter, the leading cases of the ECtHR in the field of cross-border surrogacy have been summarised and analysed. The following chapter includes the final analysis of the thesis, which has the aim of explicitly answering the research questions raised.

[303] Ibid., para. 61.
[304] Julian W. März, "What Makes a Parent in Surrogacy Cases? Reflections on the *Fjölnisdóttir et al. v. Iceland* Decision of the European Court of Human Rights", Medical Law International, Vol. 21, Issue 3, (2021), p. 272, 284.
[305] Even if a will were to be made, there are limits to how much can be disposed of by a will if the successor has a spouse or children, cf. Art. 35 of the Icelandic Act on Inheritance, No. 8/1962.

5. Final analysis of the European Court of Human Rights leading cases in the field of cross-border surrogacy

5.1. General

The case-law of the ECtHR demonstrates that the Court is in a challenging position when examining cross-border surrogacy cases and the recognition of legal parentage. It is to some extent comprehensible that the Court does not want to substitute the domestic authorities in matters of sensitive and ethical nature, such as in the field of surrogacy, where there is no European consensus among the member states. However, the best interests of the child must not suffer as a result.[306]

This chapter includes the final analysis of the thesis. The aim of the chapter is to stipulate the main findings of the thesis and to reflect on and answer the research questions raised in light of the case-law of the ECtHR in this field and the best interests of the child. *Firstly*, the question of *whether* and *to what extent* the ECtHR applies the principle of the best interests of the child, cf. Art. 3(1) of the CRC, in cases concerning the non-recognition of the legal parent-child relationships following cross-border surrogacy. In this regard, the thesis seeks to answer the question from a holistic point of view, i.e. when the cases of the ECtHR are taken together as a whole. This question will be answered in Chapter 5.2.

Secondly, the question of whether the requirement of a genetic link, between the child born through cross-border surrogacy and *at least* one of the intended parents, for the legal recognition of the parent-child relationships is in accordance with the best interests of the child under Art. 3(1) of the CRC. This question will be answered in Chapter 5.3. In this regard, the chapter will discuss both arguments for a genetic link and arguments against a genetic link. In relation to the arguments against a genetic link, the chapter will *firstly*, focus on the negative effects that the non-recognition of legal parentage has on the rights of the child in the CRC regardless of the existence of a genetic link. *Secondly*, the chapter will examine research in the field of psychology, according to which the absence of a genetic link does not seem to interfere with the development and well-being of the child. The chapter will also discuss the need for a broader concept of identity under Art. 8 of the ECHR in the context of surrogacy. Furthermore, the chapter will emphasise that children's best interests generally require a possibility of establishing the legal parentage of the intended parents regardless of the existence of a genetic link. Lastly, the chapter will discuss future developments in the field of cross-border surrogacy.

5.2. The assessment of the best interests of the child

According to the case-law of the ECtHR in the field of cross-border surrogacy, the child's best interests under Art. 3(1) of the CRC and the child's right to identity and private life, cf. Art. 8 of the ECHR, require that the legal parentage of both the intended parents, which has been legally established abroad, is recognised when there is a genetic link between the child and *at*

[306] Lydia 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, Issue 3, (2017), p. 377.

least one of the intended parents.[307] This applies even where the receiving state prohibits surrogacy, cf. for example, in the case of *Mennesson v. France* and the Advisory Opinion from 2019. Furthermore, this applies to commercial surrogacy arrangements, cf. the case of *K.K. and Others v. Denmark.* The state seems to have discretion in relation to the choice of means by which the relationship with both the intended parents is recognised, cf. *Mennesson v. France* (para. 100) and the Advisory Opinion (paras. 50-51, 53, 55) regardless of whether there is a genetic link between the child and the parent. However, there is no obligation to recognise the parent-child relationships in cases where there is no genetic link between the child and one of the intended parents, cf. the cases of *Paradiso and Campanelli v. Italy* and *Valdís Fjölnisdóttir and Others v. Iceland.*[308]

Accordingly, the ECtHR makes a clear distinction between children's legal status in relation to their relationship with the intended parents, depending on whether there is a genetic link between them.[309] When there is a genetic link between the children and one of their intended parents, cf. the case of *Mennesson v. France,* the Advisory Opinion and the case of *K.K. and Others v. Denmark,* the Court applies the best interests of the child principle, cf. Art. 3 of the CRC, and gives the children's best interests significant weight when assessing the different interests at stake. The Court focuses on the importance of the legal recognition of the relationships between the children and the intended parents, both the biological parent and non-biological parent, for the children's right to identity and private life and assesses the children's best interests in light of those rights. As the children's right to identity and other essential aspects of their private life are at stake, the Court applies a narrow margin of appreciation. In this regard, the Court stipulates that the best interests of the child are "paramount" and stresses the harmful effects that the non-recognition of the parent-child relationships has on the children's right to private life under Art. 8 of the ECHR, for example, in relation to their right to identity, right to nationality and inheritance rights. Accordingly, it is argued that in these cases, the Court applies the best interests of the child principle both as a substantive right and procedural rule. This approach of the Court ensures the children's best interests and their right to identity, under Art. 7. and Art. 8 of the CRC and Art. 8 of the ECHR, which includes the legal parent-child relationship, right to nationality and inheritance rights. Furthermore, the Court ensures that these children are not disadvantaged because of the way they were born, cf. Art. 2 of the CRC.[310]

However, when there is no genetic link between the children and the intended parents the application of the best interests of the child principle is insufficient or lacking, cf. the case of *Paradiso and Campanelli v. Italy* (*Paradiso*) and *Valdís Fjölnisdóttir and Others v. Iceland* (*Valdís Fjölnisdóttir*). For example, in *Paradiso,* it was not sufficiently explained in accordance

[307] Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland,*" European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 201. However, this position is premised on the non-biological intended parent's relationship or connection with the biological intended parent, cf. ECtHR, *A.M. v. Norway,* App. No. 30254/18, 24 March 2022, where the non-biological intended mother was refused to adopt a child born through cross-border surrogacy, as the intended parents had separated and the biological intended father did not consent to it.
[308] Ibid., p. 201.
[309] Hrefna Friðriksdóttir, "Staðgöngumæðrun milli landa – hugleiðingar um dóm Mannréttindadómstóls Evrópu frá 18. maí 2021", Úlfljótur, (2 September 2021), p. 5.
[310] Lydia 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, Issue 3, (2017), p. 376.

with the procedural aspect of the best interests of the child principle, cf. Art. 3(1) of the CRC, how the best interests of the child were assessed. Furthermore, the excessive focus on the illegality of the situation prevented the ECtHR from assessing the best interests of the child sufficiently as "a primary consideration" on grounds of the substantive aspect of the best interests principle. In this regard, the Court seems to underestimate the importance of attachment security for the development and well-being of the child. Furthermore, the Court never even considered whether it was in the child's best interests to remain with the intended parents in light of the excessive focus on the illegality of the parents' conduct. Moreover, in *Valdís Fjölnisdóttir* the Court did not even refer to Art. 3(1) of the CRC and assess the case on grounds of the best interests of the child principle. Therefore, the Court did not apply the best interests of the child principle, neither as a substantive right nor a procedural rule. In this regard, the Court did not assess the best interests of the child in relation to the other rights in the CRC, i.e. on grounds of the right to identity, cf. Art. 7 and 8 of the CRC, and right to non-discrimination, cf. Art. 2 of the CRC.

Despite that the children's right to identity was negatively affected by the measures of the state authorities in both *Paradiso* and *Valdís Fjölnisdóttir*, the ECtHR did not analyse these cases on grounds of the children's right to identity under the broader right to private life, cf. Art. 8 of the ECHR, which would have led to a narrow margin of appreciation and stricter scrutiny on behalf of the Court. Therefore, the Court did not even assess the negative impact that the measures of the state authorities had on the children's right to identity. Accordingly, the Court applies a very narrow approach towards the identity concept under Art. 8 of the ECHR as only entailing genetic identity. As will be stipulated in Chapter 5.4, the non-biological intended parents also play an important part in the formation of the child's identity, along with the child's genetic and gestational parents.[311] This approach of the Court leaves children who do not have a genetic link with their intended parents in a vulnerable position, as they face legal uncertainty in relation to their right to identity under Art. 7 and Art. 8 of the CRC and Art. 8 of the ECHR, which includes the legal parent-child relationship, right to nationality and inheritance rights.

In all these cases, the domestic laws that prohibited surrogacy and adoption had the same legitimate aims, i.e. to protect surrogate mothers from exploitation and the rights of children not to be sold and to know their origins. However, the ECtHR balances these public interests differently against the interests of the children concerned.[312] In *Mennesson v. France*, the Advisory Opinion and *K.K. and Others v. Denmark*, where there was a genetic link between the children and one of the intended parents, the Court applies a narrow margin of appreciation because the children's right to identity is at stake. In these cases, the best interests of the children concerned to have the parent-child relationships legally recognised are given greater weight than the public interests underlying domestic laws that prohibit surrogacy. In contrast, in *Paradiso* and *Valdís Fjölnisdóttir*, where the genetic link is lacking, the Court refers to the

[311] Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", Medical Law Review, Vol. 26, Issue 3, (2018), p. 468, 471-472.
[312] Lydia 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, Issue 3, (2017), p. 376-377.

rule of subsidiarity, applies a wide margin of appreciation and gives the public interests underlying domestic prohibitions on surrogacy greater weight than the best interests of the children concerned. In *Paradiso*, the Court even went so far as to accept that it was necessary and proportionate to remove the child from the intended parents and place him in an institution to protect the public interests at stake.[313] Accordingly, there is inconsistency in how the Court applies the best interests of the child principle in its case-law on cross-border surrogacy, as it is applied differently based on whether there is a genetic link between the child and *at least* one of the intended parents.[314]

The ECtHR has not given any clear reasons for why the public interests underlying domestic laws that prohibit surrogacy weigh more than the private interests of the surrogate-born child when the genetic link is lacking. In this regard, it should be mentioned that issues in relation to the exploitation of surrogate mothers and the sale of children, cf. Art. 35 of the CRC, can also apply in cases where children have a genetic link with one of their intended parents. Moreover, issues in relation to the right to know one's origins, cf. Art. 7 of the CRC, can rise where there exists a genetic link between the child and one of the intended parents, as donor gametes are also used in such instances.[315]

As has been mentioned in Chapters 3.3 and 3.4, the best interests of the child as "a primary consideration" do not automatically override other interests. Accordingly, public interests may prevail over the private interests of the child concerned.[316] However, when it comes to the recognition of legal parentage following cross-border surrogacy the private interests of the child concerned must be considered and given weight regardless of whether the child has a genetic link with one of the intended parents. In this regard, the surrogate-born child is in an extremely vulnerable position, as it risks becoming *de facto* parentless and stateless.[317] Furthermore, the non-recognition of legal parentage causes risks to the child's rights in the CRC, particularly to the child's right to identity,[318] cf. Art. 7 and Art. 8 of the CRC, which includes, for example, the legal parent-child relationship and nationality. As has been stipulated, the rights of the CRC further determine the content of the best interests of the child.[319] A decision cannot be considered in the best interests of the child if it is contrary to the child's rights in the CRC.[320] It must be emphasised that the non-recognition of the parent-child relationships has an "undeniable impact" on the child concerned and requires a willingness to

[313] Ibid., p. 376-377.
[314] As previously noted by Lydia 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, Issue 3, (2017), p. 376, 378.
[315] In this regard, the right of surrogate-born children to know their genetic origins could be secured by prohibiting anonymous gamete donations.
[316] UN Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child*, (E/CN.4/1989/48), (2 March 1989), paras. 121-122.
[317] Council of General Affairs and Policy of The Hague Conference, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, (Prel. Doc. No. 10), (2012), p. 4.
[318] Council of General Affairs and Policy of The Hague Conference, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, (Prel. Doc. No. 11), (2011), p. 11.
[319] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 32.
[320] Geraldine Van Bueren, "Children's rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edition), (Oxford University Press, 2018), p. 330.

give priority to the interests of the child.[321] Accordingly, the child's best interests should be given high priority when assessing the different interests at stake. In this regard, according to the procedural aspect of the best interests of the child principle, the impact of a decision on the child must be assessed and it must be explained in the decision how the best interests of the child have been respected and how they have been weighed against other interests.[322]

In light of the above, the thesis argues that the ECtHR applies the best interests of the child principle, cf. Art. 3(1) of the CRC, as a substantive right and a procedural rule in cross-border surrogacy cases where the children have a genetic link with *at least* one of the intended parents, cf. for example, the case of *Mennesson v. France*, the Advisory Opinion from 2019 and the case of *K.K. and Others v. Denmark*. However, where the genetic link is missing the application of the best interests of the child principle is insufficient or lacking, cf. the case of *Paradiso and Campanelli v. Italy* and *Valdís Fjölnisdóttir and Others v. Iceland*. In this regard, the Court attaches significant importance to the existence of a genetic link in relation to the obligation to legally recognise parent-child relationships in cross-border surrogacy cases.[323] In fact, the genetic link is the determining factor for the existence of such an obligation. The genetic link will be further explored in the following chapter.

5.3. The role of the genetic link for the recognition of legal parentage

5.3.1. Arguments for a genetic link

As the ECtHR attaches such extreme importance to the genetic link for the recognition of the parent-child relationships, it has in fact the effect of being a requirement for the recognition of legal parentage in cross-border surrogacy cases. As mentioned above, the ECtHR has not provided reasons for why it treats children born through cross-border surrogacy differently on the grounds of a genetic link. At first glance, distinguishing between cross-border surrogacy cases on the basis of whether there is a genetic link between the child and *at least* one of the intended parents might seem like a sensible approach for several reasons.[324]

Firstly, a genetic link is established through "natural" procreation. *Secondly*, a traditional understanding of legal parentage is generally based on a genetic link between the parents and the child.[325] *Thirdly*, the majority of states that allow surrogacy require a genetic link between the child and *at least* one of the intended parents.[326] *Fourthly*, surrogacy without

[321] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 40.
[322] Ibid., para. 6.
[323] Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", Medical Law Review, Vol. 26, Issue 3, (2018), p. 464.
[324] Julian W. März, "What Makes a Parent in Surrogacy Cases? Reflections on the Fjölnisdóttir et al. v. Iceland Decision of the European Court of Human Rights", Medical Law International, Vol. 21, Issue 3, (2021), p. 282.
[325] Lydia Bracken, "Surrogacy and the Genetic Link", Child and Family Law Quarterly, Vol. 32, Issue 3, (2020), p. 303.
[326] Julian W. März, "What Makes a Parent in Surrogacy Cases? Reflections on the Fjölnisdóttir et al. v. Iceland Decision of the European Court of Human Rights", Medical Law International, Vol. 21, Issue 3, (2021), p. 282. For example, the United Kingdom, Israel, South Africa and Ukraine require a genetic link. However, a genetic link is not required, for example, in

a genetic link resembles adoption, which is generally strictly regulated in the member states of the ECHR. If the obligation to recognise the parent-child relationships would also apply in cases where the genetic link is lacking, it would be possible to circumvent domestic and international law on adoption.[327] *Fifthly*, it has been considered that surrogacy where the genetic link is lacking raises greater moral concerns in relation to the sale of children.[328] *Sixthly*, a genetic link with *at least* one intended parent is considered to protect the right of children to know their genetic origins at least partly, especially in a cross-border context.[329]

However, further examination of arguments against the requirement of a genetic link for the recognition of legal parentage demonstrates that arguments for a genetic link should have less weight when weighed against the best interests of a particular child born through cross-border surrogacy, who is already living with its non-biological intended parents and has formed emotional bonds with them, to have the parent-child relationships recognised. Although a genetic link will likely always have value for parents and their children it is not all that matters for parenthood.[330]

5.3.2. Arguments against a genetic link

5.3.2.1. General

The emphasis of the ECtHR on a genetic link between the child born through cross-border surrogacy and *at least* one of its intended parents for the recognition of legal parentage is not in accordance with considerations based on the best interests of the child as will be discussed in the following chapters.[331] As was mentioned in Chapters 3.3-3.5, the other rights of the child in the CRC combined with findings of psychological research on children's development can be used to determine the content of the "best interests of the child" principle under Art. 3(1) of the CRC.

In Chapter 5.3.2.2 the thesis will examine the effects that the non-recognition of legal parentage has on the rights of the child in the CRC. Moreover, in Chapter 5.3.2.3 the thesis will examine research in the field of psychology on the development of surrogate-born children who were partly conceived with donor gametes and other children who do not share a genetic link with their parents.

California, Russia and Greece. For a critical discussion on the requirement of a genetic link see: Lydia Bracken, "Surrogacy and the Genetic Link", Child and Family Law Quarterly Vol. 32, Issue 3, (2020), p. 303-319.

[327] Julian W. März, "What Makes a Parent in Surrogacy Cases? Reflections on the Fjölnisdóttir et al. v. Iceland Decision of the European Court of Human Rights", Medical Law International, Vol. 21, Issue 3, (2021), p. 282-283.

[328] Ibid., p. 282-283.

[329] Lydia Bracken, "Surrogacy and the Genetic Link", Child and Family Law Quarterly, Vol. 32, Issue 3, (2020), p. 309.

[330] Mélanie Levy, "Surrogacy and Parenthood: A European Saga of Genetic Essentialism and Gender Discrimination", Michigan Journal of Gender & Law, Vol. 29, Issue 1, (2022), p. 178.

[331] Katherine Wade, "The Regulation of Surrogacy: A Children's Rights Perspective", Child Family Law Quarterly, Vol. 29, Issue 2, (2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/> Accessed 27 January 2023.

5.3.2.2. The non-recognition of legal parentage negatively affects the rights in the CRC regardless of the genetic link

According to the case-law of the ECtHR, an obligation to recognise the legal parentage of children born through cross-border surrogacy only applies to children who have a genetic link with *at least* one of their intended parents. In this regard, the Court has emphasised the negative effects that the non-recognition of legal parentage has on the child's right to identity and private life. However, the negative impact that the lack of recognition of the legal parent-child relationship has on the child's right to identity and private life applies to *all* children born through cross-border surrogacy regardless of whether they have a genetic link with one of the intended parents.[332]

Children who lack a genetic link with both their intended parents are placed in a vulnerable position of legal uncertainty compared to other children. Their relationships with the intended parents may not be legally recognised, they might be removed from their intended parents in extreme circumstances and they may have to accept foster care arrangements that do not have the same legal effects as the legal recognition of the parent-child relationships. Furthermore, the children's right to identity, nationality and inheritance rights can be negatively affected. Moreover, the children's continued relationship with the non-biological intended parent might be placed at risk if the intended parents separate or if the biological intended parent dies.[333] In this regard, surrogate-born children, who are not genetically related to their intended parents, are at risk of becoming stateless and effectively parentless.[334]

The non-recognition of legal parentage following cross-border surrogacy can have severe implications for the child's right to non-discrimination under Art. 2 of the CRC which prohibits discrimination against children of any kind, *inter alia*, based on the "birth" or "status" of the child or their parents. Discrimination against children is very difficult to justify when it is based on the conduct of the intended parents that is beyond the child's control.[335] Furthermore, the non-recognition of legal parentage negatively affects the child's right to "know and be cared for by his or her parents" under Art. 7(1) of the CRC and the child's right to "preserve his or her identity" under Art. 8(1) of the CRC.[336] The right to identity includes,

[332] ECtHR, *Valdís Fjölnisdóttir*, App. No. 71552/17, 18 May 2021, Concurring Opinion of Judge Lemmens, para. 4.
[333] ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], Request by the French Court of Cassation, No. P16-2018-001, 10 April 2019, para. 40. This was the position in ECtHR, *A.M. v. Norway*, App. No. 30254/18, 24 March 2022, where the biological intended father cut off the surrogate-born child's relationship with the non-biological intended mother.
[334] Julian W. März, "What Makes a Parent in Surrogacy Cases? Reflections on the Fjölnisdóttir et al. v. Iceland Decision of the European Court of Human Rights", Medical Law International, Vol. 21, Issue 3, (2021), p. 283-284.
[335] Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law, Vol. 29, Issue 2, (2022), p. 203, 209. In this regard, the Special Rapporteur on the Sale and Sexual Exploitation of Children has noted that "[t]he child [born through surrogacy] must not be punished or discriminated against due to the circumstances of his or her birth, and the rights of […] [the] children must be protected". See: *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Sexual Abuse Material*, 15 January 2018, A/HRC/37/60, para. 70.
[336] As was stipulated in Chapter 3.4 the CRC does not define the concept of "parents" in Art. 7(1) which can also include the non-biological intended parents who have the intention of raising the child. Furthermore, the concept of identity in Art. 8(1) of the CRC is not restricted to genetic identity and can include the child's relationship with its non-biological intended parents.

for example, the legal parent-child relationship and the right to nationality.[337] Needless to say, children who do not have a genetic link with their intended parents have the same needs as other children for legal parentage, identity and nationality.

The ECtHR has stipulated that the ECHR should be interpreted in light of the CRC and the best interests of the child principle, cf. Art. 3(1) of the CRC.[338] The other rights of the child in the CRC guide the content of the best interests of the child.[339] A decision cannot be considered in the best interests of the child if it is contrary to the child's rights in the CRC.[340] Furthermore, the CRC Committee has stipulated that the child's identity and the preservation of family relations should be taken into account when assessing the child's best interests.[341] In this regard, the CRC Committee has applied a broad approach to the interpretation of the concept of "family".[342] Consequently, the thesis argues that the non-recognition of the legal parent-child relationships when there is a lack of a genetic link between the child and the intended parents is not in the child's best interests as it negatively affects the rights of the child in the CRC.

5.3.2.3. The absence of a genetic link does not seem to interfere with the development of the child according to research in psychology

According to research conducted by Susan Golombok in the field of psychology,[343] children born through assisted reproduction involving a third party, i.e. children born through either egg donation, sperm donation or surrogacy, with an egg *or* sperm donation, generally do well, grow up in stable and safe family environments and show a high level of family functioning and adjustment from early childhood to young adulthood.[344] The children did not view their

[337] Council on General Affairs and Policy of The Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Prel. Doc. No. 3B), (2014), para. 19.
[338] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to the Rights of the Child*, (European Union Agency for Fundamental Rights and Council of Europe, 2022), p. 30.
[339] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 32.
[340] Geraldine Van Bueren, "Children's rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edition), (Oxford University Press, 2018), p. 330.
[341] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), paras. 55-70.
[342] Ibid., para. 59.
[343] It should be mentioned that in the research conducted by Susan Golombok on surrogate-born children in the United Kingdom, the children had a genetic link with *one* of their intended parents. Accordingly, it could be said that the research demonstrates that a genetic link with *both* parents is not required for the positive development of the child. However, although the research applies to *domestic* surrogacy in the United Kingdom and the surrogate-born children had a genetic link to *at least* one of their intended parents, conclusions can be drawn from the research in relation to the genetic link more broadly in cross-border surrogacy cases where surrogate-born children do not share a genetic link with either of the intended parents. Furthermore, research on adopted children and children born through embryo donation, where there is *no* genetic link between the children and the parents, points to the same results. All research to date challenges the idea that a genetic link is a prerequisite for children to thrive. See: Lydia Bracken, "Surrogacy and the Genetic Link", Child and Family Law Quarterly, Vol. 32, Issue 3, (2020), p. 306.
[344] Susan Golombok, "Love and Truth: What Really Matters for Children Born Through Third-Party Assisted Reproduction", Child Development Perspectives Vol. 15, Issue 2, (2021), p. 106. See also: Susan Golombok, Catherine Jones, Poppy Hall, Sarah Foley, Susan Imrie and Vasanti Jadva, "A Longitudinal Study of Families Formed Through Third-Party Assisted Reproduction: Mother-Child Relationships and Child Adjustment from Infancy to Adulthood", Developmental Psychology, (13 April 2023), p. 10-12.

surrogates as their "real" mothers, even in situations where there was a genetic link between them.[345] According to the research, the absence of a gestational or genetic connection between parents and their children does not appear to interfere with the development of positive relationships between them. In this regard, a positive parent-child relationship is more important than a genetic link between a child and its parents.[346] Warm and supportive relationships between parents and their children and early disclosure about the children's origins seem most important for the children's positive development.[347]

Research on adopted children who are placed with their adopted families at birth and children born through assisted reproduction, by using embryo donations, where there is no genetic link between the children and the parents, demonstrate the same results.[348] In such circumstances, provided that the child is raised in a stable and supportive family environment and is given information about its origins, the fact that there is no genetic link between the child and its parents seems to be of little importance for the child's development and well-being.[349] All the above-mentioned research points to the greater importance of the quality of the parent-child relationships over the existence of a genetic link for children's positive development.

From a psychological perspective, neither genetic nor gestational connections between children and their parents are necessary for successful parenting.[350] According to psychology, a "parent" is an individual who fulfils the child's needs, whether or not the person has a genetic link with the child and regardless of the person's sexual orientation or whether the person has been recognised by law as a legal parent.[351] A "parent" in this regard, whether biological or not, plays a role in the development of the child's identity.[352] Therefore, from a psychological perspective, the intended parents can ensure the best interests of the child regardless of whether there exists a genetic link between them.

Although the ECtHR does not seem to explicitly contradict the conclusions of the above-mentioned research in the reasoning of its case-law in the field of cross-border surrogacy, it is important that the Court takes the available research into account when determining the content of the best interests of the child principle, cf. Art. 3(1) of the CRC. In

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[345] Susan Golombok, *We Are Family: What Really Matters for Parents and Children*, (Scribe, 2020), p. 171, 184.
[346] Susan Golombok, "Love and Truth: What Really Matters for Children Born Through Third-Party Assisted Reproduction", Child Development Perspectives Vol. 15, Issue 2, (2021), p. 103, 106.
[347] Ibid., p. 107.
[348] Statens Offentliga Utredningar, *Olika vägar till föräldraskap: Slutbetänkande av Utredningen om utökade möjligheter till behandling av ofrivillig barnlöshet*, (SOU, 2016:11), p. 51. For further research in relation to children's development and adoption, see: David M. Brodzinsky and Ellen Pinderhughes, "Parenting and Child Development in Adoptive Families" in Marc H. Bornstein (eds), *Handbook of Parenting*, Volume 1, (Lawrence Erlbaum, 2nd edition, 2002), p. 279-311. For further research in relation to children's development and embryo donations see: Fiona MacCallum, Peter Brinsden and Susan Golombok, "Parenting and Child Development in Families With a Child Conceived Through Embryo Donation", Journal of Family Psychology, Vol. 21, Issue 2, (2007), p. 284-286.
[349] Statens Offentliga Utredningar, *Olika vägar till föräldraskap: Slutbetänkande av Utredningen om utökade möjligheter till behandling av ofrivillig barnlöshet*, (SOU, 2016:11), p. 51.
[350] Rachel Cook, "Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation" in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *What is a Parent? A Socio-Legal Analysis*, (Hart Publishing, 1999), p. 129, 136.
[351] Isabelle Roskam, "Psychological Insights: Parent-Child Relationships in the Light of Psychology", in Jehanne Sosson, Geoffrey Willems, Gwendoline Motte (eds), *Adults and Children in Postmodern Societies: A Comparative Handbook and Multidisciplinary Handbook*, (Intersentia, 2019), p. 665.
[352] Ibid., p. 664.

this regard, the Court must reflect the reality of children who do not share a genetic link with their intended parents and who build their identity on the persons who raise them. If the current research demonstrates that the intended parents can ensure the well-being of the child regardless of the existence of a genetic link, then it suggests that it would generally be in the child's best interests to recognise the legal parent-child relationships.

5.4. The need for a broader concept of identity under Art. 8 of the ECHR in the context of surrogacy

When there is a genetic link between a child born through cross-border surrogacy and one of the intended parents, the ECtHR analysis the case on grounds of the child's right to identity under the broader right to private life, cf. Art. 8 of the ECHR. As the child's right to identity is at stake, the Court applies a narrow margin of appreciation, which leads to stricter scrutiny on behalf of the Court. However, when there is no genetic link between the child and the intended parents, the Court does not analyse the case on grounds of the child's right to identity and applies a wide margin of appreciation. In this respect, it has been argued that the main difference between the cases of the ECtHR in the field of cross-border surrogacy regards how the Court approaches the child's right to identity.[353]

The emphasis of the ECtHR on a genetic link for the legal recognition of the parent-child relationships entails that the Court applies a narrow interpretation of the child's right to identity under Art. 8 of the ECHR as only consisting of genetic identity.[354] It has been argued that the reason for the Court's focus on the genetic link in cross-border surrogacy cases is attributed to the Court's previous case-law on the right to identity, which regards the right to know one's genetic origins and the importance of biological truth. It is this biological truth and its legal recognition that the Court regards as the core factor of the formation of personal identity.[355]

However, since the development of surrogacy and other forms of assisted reproduction, the concept of parentage has evolved. In the context of surrogacy, parentage entails not only a genetic and a gestational aspect but also an intentional aspect.[356] Therefore, in relation to surrogacy, the concept of identity, must be understood in a broader sense, as not only encompassing the child's relationship with its genetic parents and gestational mother, but also the child's relationship with its non-biological intended parents. In this regard, the non-biological intended parents also play an important role in the child's self-formation and self-development, which are important aspects of identity.[357] Knowledge of one's origins, both genetic and gestational, must be seen as imperative for the child's development of identity. The same applies to knowledge of the non-biological intended parents, who in fact bear the main responsibility of the child being born and have the intention of taking on the role of the child's

[353] As previously stated by Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", Medical Law Review, Vol. 26, Issue 3, (2018), p. 468.
[354] Ibid., p. 468.
[355] Ibid., p. 461-463, 469. See, for example, ECtHR, *Gaskin v. the United Kingdom*, App. No. 10454/83, 7 July 1989 and *Jäggi v. Switzerland*, App. No. 58757/00, 13 July 2006.
[356] Ibid., p. 471.
[357] Ibid., p. 468, 471-472.

parents. In this regard, intention is an important aspect of parentage in assisted reproduction, including surrogacy.[358]

As was mentioned in Chapter 5.3.2.3., from a psychological perspective, a parent is an individual who fulfils the child's needs. A "parent" in this regard, whether biological or not, plays a role in the development of the child's identity. [359] Therefore, the relationship between the child and the non-biological intended parents must be recognised as being important for the child's identity, in particular, if the child has begun to form emotional bonds with them.[360]

The ECtHR seems to acknowledge this in its Advisory Opinion from 2019 where the Court stated that the children's best interests and right to identity and private life, cf. Art. 8 of the ECHR, also entailed the legal recognition of the non-biological intended parent, which was responsible for raising them, meeting their needs and ensuring their welfare. Accordingly, the Court recognises that being a parent entails something more than just contributing genetic material to conceive a child and/or gestating a pregnancy.[361]

As was mentioned in Chapter 3.4, a child has a "right to know and be cared for by his or her parents" under Art. 7(1) of the CRC and a "right […] to preserve his or her identity, including nationality […] and family relations" under Art. 8(1) of the CRC. The CRC does not define the term "parents" and therefore it can be interpreted as the right to be cared for by one's genetic, gestational or non-biological intended parents.[362] The CRC Committee interprets the term "family" broadly to include biological, adoptive or foster parents or members of the extended family or community.[363] The CRC Committee has also stipulated that when assessing the circumstances of each child there is a need to take into account the social context in which children find themselves, such as the presence and absence of parents, whether the child lives with them, the quality of the relationships between the child and its family or caregivers and the safety of the environment.[364] Furthermore, the Preamble of the CRC states that "for the full and harmonious development of his or her personality [the child] should grow up in a family environment, in an atmosphere of happiness, love and understanding".

Accordingly, it cannot be said that the CRC emphasises a particular family form or that children should be cared for by particular parents, such as genetic or gestational parents. Instead, the CRC stipulates the importance of the quality of the parent-child relationships. This position is in accordance with the research in the field of psychology referred to above, which

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[358] Ibid., p. 472.
[359] Isabelle Roskam, "Psychological Insights: Parent-Child Relationships in the Light of Psychology", in Jehanne Sosson, Geoffrey Willems, Gwendoline Motte (eds), *Adults and Children in Postmodern Societies: A Comparative Handbook and Multidisciplinary Handbook*, (Intersentia, 2019), p. 664-665.
[360] Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", Medical Law Review, Vol. 26, Issue 3, (2018), p. 471-472.
[361] Alice Margaria, "Parenthood and Cross-Border Surrogacy: What is "New"? The ECtHR's First Advisory Opinion", Medical Law Review, Vol. 28, Issue 2, (2020), p. 413. However, this conclusion of the Court is premised on the fact that the non-biological mother was married to the biological intended father, who had been recognised as the children's legal father. See: ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], Request by the French Court of Cassation, No. P16-2018-001, 10 April 2019, paras. 32, 36.
[362] Katherine Wade, "The Regulation of Surrogacy: A Children's Rights Perspective", Child Family Law Quarterly, Vol. 29, Issue 2, (2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/> Accessed 27 January 2023.
[363] Committee on the Rights of the Child, *General Comment No. 14 (2013): on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, (CRC/C/GC/14), para. 59.
[364] Ibid., para. 48.

demonstrates that it is the quality of the parenting that is important for children's development and well-being.[365] In this respect, a genetic link in itself says nothing about the quality of the parent-child relationships.

Therefore, the ECtHR should interpret the child's right to identity in accordance with the reality of children born through surrogacy by including the child's relationship with the non-biological intended parents.[366] A broader interpretation of the concept of identity under Art. 8 of the ECHR would lead to a narrow margin of appreciation in all state interference concerning the recognition of the legal parent-child relationships in cross-border surrogacy cases, whether or not a genetic link exists, and require stricter scrutiny of the Court. Accordingly, the best interests of the child could be ensured regardless of whether the child has a genetic link with one of its intended parents.[367]

5.5. Children's best interests generally require a possibility of establishing legal parentage regardless of the genetic link

In light of the discussion in Chapters 5.3.2.2-5.3.2.3 and 5.4, the thesis argues that there are no weighty reasons to distinguish between children born through cross-border surrogacy on the basis of whether they have a genetic link with the intended parents in relation to the recognition of legal parentage. Once a child has formed emotional bonds with its intended parents, the best interests of the child and the child's right to identity and private life, generally require a possibility of establishing the legal parentage of the intended parents under domestic law regardless of whether there is a genetic link between them or not.[368] This applies even if the underlying surrogacy arrangements are problematic,[369] cf. *K.K. and Others v. Denmark*,[370] where commercial surrogacy was an issue. As the English High Court stipulated in *Re X and Y (Foreign Surrogacy)*, it "is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order [of transferring parentage to the intended parents]".[371] However, in light of the complexity of cross-border surrogacy and the risk of exploitation, it is not recommended that the intended parents should be automatically recognised as the legal parents of the child. Instead, such a decision should be

[365] Katherine Wade, "The Regulation of Surrogacy: A Children's Rights Perspective", Child Family Law Quarterly, Vol. 29, Issue, (2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/> Accessed 27 January 2023.
[366] Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", Medical Law Review, Vol. 26, Issue 3, (2018), p. 472. See also: Dissenting Opinion of Judge Jelić, para. 36, in ECtHR, *A.M. v. Norway*, App. No. 30254/18, 24 March 2022.
[367] Ibid., p. 472.
[368] Lydia Bracken, *Same-sex Parenting and the Best Interests Principle*, (Cambridge University Press, 2020), p. 209, 232 and Julian W. März, "What Makes a Parent in Surrogacy Cases? Reflections on the Fjölnisdóttir et al. v. Iceland Decision of the European Court of Human Rights", Medical Law International, Vol. 21, Issue 3, (2021), p. 284. See also: *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children*, 15 July 2019, A/HRC/74/162, para. 57, which states that it will rarely be in the child's best interest to refuse to recognise parenthood that reflects the child's lived reality.
[369] Andrea Mulligan, "International Surrogacy: Current Position of Surrogacy in Ireland, and in Irish and International Law: Opening Statement for the Joint Oireachtas Committee on International Surrogacy*"*, 14 April 2022. However, this would not apply in extreme cases where there was a clear abuse of public policy, such as a real concern for child trafficking, see: English Law Commission, Scottish Law Commission, *Building Families Through Surrogacy: A New Law, A Joint Consultation Paper*, (2019), p. 370.
[370] ECtHR, *K.K. and Others v. Denmark*, App. No. 25212/21, 6 December 2022.
[371] English High Court, *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

made by a court or a competent authority based on an assessment of the intended parents and the best interests of the child in each case.[372] This should apply regardless of whether there is a genetic link between the child and its intended parents.

In this regard, it is *firstly*, important to bear in mind that the surrogate mother has withdrawn her parental responsibilities and is not a legal parent of the child in her place of residence, even if she is recognised as a legal parent under the law of the receiving state. Accordingly, the surrogate mother will usually refuse to take on the role of the parent of the child.[373] *Secondly*, the intended parents who have the intention of becoming parents of the child are the only caregivers that the child has known and the child has generally formed emotional bonds with them by the time the family returns to the receiving state.[374]

Thirdly, although many states consider it important to protect the public interests underlying domestic laws that prohibit surrogacy, i.e. to prevent the potential exploitation of surrogate mothers and the sale of children and to protect the right of children to know one's origins, it is clear that these public interests are not served by punishing the child for the actions of the intended parents of circumventing the law.[375] As has been mentioned, issues in relation to the exploitation of surrogate mothers, the sale of children, cf. Art. 35 of the CRC, and the right to know one's origins, cf. Art. 7 and Art. 8 of the CRC, can also rise where there exists a genetic link between the child and one of the intended parents. Children must not be held responsible for the actions of their intended parents and the way they were born into this world. This applies to all children born through cross-border surrogacy regardless of whether they have a genetic link with *at least* one of the intended parents. Accordingly, if states want to prevent persons from circumventing domestic laws that prohibit surrogacy, by entering into surrogacy arrangements abroad, they must apply other measures than automatically refusing to recognise the legal parentage of the intended parents where the genetic link is lacking.[376]

The ECtHR seems unwilling to recognise that the child's best interests, cf. Art. 3(1) of the CRC, and the child's right to identity and private life, cf. Art. 8 of the ECHR, require that the parent-child relationships are recognised when the child does not have a genetic link with one of its intended parents. As has been stipulated, this leaves children without the genetic link in a vulnerable position of legal uncertainty and negatively affects the rights of the child in the CRC, for example, Art. 2, Art. 7 and Art. 8 of the Convention. In this regard, it must be reiterated that a decision cannot be considered in the best interests of the child if it is contrary to the rights of the child in the CRC.

In light of all of the above, the thesis puts forward the main argument that the overall approach of the ECtHR in cross-border surrogacy cases is not centred around children's rights,

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[372] Lydia Bracken, *Same-sex Parenting and the Best Interests Principle*, (Cambridge University Press, 2020), p. 210, 233. See also: *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children*, 15 January 2018, A/HRC/37/60, para. 70. This approach is in accordance with the Verona Principles, i.e. Principles for the Protection of the Rights of the Child Born Through Surrogacy, (International Social Service, 25 February 2021), cf. Art. 8 and 10.

[373] Julian W. März, "Challenges Posed by Transnational Commercial Surrogacy: The Jurisprudence of the European Court of Human Rights", European Journal of Health Law, Vol. 28, Issue 3, (2021), p. 278.

[374] Lydia Bracken, *Same-sex Parenting and the Best Interests Principle*, (Cambridge University Press, 2020), p. 232.

[375] Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", Medical Law Review, Vol. 26, Issue 3, (2018), p. 473.

[376] Julian W. März, "What Makes a Parent in Surrogacy Cases? Reflections on the Fjölnisdóttir et al. v. Iceland Decision of the European Court of Human Rights", Medical Law International, Vol. 21, Issue 3, (2021), p. 274, 285.

as it does not protect the best interests of children who do not have a genetic link with *at least* one of their intended parents. Furthermore, the thesis argues that the requirement of a genetic link for the legal recognition of the parent-child relationships following cross-border surrogacy is not in accordance with the best interests of the child, cf. Art. 3(1) of the CRC. The negative impact of the non-recognition of a legal relationship between the child and the intended parents is the same whether or not a genetic link exists between them and affects the child's rights in the CRC, particularly, the right to identity, cf. Art. 7 and Art. 8 of the CRC and Art. 8 of the ECHR, which includes the legal parent-child relationship, right to nationality and inheritance rights.[377] Moreover, according to research in the field of psychology, the absence of a genetic link does not seem to interfere with the development of the child. In this regard, the quality of the parent-child relationships seems to have greater importance for children's positive development and well-being than the existence of a genetic link.[378]

If the ECtHR would truly take into consideration the best interests of children born through cross-border surrogacy, as the Court itself has said it is obliged to do, the Court would take into account the negative effects that the non-recognition of legal parentage has on the rights of the child in the CRC regardless of the existence of a genetic link. Furthermore, the Court would consider the above-mentioned research in the field of psychology that reflects the reality of children who don't share a genetic link with their parents and who build their identity on the persons who raise them. In this regard, the children's right to identity and private life and their right to non-discrimination, along with considerations of the best interests of the child, may demand the legal recognition of the parent-child relationships where there is no genetic link between them and the intended parents.[379] In this respect, the ECtHR has stipulated in its case-law that Art. 8 of the ECHR imposes positive obligations on states to ensure that rights become effective in practice.[380] Furthermore, according to the "living instrument" doctrine, the Court should interpret the ECHR in accordance with present-day conditions.[381]

The thesis concludes that the ECtHR should abandon its distinction between children born through cross-border surrogacy on grounds of whether there is a genetic link between them and *at least* one of their intended parents by broadening the identity concept or by giving weight to other aspects of the children's private life under Art. 8 of the ECHR, cf. the Advisory Opinion from 2019 (para. 42). By applying a broader interpretation of the concept of identity, by including the children's relationship with their non-biological intended parents within that concept, the Court could ensure the best interests and rights of all children born through cross-border surrogacy regardless of the existence of a genetic link.[382]

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[377] See, for example, The Concurring Opinion of Judge Lemmens, (para. 4) in ECtHR, *Valdís Fjölnisdóttir and Others v. Iceland*, App. No. 71552/17, 18 May 2021.

[378] See, for example, Susan Golombok, "Love and Truth: What Really Matters for Children Born Through Third-Party Assisted Reproduction", Child Development Perspectives Vol. 15, Issue 2, (2021), p. 103, 106.

[379] Lydia Bracken, "Cross-Border Surrogacy before the European Court of Human Rights: Analysis of *Valdís Fjölnisdóttir and Others v. Iceland*", European Journal of Health Law. Vol. 29, Issue 2, (2022), p. 201.

[380] Björg Thorarensen, "Friðhelgi einkalífs og fjölskyldu og réttur til að stofna til hjúskapar" in Björg Thorarensen (eds), *Mannréttindasáttmáli Evrópu: Meginreglur, framkvæmd og áhrif á íslenskan rétt* (Codex, 2017), p. 282.

[381] Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: "Living Instrument" or Extinguished Sovereignty?* (Hart Publishing, 2017), p. 399.

[382] For a different view that criticises the case-law of the ECtHR in cross-border surrogacy cases and the role of the child's best interests as undermining the sovereignty of states, see: Máire Ní Shúilleabháin, "Surrogacy, System Shopping and Article

5.6. Future developments

The ECtHR has stated that it may be called upon in the future to further develop its case-law in the field of cross-border surrogacy, in light of the evolution of the issue of surrogacy, cf. the Court's Advisory Opinion (para. 36). Hopefully, the Court will apply a progressive interpretation of the ECHR in future cases, in accordance with the "living instrument" doctrine, to ensure the best interests and rights of all children born through cross-border surrogacy regardless of whether they have a genetic link with *at least* one of their intended parents. However, a push is needed in that direction if the rights and best interests of children are to be taken seriously.

The case-law of the ECtHR in this field reveals the difficulties that arise in Europe in light of the lack of consensus on how to address cross-border surrogacy and its consequences, especially in relation to the legal recognition of the parent-child relationships. The Court has the responsibility to protect the best interests of the surrogate-born child, which generally require the recognition of the legal parentage of the intended parents. However, the recognition of the legal parentage of the intended parents makes it possible to circumvent domestic laws that prohibit surrogacy.[383] Furthermore, there is a need to be aware of possible risks to surrogate mothers and children born through cross-border surrogacy.[384]

Although there is no right to have a child under the ECHR,[385] and despite prohibitions on surrogacy in many European states, the reality demonstrates that the human desire to become a parent is greater than the legal barriers put in place.[386] Cross-border surrogacy will continue to present complex issues that affect children's fundamental human rights.[387] Solving the dilemmas of cross-border surrogacy and the legal uncertainty that follows from it in relation to the recognition of legal parentage raises challenges for all states. It requires a response both at the national and international level, to tackle possible abuses of cross-border surrogacy and to protect the rights of children, through regulation, such as the right to a legal parent-child relationship, the right to nationality, the right to know one's genetic origins and the right not to be sold in accordance with the best interests of the child principle.[388] In this regard, The Hague

8 of the European Convention on Human Rights", International Journal of Law, Policy and the Family, Vol. 33, Issue 1, (2019), p. 104-122.

[383] Julian W. März, "What Makes a Parent in Surrogacy Cases? Reflections on the Fjölnisdóttir et al. v. Iceland Decision of the European Court of Human Rights", Medical Law International, Vol. 21, Issue 3, (2021), p. 285.

[384] Julian W. März, "Challenges Posed by Transnational Commercial Surrogacy: The Jurisprudence of the European Court of Human Rights", European Journal of Health Law, Vol. 28, Issue 3, (2021), p. 279.

[385] ECtHR, *Paradiso and Campanelli v. Italy* [GC], App. No. 25358/12, 24 January 2017, paras. 141, 215.

[386] Claire Fenton-Glynn and Jens M. Scherpe, "Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation", in Jens M. Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy*, (Intersentia, 2019), p. 567.

[387] Hrefna Friðriksdóttir, "Surrogacy in Iceland", in Jens M. Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy*, (Intersentia, 2019), p. 277.

[388] Katherine Wade, "The Regulation of Surrogacy: A Children's Rights Perspective", Child Family Law Quarterly, Vol. 29, Issue 2, (2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/> Accessed 27 January 2023. See also: Claire Fenton-Glynn and Jens M. Scherpe, "Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation", in Jens M. Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy*, (Intersentia, 2019), p. 591-592 and *The Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, 15 January 2018, A/HRC/37/60, paras. 19-20, 37, 41, 67.

Conference on Private International Law is working on a proposal for an international convention on legal parentage in relation to cross-border surrogacy.[389]

The international community has to take all appropriate measures to ensure that the human rights of *all* children born through cross-border surrogacy are protected regardless of whether they have a genetic link with their intended parents. As the ECtHR has stated, the best interests of surrogate-born children must be a "paramount" consideration. Emphasis should be on the children's best interests and their right to identity and private life, irrespective of whether they have a genetic link with one of their intended parents. Children must not be disadvantaged and made responsible for the conduct of their intended parents of circumventing domestic prohibitions on surrogacy and for the way they were born into this world.

[389] Council on General Affairs and Policy of The Hague Conference on Private International Law, *Parentage/Surrogacy Experts' Group: Final Report: The Feasibility of One or More Private International Law Instruments on Legal Parentage*, (Prel. Doc. No. 1), (2022). See also: Council on General Affairs and Policy of The Hague Conference on Private International Law, *Conclusions & Decisions*, (March 2023), <https://assets.hcch.net/docs/5f9999b9-09a3-44a7-863d-1dddd4f9c6b8.pdf> Accessed 15 March 2023.

6. Conclusion (summary)

As Chapter 1 stipulates, surrogacy is prohibited in many European states. However, such a ban is not global. In face of domestic prohibitions on surrogacy, persons have travelled to other states where surrogacy is allowed and become legally recognised parents of children born through surrogacy in those states. The implications of cross-border surrogacy come into reality when the intended parents return with the child to their home state where surrogacy is prohibited and request for the legal recognition of the parent-child relationships. The home state, which prohibits surrogacy, might not recognise the legal parentage established abroad, which causes legal uncertainty for the child. Due to conflicting laws of states, children born through cross-border surrogacy are at risk of becoming *de facto* parentless and stateless if their relationships with the intended parents are not legally recognised. This can have severe consequences for the child's right to identity, cf. Art. 7 and Art. 8 of the CRC and Art. 8 of the ECHR, which includes the legal parent-child relationship, the right to nationality and inheritance rights, and imposes risks for the best interests of the child, cf. Art. 3(1) of the CRC.

The ECtHR has considered several cases in the field of cross-border surrogacy where member states that prohibit surrogacy have refused to recognise the parent-child relationships between surrogate-born children and their intended parents, which have been legally established abroad. According to the Court's case-law, the child's best interests under Art. 3(1) of the CRC and the child's right to identity and private life under Art. 8 of the ECHR, require that parent-child relationships between the child and both the intended parents are legally recognised following cross-border surrogacy, where the child has a genetic link with *at least one* of the intended parents.[390] However, such an obligation does not exist when a child born through cross-border surrogacy is not genetically related to the intended parents.

The main purpose of the thesis is to examine the leading cases of the ECtHR in the field of cross-border surrogacy from a child's perspective by viewing *whether* and *to what extent* the Court applies the principle of the best interests of the child under Art. 3(1) of the CRC in these cases. Furthermore, the thesis examines whether the requirement of a genetic link, between the child born through cross-border surrogacy and *at least* one of the intended parents, for the legal recognition of the parent-child relationships is in accordance with the best interests of the child, cf. Art. 3(1) of the CRC.

In Chapter 3 the thesis seeks to determine the content of the concept of the "best interests of the child" under Art. 3(1) of the CRC and highlight the risks that the non-recognition of legal parentage has on the child's rights and best interests. In order to determine the content of the best interests of the child principle the chapter *firstly*, examines the rights of the child in the CRC. According to the ECtHR, the ECHR should be interpreted in light of the CRC and the best interests of the child principle under Art. 3(1) of the CRC. The other rights of the child in the CRC guide the content of the best interests of the child principle. A decision cannot be considered in the best interests of the child if it is contrary to the child's rights in the

[390] However, this position is premised on the non-biological intended parent's relationship or connection with the biological intended parent, cf. ECtHR, *A.M. v. Norway*, App. No. 30254/18, 24 March 2022, where the non-biological intended mother was refused to adopt a child born through cross-border surrogacy, as the intended parents had separated and the biological intended father did not consent to it.

CRC. In this regard, the chapter highlights the main rights of the child in the CRC that follow from the recognition of legal parentage. Furthermore, the chapter describes how the non-recognition of legal parentage following cross-border surrogacy can have severe implications for the child's rights in the CRC, particularly, the child's right to identity, cf. Art. 7 and Art. 8 of the CRC, and the right to non-discrimination, cf. Art. 2 of the CRC. This imposes risks to the best interests of the child, cf. Art. 3(1) of the CRC. *Secondly*, the chapter examines research in the field of psychology on the development of surrogate-born children and other children who do not share a genetic link with their parents in order to determine the content of the best interests of the child principle. According to the research, the quality of the parent-child relationships seems to have greater importance for the children's positive development and well-being than the existence of a genetic link between the children and their parents.

In Chapter 4 the thesis examines *whether* and *to what extent* the ECtHR applies the best interests of the child principle under Art. 3(1) of the CRC in each of the Court's leading cases in the field of cross-border surrogacy, i.e. in *Mennesson v. France*, the Advisory Opinion from 2019, *Paradiso and Campanelli v. Italy*, *Valdís Fjölnisdóttir v. Iceland* and *K.K. and Others v. Denmark*. Furthermore, the thesis examines what role the genetic link plays in relation to the recognition of legal parentage in each case.

In Chapter 5 the thesis seeks to answer the two research questions raised. In Chapter 5.2 the thesis answers the question of *whether* and *to what extent* the ECtHR applies the principle of the best interests of the child, cf. Art. 3(1) of the CRC, in its case-law on cross-border surrogacy from a holistic point of view, i.e. when the cases of the Court are taken together as a whole.

As Chapter 5.2 stipulates, the ECtHR in its case-law on cross-border surrogacy, makes a clear distinction between children's legal status in relation to their relationship with the intended parents, depending on whether there is a genetic link between them. When there is a genetic link between the children and one of their intended parents, the Court applies the best interests of the child principle, cf. Art. 3 of the CRC, and gives the children's best interests significant weight when assessing the different interests at stake. The Court focuses on the importance of the recognition of the relationships between the children and the intended parents, both the biological parent and non-biological, for the children's right to identity and private life and assesses the children's best interests in light of those rights. As the children's right to identity and other essential aspects of their private life are at stake, the Court applies a narrow margin of appreciation. In this regard, the Court stipulates that the best interests of the child are "paramount" and stresses the harmful effects that the non-recognition of the parent-child relationships has on the children's right to identity under the broader right to private life, cf. Art. 8 of the ECHR. Accordingly, the Court applies the best interests of the child principle both as a substantive right and procedural rule. In these cases, the interests of the children concerned to have the parent-child relationships legally recognised are given greater weight than the public interests underlying domestic laws that prohibit surrogacy. This approach of the Court ensures the children's right to identity under Art. 7 and Art. 8 of the CRC and Art. 8 of the ECHR, which includes the legal parent-child relationship, right to nationality and inheritance rights. Furthermore, the Court ensures that children who have a genetic link with

at least one of their intended parents are not disadvantaged because of the way they were born, cf. Art. 2 of the CRC.

However, when there is no genetic link between the children and the intended parents the application of the best interests of the child principle, cf. Art. 3(1) of the CRC, is insufficient or lacking. For example, in *Paradiso and Campanelli v. Italy*, the ECtHR did not sufficiently explain in accordance with the procedural aspect of the best interests of the child principle how the child's best interests were assessed. Furthermore, the excessive focus on the illegality of the situation prevented the Court from assessing the best interests sufficiently as "a primary consideration" on grounds of the substantive aspect of the best interests of the child principle. Moreover, in *Valdís Fjölnisdóttir and Others v. Iceland*, the Court did not even refer to Art. 3(1) of the CRC and assess the case on grounds of the best interests of the child principle. Therefore, the Court did not apply the principle in the case, neither as a substantive right nor a procedural rule.

Despite that the children's right to identity was negatively affected by the measures of the state authorities in both *Paradiso and Campanelli v. Italy* and *Valdís Fjölnisdóttir and Others v. Iceland*, the Court did not analyse these cases on grounds of the children's right to identity under the broader right to private life, cf. Art. 8 of the ECHR, which would have led to a narrow margin of appreciation and stricter scrutiny of the Court. Therefore, the Court did not even assess the negative impact that the measures of the state authorities had on the children's right to identity. Instead, the Court applies a wide margin of appreciation and gives the public interests underlying domestic laws that prohibit surrogacy greater weight than the interests of the children concerned. This approach of the Court leaves children who do not have a genetic link with their intended parents in a vulnerable position, as they face legal uncertainty in relation to their right to identity under Art. 7 and Art. 8 of the CRC and Art 8 of the ECHR, which includes the legal parent-child relationship, right to nationality and inheritance rights.

Accordingly, the thesis argues that the ECtHR applies the best interests of the child principle, cf. Art. 3(1) of the CRC, as a substantive right and a procedural rule in cross-border surrogacy cases where the children have a genetic link with *at least* one of their intended parents, cf. the case of *Mennesson v. France*, the Advisory Opinion from 2019 and *K.K. and Others v. Denmark*. However, where the genetic link is missing the application of the best interests of the child principle is insufficient or lacking, cf. the case of *Paradiso and Campanelli v. Italy* and *Valdís Fjölnisdóttir and Others v. Iceland*. Accordingly, there is inconsistency in how the Court applies the best interests of the child principle, as it is applied differently on the grounds of whether there is a genetic link between the children and *at least* one of the intended parents. In this regard, the Court attaches significant importance to the existence of a genetic link in relation to the obligation to legally recognise the parent-child relationships following cross-border surrogacy.

In Chapter 5.3 the thesis seeks to answer the question of whether the requirement of a genetic link, between the child born through cross-border surrogacy and at *least one* of the intended parents, for the legal recognition of the parent-child relationships is in accordance with the best interests of the child under Art. 3(1) of the CRC. In this regard, the thesis provides both arguments for a genetic link and against a genetic link. In relation to arguments against

the genetic link, the thesis seeks to determine the content of the best interests of the child principle by *firstly*, emphasising the rights of the child in the CRC which are affected by the non-recognition of legal parentage. *Secondly*, by examining research in the field of psychology on the development of surrogate-born children and other children who don't share a genetic link with their parents. In this regard, the thesis emphasises that the negative impact that the lack of recognition of the legal parent-child relationships has on the child's right to identity, cf. Art. 7 and Art. 8 of the CRC, and right to non-discrimination, cf. Art. 2 of the CRC, applies to *all* children born through cross-border surrogacy regardless of whether they have a genetic link with the intended parents. In this respect, a decision cannot be considered in the best interests of the child if it is contrary to the child's rights in the CRC. Furthermore, according to research in the field of psychology, the absence of a genetic link does not seem to interfere with the development and well-being of the child. In this regard, the quality of the parent-child relationships is more important for the positive development of the child than the existence of a genetic link. If the current research demonstrates that the intended parents can ensure the well-being of the child regardless of the existence of a genetic link, then it suggests that it would generally be in the child's best interests to recognise the legal parent-child relationships.

In Chapter 5.4 the thesis points out that the main difference between the cases of the ECtHR in the field of cross-border surrogacy regards how the Court approaches the child's right to identity. The Court's emphasis on the genetic link for the legal recognition of the parent-child relationships entails that the Court applies a narrow interpretation of the child's right to identity under Art. 8 of the ECHR as only entailing genetic identity. However, in the context of surrogacy, the concept of identity must be understood in a broader sense as to include the child's relationship with its non-biological intended parents as they also play an important role in the child's self-formation and self-development, which are important aspects of identity. Accordingly, the thesis argues that there is a need for a broader concept of identity under Art. 8 of the ECHR in the context of surrogacy. A broader interpretation of the concept of identity would lead to a narrow margin of appreciation in all state interference concerning the legal recognition of the parent-child relationships in cross-border surrogacy cases regardless of the existence of a genetic link.

In Chapter 5.5 the thesis argues that there are no weighty reasons to distinguish between children born through cross-border surrogacy on the grounds of whether they have a genetic link with the intended parents in relation to the recognition of legal parentage. Once a child has formed emotional bonds with the intended parents the best interests of the child and the child's right to identity under the broader right to private life, generally require a possibility of establishing the legal parentage of the intended parents under domestic law regardless of whether there is a genetic link between them. However, considering the complexity of cross-border surrogacy and the risk of exploitation, a decision on legal parentage should be made by a court or a competent authority based on the assessment of the intended parents and the best interests of the child in each case.

As Chapter 5.5 further stipulates, the ECtHR seems unwilling to recognise that the child's best interests, cf. Art. 3(1) of the CRC, and the child's right to identity and private life, cf. Art. 8 of the ECHR, require that the parent-child relationships are recognised when the child

does not have a genetic link with either of the intended parents. This leaves children without the genetic link in a vulnerable position of legal uncertainty and negatively affects the rights of the child in the CRC, for example, Art. 2, Art. 7 and Art. 8 of the Convention. As has been reiterated, a decision cannot be considered in the best interests of the child if it is contrary to the rights of the child in the CRC.

Accordingly, the thesis puts forward the main argument that the overall approach of the ECtHR in cross-border surrogacy cases is not centred around children's rights, as it does not protect the best interests of children who do not have a genetic link with *at least* one of their intended parents. Furthermore, the thesis argues that the requirement of a genetic link for the legal recognition of the parent-child relationships following cross-border surrogacy is not in accordance with the best interests of the child, cf. Art. 3(1) of the CRC. The negative impact of the non-recognition of a legal relationship between the child and the intended parents is the same whether or not a genetic link exists between them and affects the child's rights in the CRC, particularly, the right to identity, cf. Art. 7 and Art. 8 of the CRC and Art. 8 of the ECHR, which includes the legal parent-child relationship, right to nationality and inheritance rights. Moreover, according to research in the field of psychology, the absence of a genetic link does not seem to interfere with the development of the child. In this regard, the quality of the parent-child relationships seems to have greater importance for children's positive development and well-being than the existence of a genetic link.

The thesis concludes that the ECtHR should abandon its distinction between children born through cross-border surrogacy on grounds of whether there is a genetic link between them and *at least* one of their intended parents by broadening the identity concept or by giving weight to other aspects of the children's private life under Art. 8 of the ECHR, cf. the Advisory Opinion from 2019 (para. 42). By applying a broader interpretation of the concept of identity, by including the children's relationship with their non-biological intended parents within that concept, the Court could ensure the best interests of all children born through cross-border surrogacy regardless of the existence of a genetic link.

As Chapter 5.6 stipulates, the ECtHR has stated that it may further develop its case-law in the field of cross-border surrogacy in the future. Hopefully, the Court will apply a progressive interpretation of the ECHR in future cases, in accordance with the "living instrument" doctrine, to ensure the best interests of all children born through cross-border surrogacy regardless of whether they have a genetic link with *at least* one of their intended parents. However, a push is needed in that direction if the interests of children are to be taken seriously. As cross-border surrogacy will continue to present complex issues that affect children's fundamental human rights, there is a need to protect children's rights through regulation both at the national and international level. The international community has to take all appropriate measures to ensure that the human rights and best interests of *all* children born through cross-border surrogacy are protected regardless of whether they have a genetic link with their intended parents. Children must not be disadvantaged and made responsible for the conduct of their intended parents of circumventing domestic surrogacy laws and for the way they were born into this world.

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