

AMBIGUITY AFFIRMED: COMMENTARY ON THE JUDGEMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CASE OF VALDÍS FJÖLNISDÓTTIR AND OTHERS V. ICELAND OF 18 MAY 2021

Michał Kowalski¹ – Maria Masłowiec²

ABSTRACT

The text comments on the European Court of Human Rights judgement of 18 May 2021 in the case of Valdís Fjölfnisdóttir and others v. Iceland. The case is another judgement of the ECtHR dealing with the phenomenon of surrogate motherhood. Indeed, the legal consequences of surrogate motherhood vary and result in challenges both in national and international legal contexts. The judgement commented on is of high importance as it dealt with links between surrogate motherhood and adoption, as well as illustrated modern challenges for civil status registration. The text provides for an in-depth analysis of the judgement concerned and identifies some ambiguity and lack of consistence in the Court's approach to surrogate motherhood. In the course of its analysis the Valdís Fjölfnisdóttir and others case is assessed as a lost chance in this respect.

KEY WORDS

surrogacy
adoption
foreign civil status registration
ECtHR

1. Introduction

In 2014, the European Court of Human Rights [ECtHR] issued its first judgement on surrogate motherhood and the problems resulting from this phenomenon.³ Since then, the case law of the Court on surrogate motherhood has been slowly, yet constantly,

1 | Professor, Faculty of Law and Administration Jagiellonian University in Krakow, Poland; michal.kowalski@uj.edu.pl; ORCID: 0000-0002-4539-3579.

2 | PhD student, University of Miskolc – Central European Academy, Hungary; maslowiec.maria@uni-miskolc.hu; ORCID: 0000-0003-0870-6051.

3 | ECtHR, *Menesson v. France*, judgement (Chamber) of 26 June 2014, Application No. 65192/11; ECtHR, *Labassee v. France*, judgement (Chamber) of 26 June 2014, Application No. 65941/11.



developing,⁴ including the first-ever advisory opinion issued in 2019 under Protocol 16.⁵ However, one can claim that case law has not been extensively developed so far, and some hesitancy and ambiguity in the Court's approach may be detected. The judgement of May 18, 2021, in the case of *Valdís Fjölfnisdóttir and others v. Iceland*⁶ is another one contributing to the development of the case law on surrogate motherhood. It is worth analyzing carefully, especially as it places itself within the hesitant approach. It also illustrates the links between surrogate motherhood and adoption, as well as the modern challenges for civil status registration that remain of crucial importance.

2. The facts of the case and the legal context⁷

The applicants Ms Valdís Glódís Fjölfnisdóttir and Ms Eydís Rós Glódís Agnarsdóttir were a married couple living in Iceland who concluded a paid gestational surrogacy agreement in the United States. The third applicant, Mr X, was born in February 2013 via a surrogate mother and, on the basis of the agreement concluded, was intended to be the son of the first two applicants, despite not having any biological bonds with them. Ms. Fjölfnisdóttir and Ms. Agnarsdóttir were registered in California as parents of the child. A birth certificate and US passport were issued for X. According to the documents, the surrogate mother waived any claim regarding the legal parenthood of X.

After arriving in Iceland with the three-week-old child, the applicants made an inquiry aimed at introducing the child to the national register. They used a form for Icelanders born abroad entitled automatically to Icelandic citizenship, enclosing a Californian birth certificate. Later, the applicants informed the authorities that X had been born through gestational surrogacy. Consequently, Registers Iceland denied the request for child registration. The decision was based on the fact that X had been born in the United States to a surrogate mother. As a result, Icelandic legal provisions on the child's parentage were not applicable, and the child was not automatically entitled to citizenship. Therefore, Registers Iceland considered the third applicant to be a foreign national to whom relevant regulations were applied. As he was considered a foreign national and an unaccompanied minor, in September 2013, and in accordance with Icelandic regulations,

4 | ECtHR, *D. and others v. Belgium*, decision of 8 July 2014, Application No. 29176; ECtHR, *Foulon and Bouvet v. France*, judgement (Chamber) of 21 July 2016, Application Nos. 9063/17 and 10410/14; ECtHR, *Paradiso and Campanelli v. Italy*, judgement (Grand Chamber) of 24 January 2017, Application No. 25358/12; see also judgements delivered after having submitted the present text for publication: ECtHR, *A.M. v. Norway*, judgement (Chamber) of 24 March 2022, Application No. 30254/18, ECtHR, *A.L. v. France*, judgement (Chamber) of 7 April 2022, Application No. 13344/20; ECtHR, *D.B. and others v. Switzerland*, judgement (Chamber) of 22 November 2022, Application No. 58817/15 and 58252/15; ECtHR, *K.K. and others v. Denmark*, judgement (Chamber) of 6 December 2022, Application No. 25212/21.

5 | 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 (Grand Chamber), request No. P16-2018-001, French Court of Cassation, 10 April 2019, [Advisory Opinion]. See also, e.g.: Margaria, 2020, pp. 412–425; Bracken, 2021, pp. 3–18.

6 | ECtHR, *Valdís Fjölfnisdóttir and others v. Iceland*, judgement (Chamber) of 18 May 2021, Application No. 71552/17 (hereinafter: *Valdís Fjölfnisdóttir*).

7 | *Valdís Fjölfnisdóttir*, paragraphs 5–36.

a legal guardian, Ms M, was appointed for X. However, the child was placed under temporary care of the applicants.

Ms Fjölnisdóttir and Ms Agnarsdóttir appealed against the negative decision concerning registration to the Ministry of the Interior who confirmed the refusal. The Ministry's decision stated that the matter of the child's registration depended on fulfilment of the conditions of Icelandic citizenship and not on the question of recognition of the foreign decision concerning parentage. Under Icelandic law, the woman who gave birth to a child was always considered its mother, regardless of whether the child was conceived using her gametes. Being born in the US via a surrogate mother (considered as the mother of the child by Icelandic law) of US citizenship, in the absence of information about Icelandic citizenship of a father, the child was not automatically entitled to Icelandic citizenship and could not enter the national register. Recently, as a result of a change in Icelandic law at the end of 2015, X was granted Icelandic citizenship and registered. However, Ms. Fjölnisdóttir and Ms. Agnarsdóttir were not registered as his parents.

The applicants sought a judicial review of the Ministry's decision, demanding its annulment and 'a declaratory judgement to the effect that Registers Iceland was obligated to register the first and the second applicants as the third applicant's parents, in accordance with the child's birth certificate.'⁸

While the proceedings before the District Court of Reykjavik were pending, in 2015, Ms Fjölnisdóttir and Ms. Agnarsdóttir divorced, which resulted in the invalidity of the foster care agreement concerning X. After the expiration of the subsequent temporary agreements, the situation regarding the parentage of the child had not changed. Consequently, since December 2019, based on the relevant authorities' decision, the boy has been permanently fostered by the first applicant and her new spouse but has continued to enjoy equal access to the second applicant and her spouse.

Meanwhile, since 2013, the adoption case concerning X has been ongoing from the application of Ms Fjölnisdóttir and Ms. Agnarsdóttir. Initially, the adoption application was put on hold due to the pending case of registration of parentage, as the parents of the child could not become adoptive parents. Following the Ministry's decision to refuse to register, the adoption question arose again. The District Commissioner examined the case, recalling the principle of maternity of the woman who gave birth to the child (and of her husband's paternity), and requested that the applicants submit information about the address of the surrogate mother (and her husband; the confirmation of surrogate mother's marital status was also requested). Under the Icelandic regulations, the Commissioner stated that the consent of the surrogate mother (and her husband) would be required for the adoption, along with confirmation from the applicants and the other party that they had not paid for the consent being given. The applicants disagreed with the reasoning presented. However, the considerations on the basis of Icelandic regulations on adoption matters were interrupted by the applicants' divorce and their withdrawal of their application for adoption.

By the judgement of 2 March 2016, the District Court rejected the applicants' claims for the Ministry's decision of non-recognition to be annulled. The claim to register Ms Fjölnisdóttir and Ms. Agnarsdóttir as the parents of X by civil status services was also rejected. The Court again invoked the principle that the woman who gave birth to a child was considered its mother. Accordingly, the applicants could not be regarded as

8 | Valdís Fjölnisdóttir, paragraph 10.

the parents. As to the question of recognition of the decision to establish parentage by the Californian authorities, the Court applied the public policy clause (*ordre public*). The maternity of the woman who gave birth was recognized as one of the fundamental principles of Icelandic family law, and the decision rendered abroad as manifestly incompatible with it. As surrogacy was banned and punishable in Iceland, recognizing a foreign decision concerning Icelandic residents in this regard would be a circumvention of the law. Despite the fact that the lack of registration had affected the applicants' private and family life, the Court found this interference legitimate and necessary, aimed to protect morality and the rights of others, uphold the ban on surrogacy, and protect the interests of women (exposed to abuses resulting from surrogacy) and children's rights to heritage. The Court noted that the authorities had taken steps to counteract the interference and ensure the child's best interests. X was fostered by Ms Fjölnisdóttir and Ms. Agnarsdóttir, became a resident and subsequently a citizen of Iceland, and this made it possible to preserve the family bond between the applicants.

Furthermore, the District Court recalled the special rule on adoption by foster parents, which may occur without the approval of biological parents, in the child's best interests. Thus, the applicants' divorce prevented a successful adoption.

The applicants appealed against the judgement to the Supreme Court of Iceland. However, the District Court's rejection of the applicants' claims was upheld by the judgement from 30 March 2017. The Supreme Court found once again that only the woman who gave birth to a child conceived by artificial fertilization could be considered its mother under Icelandic law, and that surrogacy was explicitly banned by law. Neither the first nor the second applicant had given birth to the child and were not considered the parents under Icelandic law. Consequently, the authorities were entitled to refuse to recognize family ties that had been established in a manner contrary to the fundamental principles of domestic family law. However, the Supreme Court's answer to the question of the existence of a family life between the applicants (as well as its possible interference by the refusal of registration) was different from that of the District Court. Referring to the Icelandic Constitution and to the ECtHR judgement in *Paradiso and Campanelli v. Italy*, the Supreme Court reiterated the lack of a biological relationship between the applicants and the child and considered the moment when the family life was established between Ms Fjölnisdóttir, Ms. Agnarsdóttir, and X to be the formal decision to entrust the child to foster care. Therefore, the prior refusal to enter the national register could not have violated the applicants' right to respect for family life.

On 25 September 2017, Ms. Fjölnisdóttir, Ms. Agnarsdóttir, and Mr. X lodged the application against the Republic of Iceland complaining of a violation of their right to respect for private and family life under Article 8 of the European Convention on Human Rights [ECHR]. The applicants submitted that the refusal by the authorities to register the third applicant as the first and the second applicant's child (to recognize the Californian birth certificate, issued in accordance with the law, as the ban on surrogacy did not apply extra-territorially) had amounted to an interference with their right to respect for a private and family life. They argued that the refusal had prevented them from enjoying a stable and legal parent-child relationship (...).⁹ Despite regarding X as their son, the first two applicants did not have custody of him, neither legal nor physical. The applicants claimed that the best interests of the boy were not satisfactorily protected by Icelandic authorities. In

9 | Valdís Fjölnisdóttir, paragraph 43.

the course of foster care proceedings, the care being taken of the child was not questioned (on the contrary, the authorities assessed it positively). The applicants argued that the foster care system did not sufficiently protect the stability of their social relationships or their rights in inheritance matters. Furthermore, the instability of social relationships and uncertain legal status caused anguish and distress.

The Government recalled the ban on surrogacy, its justification, and the potential dangers it caused around surrogacy: the Government also submitted the controversial nature of the issue and the existence of a wide margin of appreciation for the State. The Government also stated that neither the first nor the second applicant had applied to adopt the third applicant after their divorce, either as individuals or with their new spouses. It meant, therefore, the inexhaustibility of domestic remedies and inadmissibility of the application. The Government recalled that Article 8 of the ECHR did not guarantee the right to find a family or the right to adopt, and that there had been no violation of the applicants' right to respect for their private and family life.

3. The ruling¹⁰

The Court considered that the exhaustion of domestic remedies would be examined jointly on the merits closely linked to it. First, the Court assessed whether the relationship between applicants came within the sphere of family life in the meaning of Article 8. The Court recalled, referring to its previous case law, notions of 'family life' and 'family' and their content. Family life requires the existence of close personal ties, and being a family may be based on marriage or factual ties (including same-sex couples). Living together (outside marriage) or other factors of sufficient constancy could serve as indicators of 'family ties'. Furthermore, the provisions of Article 8 do not guarantee neither the right to establish a family nor to adopt. The desire to establish a family is not safeguarded by the ECHR; at the least, potential relationships are protected. The fact that there was no biological bond among the three applicants was not contested. However, the Court noted that the existence of family life might be recognized in the case of *de facto* relations between an adult or adults and a child in the absence of biological ties or a legal tie, provided that there were genuine personal ties. It was therefore necessary to consider the quality of the ties between Ms Fjölnisdóttir, Ms Agnarsdóttir, and Mr X and their 'family' roles respectively, as well as the duration of the applicants' cohabitation. The Court noted the change in the applicants' situation (their divorce) while judicial proceedings were ongoing at the national level and the fact that the Icelandic Supreme Court had the opportunity to examine the factual ties and relationships between the first two applicants, initially together and lately individually, and the third applicant from his birth in February 2013 until the end of March 2017. In the Court's opinion, it was worth emphasizing that the applicants were entrusted with custody of the child. Their divorce did not restrict access to the child for either of them. X was cared for by Ms Fjölnisdóttir and Ms. Agnarsdóttir and, consequently, he had been bonded to them for his entire life. The relationship between the applicants and X was strengthened by the passage of time and reinforced by the legally established foster care arrangement. The first and second

10 | Valdís Fjölnisdóttir, paragraphs 41–42; 56–79.

applicants argued that they had assumed the role of the third applicant's parents and that he regarded them as such. The quality of their emotional bonds has not been contested by the Government. The observation that surrogacy is unlawful in Iceland and criminalized under its jurisdiction, together with principles concerning maternity binding in this State, did not change the Court's conclusion that the requirements of 'family life' have been fulfilled in this particular case.

As a consequence of placing the applicants' situation with regard to the protection of family life, the Court found that the refusal to recognize the first and second applicants as the third applicant's parents, despite the Californian birth certificate to that effect, amounted to interference with the three applicants' right to respect for that family life. Therefore, under Article 8 § 2, it was necessary to check whether this interference was in accordance with law, pursued one or more of the legitimate aims listed in the provision, and was necessary in a democratic society in order to achieve the aim or aims concerned.

The general rule on maternity (for a woman who gave birth to a child) under Icelandic law, although not explicitly stated in legal provisions, was reasoned in detail by the Supreme Court's judgement in the case. Furthermore, regulations introducing the ban on surrogacy and the rule on maternity in situations involving artificial fertilization exist in the Icelandic legal order. After assisted conception treatment, the woman who gave birth to a child was considered the mother, and a woman who consented to her wife undergoing such treatment was considered the child's parent. These conditions were not met in either the first or second applicant cases under Icelandic law. Consequently, considering that this interpretation of domestic law is neither arbitrary nor manifestly unreasonable, the Court concluded that the refusal to recognize the first and the second applicants as the third applicant's parents had a sufficient basis in law.¹¹

Furthermore, in accordance with the Government's submission, the Court found a refusal to recognize the applicants as the child's parents pursued a legitimate aim. It was the protection of the rights and freedoms of others, women, and children whose interests were intended to be safeguarded by the ban on surrogacy.

According to the established case law, the Court reiterated the understanding of the notion of necessity in a democratic society. This implies a correspondence of interference to a pressing social need and proportionality to the aim pursued. Of course, a fair balance between the relevant competing interests should be considered. The Court noted that it was not its rule to determine *in abstracto* the appropriate policy for regulating complex and sensitive matters such as issues arising from commercial surrogacy arrangements. It was, however, to determine *in concreto* whether impugned measures taken by State's authorities had been relevant and sufficiently justified, considering the assumed (legitimate) aim. The Court recalled the margin of appreciation enjoyed by the State, although its breadth was restricted by the important facet of an individual's existence or identity under Article 8. However, the Court reiterated the conclusions from previous judgements concerning the question of consensus within the member States of the Council of Europe. In the absence of consensus, either regarding the relative importance of the interest at stake or the best means of protecting it, the margin of appreciation will be wider. In particular, this occurs when the case raises sensitive moral or ethical issues or usually in cases evoking competition of private and public interests or the ECHR rights. In reference

11 | Valdís Fjölнисdóttir, paragraph 64.

to previous judgements, the Court noted that among issues of a delicate nature, allowing a wider margin of appreciation due to the nuanced approach of the countries, proving no consensus, are definitely situations of heterologously assisted fertilization or surrogacy arrangements and the legal recognition of the parent-child relationship established legally abroad as a consequence of them.

Applying the aforementioned principles in the discussed case, the Court noted that the applicants' actual enjoyment of their family life had not been interrupted by the intervention of the State. Non-recognition as parents has affected the applicants' family life; however, the respondent State took measures to safeguard it. The child has been fostered by his intended parents, and foster care arrangements have been rendered permanent, which could provide a certain stability for the family, even after Ms Fjölнисdóttir and Ms. Agnarsdóttir's divorce. The Court also took into consideration the fact that Mr. X was granted Icelandic citizenship, which influenced the regulation of his residence and security of his rights; consequently, it reduced the practical obstacle to the enjoyment of the three applicants' family life. Furthermore, it seemed to the Court that Ms Fjölнисdóttir and Ms. Agnarsdóttir's joint adoption of X had been an option open to them until their divorce. After their divorce, they withdrew from the application to adopt. Thus, no final determination has been made by the Icelandic Supreme Court regarding the two applicants' right to adopt the third applicant. Therefore, the Court pointed out that the issue was limited to the matter of registration of a parental link, which had been the subject of the applicants' judicial proceedings, having been concluded by a final judgement of the Supreme Court of Iceland. The Government's objection to the non-exhaustion of domestic remedies concerning adoption proceedings had been dismissed. Nevertheless, the Court noted that either the first or the second applicant could still apply to adopt the third applicant as individuals, or together with their new spouse. Although this would, of course, raise problems resulting from the fact that it would not have been possible for both applicants together.

It is worth quoting in full the final point of the Court's reasoning: 'Considering all of the above, in particular the absence of an indication of actual, practical hindrances in the enjoyment of family life, and the steps taken by the respondent State to regularise and secure the bond between the applicants, the Court concludes that the non-recognition of a formal parental link, confirmed by the judgement of the Supreme Court, 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. The State thus acted within the margin of appreciation which is afforded to it in such matters. There has accordingly been no violation of Article 8 of the Convention with regard to the applicants' right to respect for their family life.'

The Court found that the conclusions regarding the applicants' private lives were the same as the reasoning outlined above for family life. Moreover, the Court found no grounds to declare violation also alleged by the applicants, of the prohibition of discrimination provided in Article 14 of the ECHR.

The judgement was issued unanimously. However, in the concurring opinion, Judge Lemmens expressed doubts about the lack of separate consideration of 'private life' and 'family life' in the context of the need to protect the rights of the child, the third applicant.

4. Commentary

| 4.1. Case law on surrogacy and the Valdís Fjöl­nisdóttir case

As it has already been mentioned in the introduction to the present text, the judgement commented on is another one before the ECtHR dealing with the consequences of gestational surrogacy. To some extent the Valdís Fjöl­nisdóttir case may be distinguished from the previous cases by the specific position of the adult applicants: two women, who were married and then divorced, having been involved in a ‘parental project’ under commercialized gestational surrogacy abroad. However, this is not the case’s factual specificity, which makes it important and worth considering in more detail.¹² What makes it so is the fact that it demonstrates the ongoing ambiguity of the ECtHR’s case law on gestational surrogacy and the Court’s hesitancy to directly address this phenomenon and its implications from the perspective of conventional values. In addition, one can even claim that the judgement commented on provides for more inconsistency of the case law when confronted with the Grand Chamber judgement of 2017 in the case of Paradiso and Campanelli, in which the Court dealt with gestational surrogacy without any biological links between the child and the intended parents. As it was the first case of gestational surrogacy decided by the Grand Chamber of the ECtHR, it was perceived as an important step in the development of a consistent line of jurisprudence on the issue. Also, as the Grand Chamber in Paradiso and Campanelli refused to acknowledge the links between the child and the intended parents as forming family life under Article 8 of the ECHR, the judgement was perceived by some commentators as the manifestation of a more restrictive approach towards the interpretation of the notion of ‘family life’ under the ECHR, as well as towards the phenomenon of gestational surrogacy itself.¹³ Neither of these assumptions – of a somewhat wishful thinking character – proved true, as the judgement in the Valdís Fjöl­nisdóttir case illustrates. The apparent deficiencies of the reasoning in the Paradiso and Campanelli judgement were already identified and expressed in strong language by four judges in their concurring opinion attached to the Grand Chamber judgement.¹⁴ Indeed, the critical arguments raised there should form an important point of reference for further discussion.

| 4.2. Family and private life

In the Paradiso and Campanelli case, the ECtHR dealt with relations between the intended parents and a child born by a surrogate mother without any biological links between them and did not recognize them as ‘family life’ under Article 8 of the ECHR.

12 | However, due to the existence of various types of family or *de facto* relationships, various types of surrogacy agreements, various regulations in particular states, and as a consequence of the assumptions adopted by the ECtHR in acknowledging the existence of family life (see below), the Court is forced to analyze in casuistic manner factual specificity of each of the cases, which hinders setting some more general standards. Consequently, the commentators analyzing the Court reasoning do likewise, sometimes noticing ambiguity/inconsistency in the Strasbourg approach but for reasons other than these raised in this text; cf. Bracken, 2017, pp. 368–379.

13 | Cf. Mirocha, 2019, p. 555 and the sources quoted.

14 | Paradiso and Campanelli, Joint Concurring Opinion of Judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov.

However, what was decisive in this respect was the relatively short period of time (eight months) in which the intended parents had had direct contact with the child and ‘the uncertainty of the ties [among them] from a legal perspective’. Subsequently, the child was separated from the intended parents by Italian authorities. Although the Court in the Grand Chamber judgement did not acknowledge the existence of family life, it reserved that ‘it [did] accept, in certain situations, the existence of *de facto* family life between an adult or adults and a child in the absence of biological ties or a recognized legal tie, provided that there [were] genuine personal ties.’¹⁵ And it was exactly this approach that allowed the Court to establish family life between the three applicants in the *Valdís Fjöl­nisdóttir* judgement. The only criterion that actually mattered in this respect was the passage of time; in the latter case, it amounted to four years, which, according to the Court, resulted in strong emotional bonds between the intended parents (by that time divorced) on the one hand, and the child on the other.

Thus, the Court’s approach in both judgements referred to was in line with its interpretation of the ‘family life’ notion visibly developing towards covering relations based on genuine personal links that are close and constant enough. However, such an approach results in far-reaching ambiguity. As aptly noted by the concurring judges in the context of the Grand Chamber judgement in the *Paradiso and Campanelli* cases:

[...] the proposed formula is simultaneously both too vague and too broad. The approach seems based on the implicit assumption that existing interpersonal ties should enjoy at least *prima facie* protection against State interference. We note in this respect that close and constant personal ties may exist out of the scope of any family life. The reasoning does not explain the nature of those specific interpersonal ties which form family life. At the same time, it seems to attach great importance to emotional bonds [...]. However, emotional bonds *per se* cannot create family life.¹⁶

Yet, it seems that to a considerable extent, in the understanding of the Court, they can create family life. In the *Valdís Fjöl­nisdóttir* judgement the Court concluded that ‘the requirements of ‘family life’ [had] been fulfilled on the particular facts of the present case. In this regard, the Court [had] taken account of the long duration of the first two applicants’ uninterrupted relationship with the third applicant, the quality of the ties already formed and the close emotional bonds forged with the third applicant during the first stages of his life, reinforced by the foster care arrangement adopted by the national authorities and not contested by the Government before the Court.’¹⁷ Regarding the ‘quality of the ties’, it should be noted that the relationships among the applicants were significantly disrupted by the divorce of the two adult applicants. Indeed, the foster care arrangement reinforcing the links between applicants did not transform them into a family life. Thus, these links might have been more appropriately considered as personal ties covered by the concept of private life.

In was stated in the context of the *Paradiso and Campanelli* judgement that ‘the reasoning adopted by the majority [left] it unclear what exactly [was] entailed by private life, what [was] the scope of the protection of the right recognized in Article 8, and what

15 | *Paradiso and Campanelli*, paragraph 148; *Valdís Fjöl­nisdóttir*, paragraph 59.

16 | *Paradiso and Campanelli*, Joint Concurring Opinion of Judges De Gaetano et al., paragraph 2.

17 | *Valdís Fjöl­nisdóttir*, paragraph 62.

constitute[d] an interference within the meaning of Article 8.¹⁸ The Valdís Fjölnisdóttir judgement only extended this ambiguity to family life.

One particularly important aspect of gestational surrogacy cases in the context of the establishment of family life or private life under Article 8 of the ECHR, and the scope of protection is the way in which the interpersonal links concerned have been established. Indeed, the scope of protection under the ECHR should be especially carefully assessed where the factual circumstances result from illegal or/and immoral activities.¹⁹ When it comes to gestational surrogacy, it is often the case that the intended parents decide to get involved in surrogacy arrangements abroad to circumvent the legal restrictions under national jurisdictions. This is particularly true in the context of commercial surrogacy. Offering by the ECtHR a far-reaching protection under the ECHR to effects of actions taken in clear violation of national jurisdiction of a State Party, while relying on the lack of European consensus on the phenomenon of gestational surrogacy, which results in a wide margin of appreciation enjoyed by a State Party, causes serious doubts, to say the least.²⁰ Paradoxically, certain significant effects of the circumvention of the ban on surrogacy under national law, which is mostly aimed at protecting children, are nevertheless acknowledged due to the best interest of the child principle applied in a specific case.²¹

One has to admit, however, that in the Valdís Fjölnisdóttir case, the Icelandic authorities themselves contributed to acknowledging personal links between the intended parents and the child, having been intentionally established under foreign jurisdiction to circumvent the national prohibitive regulations, by resting foster care on the former. In contrast, in the Paradiso and Campanelli case, the Italian authorities intervened and separated the child from the intended parents relatively quickly. Thus, it may be claimed that the national authorities' actions in these two cases were guided by different approaches to the best interest of the child principle. Whereas the Italian authorities were guided by the protection of children in general from illicit practices, the Icelandic authorities concentrated on the best interest of the individual child concerned (so they were driven

18 | Paradiso and Campanelli, Joint Concurring Opinion of Judges De Gaetano et al., paragraph 5 in fine.

19 | Cf. Paradiso and Campanelli, Joint Concurring Opinion of Judges De Gaetano et al., paragraph 3.

20 | Carlos Martínez de Aguirre noted in this context, however, that 'the ECtHR is aware that endorsing this conduct [i.e. avoiding national prohibitive or restrictive laws in surrogate motherhood] through its judgements would be tantamount to legalizing the situation created by the intended parents, in breach of important rules of their national Law' (Martínez de Aguirre, 2019, p. 471). Yet, the scope of the Court's 'awareness' in this respect remains arguable. Also note the explicit position of the dissenting judges in the Paradiso and Campanelli judgement who stated that 'Italian law [prohibiting surrogacy] does not have extraterritorial effects. Where a couple has managed to enter into a surrogacy agreement abroad and to obtain from a mother living abroad a baby, which subsequently is brought legally into Italy, it is the factual situation in Italy stemming from these earlier events in another country that should guide the relevant Italian authorities in their reaction to that situation. In this respect, we have some difficulty with the majority's view that the legislature's reasons for prohibiting surrogacy arrangements are of relevance in respect of measures taken to discourage Italian citizens from having recourse abroad to practices which are forbidden on Italian territory [...]. In our opinion, the relevance of these reasons becomes less clear when a situation has been created abroad which, as such, cannot have violated Italian law', Paradiso and Campanelli, Joint Dissenting Opinion of Judges Lazarova, Trajkovska, Bianku, Laffranque, Lemmens and Grozev, paragraph 11.

21 | Cf. Bracken, 2022, p. 204, critically evaluating the fact that in the judgment in question the best interest of the child principle was not considered explicitly.

by ‘this particular child approach’ as Carlos Martínez de Aguirre would put it²²). In gestational surrogacy cases, the tension between these two approaches is paramount²³ and, as such, should be precisely and consistently addressed by the ECtHR.

| 4.3. Surrogacy and adoption, and recognition of foreign civil status

The issue of establishing interpersonal links between intended parents and a child born through surrogacy resulting from a circumvention of binding laws is also evident in the relationship between surrogacy and international (intercountry) adoption and the accompanying international regulations aimed at prohibiting and preventing the sale of children. This relation was also alluded to in the concurring opinion of the four judges in the Paradiso and Campanelli judgement.²⁴

In their argumentation, the judges referred to the Convention on the Rights of the Child [UNCRC] among others;²⁵ the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography [the Protocol];²⁶ and the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption [the Hague Convention].²⁷ All of the aforementioned international agreements have a wide scope of application, and all explicitly introduce the ban on the sale of children.²⁸ This prohibition is fundamental for the Hague Convention, which imposes a number of obligations on State Parties, as well as on individuals who choose to proceed with an intercountry adoption. It is worth considering whether children conceived through surrogacy should be subject to less protection than adoptive children. From a different perspective, those pursuing their ‘parental project’ through gestational surrogacy (despite domestic bans, if applicable) have more autonomy of action than those seeking intercountry adoption. The issues of the need for the protection of the rights of the children in cross-border surrogacy cases, as well as of solving the multiple challenges of the legal parentage establishment, have been addressed by the Hague Conference on Private International Law [HCCH], under the auspices of which works on a relevant convention, and have been underway for more than 10 years.²⁹

It is worth noticing that the response to the surrogacy cases, especially ‘coming from abroad’, in the states which do not regulate surrogacy or ban it (like Iceland), is the attempt to use the institution of adoption or the recognition of foreign civil status (accepting the consequences of the surrogate motherhood) as the only way to establish legal relationship between the ‘intended parents’ and a child born by surrogate mother.³⁰ Interestingly, a link

22 | Martínez de Aguirre, 2019, p. 471.

23 | Cf. März, 2021, p. 276 and the quoted literature.

24 | Paradiso and Campanelli, Joint Concurring Opinion of Judges De Gaetano et al., paragraph 6.

25 | United Nations Convention on the Rights of the Child signed at New York on 20 November 1989, UNTS, vol. 1577, p. 3.

26 | United Nations Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography signed at New York on 25 May 2000, UNTS, vol. 2171, p. 227.

27 | Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, UNTS, vol. 1870, p. 167.

28 | Article 35 of UNCRC; Article 1 of the Protocol; Article 1 of the Hague Convention.

29 | The information reports and projects may be found at the HCCH, no date.

30 | As an example, see the Polish context presented in detail by Gajda and Łukasiewicz, 2019, pp. 709–753 and the sources quoted.

between realizing a surrogacy arrangement and the institution of adoption is visible also in the conclusions of the 2019 Court's Advisory Opinion.³¹ The issue of non-recognition of foreign civil status (lack of 'entrance of the intended mother to the national register of births, marriages, and deaths') will be briefly presented in the next paragraph. Here, it is worth referring to the aforementioned doubts about the risk of children's sale. Also, in determining what is relevant for the Valdís Fjölnisdóttir case, one should remember that 'means such as adoption' may include various forms of adult-child relations – in addition to relations based on filiation or parental responsibility, and those based on right to contact or similar under domestic law.

The possibility of adopting a child was not questioned in the Valdís Fjölnisdóttir case. What was subjected to the Court's assessment was the non-recognition of foreign civil status (due to the application of the *ordre public* clause). The Court seems to have elaborated its approach by neither addressing surrogacy as such (or, at least not in a significantly direct way, as stated above), nor requiring entrance of the 'intended parents' to the civil status register as the exclusive solution to protect private or family life (see: the Advisory Opinion), but by checking the degree of 'practical hindrances' that resulted from 'non-entrance' for the applicants.³² However, many problems of crucial importance remain unresolved.

5. Conclusion

Regrettably, the Valdís Fjölnisdóttir judgement affirmed ambiguity in the ECtHR's approach to gestational surrogacy cases. It may be claimed that the Court does much in order not to address the phenomenon of surrogacy in a more general and structural way from the perspective of the ECHR rights and freedoms. Instead, it prefers to repeat that 'the Court's task is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating the complex and sensitive matter of the relationship between intended parents and a child born abroad as a result of commercial

31 | Advisory Opinion, conclusion, point 2: 'the child's right to respect for private life within the meaning of Article 8 of the Convention does not require such recognition to take the form of entry in the register of births, marriages and deaths or the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests.'

32 | Such hindrances have not been found in the Valdís Fjölnisdóttir case, in which the child was granted citizenship by Icelandic authorities, the foster care agreement was concluded, etc., see Valdís Fjölnisdóttir, paragraph 75. Such a pragmatic approach is present in the last years' case law on recognition of foreign civil status of both domestic and international courts. It has of course its positive (practical) consequences, like a possibility of issuing the documents for a child or providing it with limited 'functional recognition', which enables the child to benefit from the European Union free movement; seeking for protection of *ordre public* at the same time. E.g.: The Polish Supreme Administrative Court (*Naczelny Sąd Administracyjny*) Resolution of 2 December 2019, II OPS 1/19, commented by Mostowik, 2021, pp. 185–203; judgment of the Court of Justice of the European Union of 14 December 2021, V.M.A./Stolichna obshtina, rayon 'Pancharevo', C-490/20, commented by de Groot, 2021, pp. 4–25.

surrogacy arrangements, which are prohibited in the respondent State³³ and concentrate on the individualized specific circumstances of particular cases. The results are ambiguous and inconsistent.

One may not necessarily share the unequivocal position of the four judges presented in their concurring opinion to the *Paradiso and Campanelli* judgement that gestational surrogacy is incompatible with human dignity on which the ECHR is based, but one must not ignore the arguments raised in their opinion. It is the Court that should confront itself with this challenging task. In this respect, the *Valdís Fjölnisdóttir* judgement is a lost chance.

Obviously, gestational surrogacy cases demonstrate a much broader dilemma of the ECtHR's role in the European legal order. Should the Court develop and foster the European standards of human rights protection under the ECHR towards new phenomena, such as surrogacy, or should it rely on the flexible interpretative methods of the ECHR, such as the European consensus and margin of appreciation that allow the Court to await the national developments to be established and safely follow the majority of State Parties? No matter how one answers this mostly complex and intertwined question, one should expect consistency in the Court's approach.

33 | *Paradiso and Campanelli*, paragraph 180; *Valdís Fjölnisdóttir*, paragraph 67.

Bibliography

- Bracken, L. (2021) 'The ECtHR's first advisory opinion: Implications for cross-border surrogacy involving male intended parents', *Medical Law International*, 21(1), pp. 3–18; <https://doi.org/10.1177/09685332211002592>.
- Bracken, L. (2017) '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*, 39(3), pp. 368–379; <https://doi.org/10.1080/09649069.2017.1344393>.
- Bracken, L. (2022) 'Cross-Border Surrogacy before the European Court of Human Rights: Analysis of Valdís Fjölnisdóttir and Others v. Iceland', *European Journal of Health Law*, 29(2), pp. 194–216; <https://doi.org/10.1163/15718093-bja10059>.
- Gajda, J., Łukasiewicz, R. (2019) 'Principles of adoption system versus surrogate motherhood' in Mostowik, P. (ed.) *Fundamental legal problems of surrogate motherhood. Global perspective*. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwosci, pp. 709–753.
- De Groot, D., (2021) 'EU law and the mutual recognition of parenthood between Member States: the case of V.M.A. v Stolichna Obshtina', [Global Governance Programme], *GLOBALCIT, Special Report, 2021/01, [Global Citizenship]*, European University Institute, pp. 4–24.
- Margaría, A. (2020) 'Parenthood and cross-border surrogacy: What is 'new'? The ECtHR's First Advisory Opinion', *Medical Law Review*, 28(2), pp. 412–425; <https://doi.org/10.1093/medlaw/fwz042>.
- Martínez de Aguirre, C. (2019) 'International surrogacy arrangements: a global "Handmaid's Tale"?' in Mostowik, P. (ed.) *Fundamental legal problems of surrogate motherhood. Global perspective*. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, pp. 451–486.
- März, J. W. (2021) 'What makes a parent in surrogacy cases? Reflections on the Valdís Fjölnisdóttir et al. v. Iceland decision of the European Courts of Human Rights', *Medical Law International*, 21(3), pp. 271–285; <https://doi.org/10.1177/09685332211043499>.
- Mirocha, Ł. (2019) 'Dark side of diversity. Actions undertaken in the system of the Council of Europe with regard to the issue of surrogate motherhood' in Mostowik, P. (ed.) *Fundamental legal problems of surrogate motherhood. Global perspective*. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwosci, pp. 527–558.
- Mostowik, P. (2021) 'Resolving administrative cases concerning child under the foreign custody of same-sex persons without violating national principles on filiation as the ratio decidendi of the Supreme Administrative Court (NSA) Resolution of 2 December 2019', *Prawo w Działaniu. Sprawy Cywilne*, 46, pp. 185–203; <https://doi.org/10.32041/PWD.4609>.
- HCCH (no date) *The parentage/surrogacy project* [Online]. Available at: <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (Accessed: 8 September 2022).