



Refusal to register the birth details of a child born abroad through surrogacy not in breach of the right to respect for private life, in so far as a legal parent-child relationship can be established through adoption

In today's **Chamber judgment**¹ in the case of [D v. France](#) (application no. 11288/18) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 8 (right to respect for family life) of the European Convention on Human Rights, and

no violation of Article 14 (prohibition of discrimination) read in conjunction with Article 8.

The case concerned the refusal to record in the French register of births, marriages and deaths the details of the birth certificate of a child born abroad through a gestational surrogacy arrangement in so far as the certificate designated the intended mother, who was also the child's genetic mother, as the mother.

The Court observed that it had previously ruled on the issue of the legal parent-child relationship between a child and its intended father where the latter was the biological father, in its judgments in [Menesson v. France](#) and [Labassee v. France](#). According to its case-law, the existence of a genetic link did not mean that the child's right to respect for his or her private life required the legal relationship with the intended father to be established specifically by means of the recording of the details of the foreign birth certificate. The Court saw no reason in the circumstances of the present case to reach a different decision regarding recognition of the legal relationship with the intended mother, who was the child's genetic mother.

The Court also pointed to its finding in advisory opinion no. [P16-2018-001](#) that adoption produced similar effects to registration of the foreign birth details when it came to recognising the legal relationship between the child and the intended mother.

Principal facts

The applicants, Mrs D, Mr D, and Ms D, were born in 1972, 1957 and 2012 respectively and live in Canet en Roussillon. The third applicant was born in Ukraine through a gestational surrogacy arrangement. Her birth certificate, issued on 3 October 2012 in Kyiv, states that the first applicant is her mother and the second is her father.

Mr and Mrs D were married in France in 2008. The child was born in Ukraine in September 2012 to a surrogate mother. The birth certificate issued in Kyiv names the first applicant as the mother and the second applicant as the father, without mentioning the woman who gave birth to the child.

On 20 September 2014 the first two applicants applied to the French embassy in Kyiv to have the details of the birth certificate entered in the French register of births, marriages and deaths. The deputy consul replied that on account of the specific nature of the situation she had decided to defer recording the details and issuing the family record book (*livret de famille*) and to refer the

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

matter to the public prosecutor in Nantes. The latter informed the couple that pending instructions from the Ministry of Justice concerning the follow-up to the Court's judgments in [Mennesson v. France](#) and [Labassee v. France](#), all applications relating to surrogacy arrangements had been suspended.

On 27 January 2016 Mr and Mrs D brought proceedings against the public prosecutor in the Nantes *tribunal de grande instance* seeking an order for the details of the child's birth certificate to be entered in the French register.

On 12 January 2017 the Nantes *tribunal de grande instance* granted the application. It emphasised, among other points, that the fact that the birth certificate designated the first applicant as the mother, even though she had not given birth, could not, having regard to the best interests of the child as determined by the European Court of Human Rights, justify a refusal to recognise the legal mother-child relationship, which was "the only relationship recognised as legally established in the country of birth" and which therefore corresponded to the legal reality.

On 18 December 2017 the Rennes Court of Appeal upheld the judgment of 12 January 2017 in so far as it approved the application to record the details of the birth certificate in respect of the father-child relationship, but overturned it with regard to the mother-child relationship. The judgment stated in particular that "... concerning the designation of the mother on the birth certificate, the reality within the meaning of [Article 47 of the Civil Code] is the very fact of giving birth. While the law may transform that reality within the meaning of [that provision], positive law permits an exemption from the principle *mater semper certa est* only in a limited number of situations expressly provided for by the legislature, in the context of full adoption (Article 356, first paragraph, of the Civil Code), thus enabling an adoptive mother who has not given birth to be properly designated as the mother ..."

The applicants did not appeal to the Court of Cassation.

On 12 September 2019, in response to a request for information from the President of the Chamber, the applicants informed the Court that Mrs D was Ms D's genetic mother.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for family life), taken separately and in conjunction with Article 14 (prohibition of discrimination), the applicants complained of a violation of the child's right to respect for her private life, and of discrimination on the grounds of "birth" in her enjoyment of that right.

The application was lodged with the European Court of Human Rights on 2 March 2018.

Judgment was given by a Chamber of seven judges, composed as follows:

Síofra O'Leary (Ireland), *President*,
Gabriele Kucsko-Stadlmayer (Austria),
Ganna Yudkivska (Ukraine),
André Potocki (France),
Mārtiņš Mits (Latvia),
Lado Chanturia (Georgia),
Anja Seibert-Fohr (Germany),

and also Victor Soloveytchik, *Deputy Section Registrar*.

Decision of the Court

Article 8

The Court noted that the Rennes Court of Appeal had granted the request for the details of the third applicant's Ukrainian birth certificate to be entered in the French register of births in so far as it designated the second applicant, who was the intended father and the biological father, as the father, but had refused the request in so far as the birth certificate designated the first applicant as the mother. However, the Court of Appeal had stressed that the mother-child relationship could be legally established by means of adoption.

The Court observed that the applicants had argued in substance that the refusal to record the details of the third applicant's Ukrainian birth certificate in so far as it designated the first applicant as her mother amounted to disproportionate interference with the child's right to respect for her private life, given that the first applicant was her genetic mother.

The Court had previously ruled on the issue of the legal parent-child relationship between the child and the intended father where the latter was the biological father (see the judgments in [Menesson v. France](#) and [Labassee v. France](#)). According to its case-law, the fact that a genetic link existed did not mean that the child's right to respect for his or her private life required the legal relationship with the intended father to be established specifically by means of registration of the details of the foreign birth certificate. The Court saw no reason in the circumstances of the present case to reach a different decision with regard to recognition of the legal relationship with the intended mother, who was also the genetic mother.

It could not therefore be said that the refusal of the request to register the details of the third applicant's Ukrainian birth certificate in respect of the first applicant amounted to disproportionate interference with the child's right to respect for her private life simply because the first applicant was her genetic mother, given that the legal mother-child relationship could in fact be established by other means.

As to the proportionality of the interference with the third applicant's right to respect for her private life, the Court considered it decisive that the refusal of the request for registration of the details of the Ukrainian birth certificate in so far as it designated the first applicant as the mother did not preclude the establishment of the legal mother-child relationship. Indeed, the Rennes Court of Appeal had been careful to stress that the possibility of adoption was available, a position confirmed by the case-law of the Court of Cassation.

As far as the third applicant's right to respect for her private life was concerned, she had to have access to an effective and sufficiently speedy mechanism enabling her legal relationship with the first applicant to be recognised.

As emphasised by the Government, since the first and second applicants were married and the Ukrainian birth certificate made no mention of the woman who had given birth to the child, it was open to the first applicant to apply to the courts to adopt her spouse's child by way of full adoption.

As the Court had observed in its advisory opinion no. [P16-2018-001](#), adoption produced similar effects to registration of the foreign birth details when it came to recognising the legal relationship between the child and the intended mother.

The Court observed that it transpired from the information provided by the Government that the average time taken to obtain a decision on full adoption was only 4.1 months. Hence, if the adoption procedure had been initiated following the Rennes Court of Appeal's judgment of 18 December 2017, the situation of the third applicant regarding the legal mother-child relationship would in all likelihood have been resolved before she reached the age of six, and at around the time when the applicants had applied to the Court.

Thus, the Court concluded that adoption of the spouse's child constituted in the present case an effective and sufficiently speedy mechanism enabling the legal relationship between the first and third applicants to be recognised.

Accordingly, in refusing to record the details of the third applicant's Ukrainian birth certificate in the French register of births in so far as it designated the first applicant as the child's mother, the respondent State had not overstepped its margin of appreciation in the circumstances of the present case.

There had therefore been no violation of Article 8 of the Convention.

[Article 14 read in conjunction with Article 8](#)

In their further observations of 11 February 2020 the applicants argued that refusing to record the details of the birth certificate of a child born abroad through surrogacy in so far as the certificate designated the intended mother, who was the genetic mother, as the child's mother, while recording the details in respect of the intended father, the child's biological father, amounted to discrimination against the mother.

The Court noted that the applicants' argument amounted to a complaint of discrimination within the meaning of Article 14 of the Convention in respect of the first applicant. It observed that this complaint was separate from the other complaints, which concerned only the rights of the third applicant, and that it was based on a fact – the circumstance that the first applicant was the child's genetic mother – which the applicants had omitted to mention in their application of 2 March 2018, and which they had disclosed to the Court only on 12 September 2019. The applicants had likewise omitted to inform the domestic authorities and courts of this fact, which had therefore not been examined in the domestic proceedings. The Court found that this fresh complaint did not comply with the six-month time-limit under Article 35 § 1 of the Convention, and therefore dismissed it under Article 35 §§ 1 and 4 of the Convention.

However, the Court noted that the complaint concerning the discrimination allegedly suffered by the third applicant in the enjoyment of her right to respect for her private life was not manifestly ill-founded, nor was it inadmissible on any other ground referred to in Article 35 of the Convention. It therefore declared it admissible.

In the Court's view, the difference in treatment between French children born abroad through surrogacy and other French children born outside the country did not lie in the fact that the former – unlike the latter – could not obtain recognition in domestic law of a legal mother-child relationship with the person named on the foreign birth certificate. Rather, it consisted in the fact that at the relevant time the former, in contrast to the latter, could not obtain the entry in the register of the full details of that birth certificate and had to have recourse to adoption in order to have the mother-child relationship legally established. As the Court had already emphasised, adoption of the spouse's child constituted in the present case an effective mechanism for recognition of the legal relationship between the first and third applicants.

The Government had explained that this difference in treatment regarding the means of establishing the legal mother-child relationship was designed to ensure, in the specific circumstances of each case, that it was in the best interests of the child born through surrogacy for such a relationship to be established with the intended mother. The Court therefore accepted that the difference in treatment of which the applicants complained with regard to the means of recognition of the legal relationship between such children and their genetic mother had an objective and reasonable justification. Hence, there had been no violation of Article 14 read in conjunction with Article 8.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.