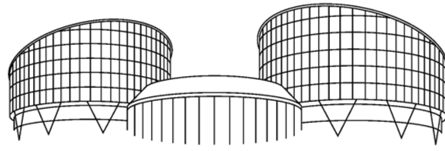

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF K.K. AND OTHERS v. DENMARK

(Application no. 25212/21)

JUDGMENT

Art 8 • No obstacles to enjoying family life by children born abroad via surrogacy and their genetic father's wife, who was granted joint custody but not adoption • Refusal to allow adoption by wife of children's genetic father, despite no other possibilities of recognition of a legal parent-child relationship • Private life of the intended mother outweighed by the public interests at stake • Negative impact on the children's right to respect for their private life due to legal uncertainty regarding their identity within society • Cumulative solutions provided for by Danish law insufficient to make up for the denial of stepchild adoption • Fair balance between competing interests at stake not struck

STRASBOURG

6 December 2022

FINAL

06/03/2023

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

In the case of K.K. and Others v. Denmark,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Carlo Ranzoni, *President*,
Jon Fridrik Kjølbro,
Egidijus Kūris,
Pauliine Koskelo,
Jovan Ilievski,
Saadet Yüksel,
Diana Sârcu, *judges*,
and Hasan Bakırcı, *Section Registrar,*

Having regard to:

the application (no. 25212/21) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Danish nationals, Ms K.K. and two children, C1 and C2 ("the applicants"), on 11 May 2021;

the decision to give notice to the Danish Government ("the Government") of the application;

the decision not to have the applicants' names disclosed;

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

the comments submitted by the NGO, Ordo Iuris, which had been granted leave by the Section Vice-President to intervene as a third party in the proceedings (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court);

Having deliberated in private on 8 November 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. Before the Court, the applicants complained that the authorities' refusal, upheld by the Supreme Court on 6 November 2020, to let the first applicant adopt the second and third applicants, twins born through surrogacy, amounted to an infringement of their right to respect for private and family life as guaranteed by Article 8 of the Convention.

THE FACTS

2. The first applicant was born in 1967. The second and third applicants are twins, born in 2013. They all live in Copenhagen. They were represented by Ms Maryla Rytter Wroblewski, a lawyer practising in Copenhagen.

3. The Government were represented by their Agent, Mr Michael Braad, from the Ministry of Foreign Affairs, and their Co-Agent, Ms Nina Holst-Christensen, from the Ministry of Justice.

4. The facts of the case may be summarised as follows.

5. In December 2013 a surrogate mother in Ukraine gave birth to the second and third applicants following a surrogacy agreement with the first applicant and her husband, who were the intended parents of the children.

6. The husband was the biological father of the children. The Ukrainian authorities issued birth certificates for the children, naming the first applicant as their mother and her husband as their father.

7. The children were brought to Denmark in February 2014.

8. In Denmark, under section 30 of the Children Act, the woman giving birth to a child is the legal parent of the child (also where the egg from which the child was developed was donated to the mother). Accordingly, the surrogacy agreement stating that the first applicant was to be named as the mother of the two children on the birth certificates had no legal effect in Denmark. However, the children obtained Danish nationality because of their family ties to their father. In addition, on 22 March 2018, the authorities approved the first applicant and her husband being given joint custody of the children.

9. In the meantime, the first applicant applied for adoption of the children as a step-parent (stepchild adoption).

10. By a decision of 26 February 2014, the State Administration (*Statsforvaltningen*) refused the application for adoption, as the first applicant and the children had only lived together in Denmark for sixteen days.

11. On 26 July 2016 the National Social Appeals Board (*Ankestyrelsen*) affirmed the decision of 26 February 2014, stating that adoption would be contrary to section 15 of the Adoption Act, since the surrogate mother had been paid to consent to adoption. On 20 February 2017 the National Social Appeals Board confirmed its decision.

12. The first applicant brought the case before the courts, which by judgments of, respectively, 6 June 2018 (the District Court of Lyngby (*Retten i Lyngby*)) and 14 June 2019 (the Eastern High Court (*Østre Landsret*)) upheld the decision to refuse adoption.

13. With permission from the Appeals Permission Board (*Procesbevillingsnævnet*), the judgment of 14 June 2019 was brought before the Supreme Court, which in a judgment of 16 November 2020 found against the applicants.

14. From the outset, the Supreme Court found it established that a payment of 32,265 euros by the first applicant and her husband to a clinic in Ukraine had included remuneration to the surrogate mother for giving birth to the children, and for her consenting to the first applicant and her husband being the legal parents of the children, including adopting the children. Thus,

the Supreme Court found the adoption to be contrary to section 15 of the Adoption Act.

15. The Supreme Court also considered whether the refusal was contrary to Article 8 of the Convention. Referring to, *inter alia*, *Mennesson v. France* (no. 65192/11, ECHR 2014 (extracts)) and *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, French Court of Cassation, 10 April 2019 – “the *Advisory opinion*”), the Supreme Court concluded that the *Advisory opinion* also applied to surrogacy where remuneration had been paid, as mentioned in section 15 of the Adoption Act. In such situations, the best interests of the child should always be taken into consideration. However, section 15 of the Adoption Act contained an absolute ban on granting adoption if anybody having to consent to the adoption had been paid or received remuneration. Against that background, the Supreme Court concluded that the Government needed to reconsider section 15 of the Adoption Act, and that until a change to section 15 had entered into force, the authorities should in all cases involving that section carry out an individual assessment of whether refusing an application for adoption would be contrary to Article 8 of the Convention. More specifically it stated:

> “The question is then whether the refusal of the application for stepchild adoption conflicts with Article 8 of the European Human Rights Convention.
>
> The National Social Appeals Board’s refusal of the application for an adoption to [the first applicant] must be deemed to be an interference with [the second and third applicant’s] rights under Article 8(1) of the Convention. It follows from Article 8(2) that such interference is not legitimate unless it is in accordance with the law and is necessary in a democratic society in the interests of, *inter alia*, the protection of the rights and freedoms of others.
>
> The European Court of Human Rights has defined, on several occasions, the scope of Article 8 in cases concerning gestational surrogacy, i.e. surrogate motherhood where the child does not develop from the egg of the woman giving birth. As mentioned in the judgment of the High Court, the European Court of Human Rights did so in its judgment of 26 June 2014 in *Mennesson v. France* (application No. 65192/11) and in its *Advisory opinion* of 10 April 2019 to the Cour de Cassation in France (No. P16-2018-001).
>
> The *Advisory opinion* concerns a case where a child was born abroad and was conceived using the gametes of the intended father, and where a legal parent-child relationship between the child and the intended father is recognised in the father’s country of origin. According to the conclusion of the *Advisory opinion*, the child’s right to respect for private life in such cases requires that domestic law provides a possibility of recognition of a legal parent-child relationship with the intended mother, who in a birth certificate legally established abroad is designated as the ‘legal mother’. It further appears from the conclusion that the recognition of the relationship does not necessarily require registration of the foreign birth certificate. Other means might also serve the purpose, including adoption, provided that those means could be implemented promptly and effectively in accordance with the best interests of the child. In its judgment of 16 July 2020 in *D v. France* (application No. 11288/18), the European Court of Human

Rights expressed a similar view in a case where the intended mother was also the child's genetic mother.

The detailed reasons for the conclusion given by the European Court of Human Rights in its the *Advisory opinion* are provided in paragraphs 39-42 et al. Paragraph 39 thus refers to the Court's acknowledgement in its judgment of 26 June 2014 (*Mennesson v. France*) of France's intention to deter its nationals from going abroad to make use of assisted reproductive methods that were forbidden in France, but that the failure to recognise a legal parent-child relationship did not only affect the intended parents, but, to a very high degree, also the right of the children to respect for their private life. In this context, the Court pointed in paragraph 40 in particular to the risk that the child might be denied access to the intended mother's nationality or to remain in the mother's country of origin, and that the child's right to inherit her estate may be impaired. The Court further pointed out that the child's relationship with the intended mother may be jeopardised if the intended parents divorce or are legally separated, or the intended father dies, and that the child has no protection should the intended mother cease to take care of it.

In addition, paragraph 41 of the *Advisory opinion* states that the Court was mindful of the fact that, in the context of surrogacy arrangements, the best interests of the child do not merely involve respect for the child's right to private life, but also other components that do not necessarily weigh in favour of recognition of a legal parent-child relationship between the child and the intended mother. In this context, the Court pointed to the protection against risks of abuse entailed by surrogacy arrangements and refers to paragraph 202 of the judgment of 24 January 2017 in *Paradiso and Campanelli v. Italy* (application No. 25358/12) concerning the protection of children against human trafficking, etc. According to paragraph 42 of the *Advisory opinion*, a general and absolute prohibition against the recognition of a relationship between a child born abroad through a surrogacy arrangement and the intended mother is incompatible with the best interests of the child, which require at a minimum that each situation be examined in the light of the particular circumstances of the case.

In the opinion of the Supreme Court, the *Advisory opinion* must be interpreted to mean that it, among other things, aims at cases of paid surrogacy as mentioned in section 15 of the Adoption Act, and therefore, such situations also require an assessment of the best interests of the child in question based on the particular circumstances of each case. The first sentence of section 15 of the Adoption Act does not allow for such assessment to be made as the provision unconditionally prohibits the grant of an adoption in cases where a person who is to give his or her consent to the adoption has paid or received remuneration, etc.

Against this background, the Supreme Court finds that there is a need for the legislative authorities to review section 15 of the Adoption Act.

Until such new regulations are available, the European Convention on Human Rights provides that an examination in the light of the particular circumstances of the case as described above is required for the purpose of determining whether a refusal of the application for stepchild adoption would conflict with Article 8 of the Convention."

16. In respect of the refusal to grant adoption in the present case, the majority of the Supreme Court (four judges) found against the applicants for the following reasons:

"Section 15 is a re-enactment of section 20 of the former Adoption Executive Order from 1986 and builds on the same interests. As to these interests, it is evident from the legislative history of Act No. 326 of 4 June 1986 amending the Adoption Act and the

Nationality Act (the Official Report of Danish Parliamentary Proceedings 1985-86, supplement A, Bill No. L 164, column 4164) that whereas one should not prevent surrogacy arrangements not involving payment, agreements on the 'delivery of a child' against payment seemed in conflict with the fundamental principles of our society. In this context, it is provided that it should not be possible to buy and sell unborn children, that infertility problems should not become actual 'trading' in children and that in connection with agreements involving payment, there is a risk that a woman who chooses to give birth to a child for another may be influenced more by the payment offered than by the best interests of the child when choosing the 'parents' of her child. It is also clear from the legislative history that making it punishable to enter into agreements on paid surrogacy had been considered, but that it had been concluded that it was probably rules barring entering into agreements rather than the threat of punishment which would counter such agreements being made.

As mentioned, the *Advisory opinion* must be interpreted to mean that it also aims to deal with cases of paid surrogacy as covered by section 15 of the Adoption Act. It follows from the *Advisory opinion*, that when determining whether to recognise the legal relationship between a child born through a surrogacy arrangement and the intended mother, for example through adoption, regard should be had to what is best for the child, and that the best interests of that child are paramount. At the same time, however, it should be taken into consideration that the *Advisory opinion* was given on the basis of a judgment of 26 June 2014 (*Mennesson v. France*), which states in paragraph 8 that the surrogate mother was not remunerated. It must, therefore, give rise to some doubt about how the court finds that the interests of the individual children affected in concrete cases should weigh against the interests underlying section 15 of the Adoption Act. These interests generally aim to discourage commercial surrogacy arrangements and to protect children against being turned into a commodity, including preventing the surrogate mother from caring more about what payment she is offered for the child than about the best interests of the child when selecting 'parents' of that child. To this is added the interest in countering the exploitation of vulnerable women in commercial surrogacy arrangements.

We acknowledge that [the second and third applicants], who have lived with [the first applicant] all their lives, have a vital interest in her adopting them in order for their identity as her children to be legally recognised. On the other side, there are the interests of general deterrence safeguarded by the prohibition against adoption in section 15 of the Adoption Act. At the same time, we observe that [the first applicant's] own interests in obtaining recognition of the legal relationship between her and the children through adoption can be given no particular weight as this would be equal to legalising the situation that she has created by making a payment for a consent to adoption contrary to section 15 of the Adoption Act (see also paragraph 215 of the judgment of 24 January 2017 in *Paradiso and Campanelli v. Italy*).

If the circumstances emphasised by the European Court of Human Rights in paragraph 40 of the *Advisory opinion* are considered to be being particularly important for the protection of children's right to respect for their private life, there is, in our opinion, nothing to suggest that it would have a significant impact on the private life of [the second and third applicants] at present if [the first applicant] is not granted an adoption. In this context, it is observed that the children obtained Danish nationality at birth and that they are therefore entitled to reside in Denmark. [The first applicant's] shared custody further implies that she has a duty to care for the children and that in the event of legal separation or divorce or the death of [the genetic father], she will be able to retain custody under the general rules of the Parental Responsibility Act. Moreover, [the first applicant] will be able to make provision for the children in her will under the

rules of the Inheritance Act, and for inheritance tax purposes the children will be in the same position as if they were her children.

Based on an overall assessment, we find that the interests of [the second and third applicants] in being adopted by [the first applicant] − weighed against the above-mentioned general interests in protecting children against being turned into a commodity and in preventing the exploitation of vulnerable women − do not imply that the refusal of [the first applicant's] application for an adoption should, at present, be deemed to constitute a violation of Article 8 of the European Convention on Human Rights."

17. The minority of the Supreme Court (three judges) disagreed for the following reasons:

"As mentioned above, the European Court of Human Rights concludes in its *Advisory opinion* of 10 April 2019 that the general and absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is incompatible with the child's best interests. The best interests of the child require that each situation be examined in the light of the particular circumstances of the case (see in general paragraph 42 of the *Advisory opinion*).

The balancing of interests and the assessment to be made when determining whether to recognise a legal parent-child relationship between the child and the intended mother (in this case [the first applicant]), for example through adoption, should be based on what is best for the individual child (in this case [the second and third applicants]). According to paragraph 38 of the *Advisory opinion*, these interests are 'paramount', which must be interpreted to mean that very weighty counterarguments are required to reach a different outcome than the one dictated by the best interests of the child.

The best interests of the child should be weighed against the interests underlying section 15 of the Adoption Act, including the interests in preventing commercial surrogacy agreements and the implementation of any agreements on commercial surrogacy.

In the present case, the children [the second and third applicants] have lived with [the first applicant] and her husband, who is their genetic father, since they were born in December 2013. The children consider them both to be their parents, and in 2018, the State Administration approved [the father and the first applicant] having joint custody of them.

We take into account that it would be best for [the second and third applicants] to be adopted by [the first applicant] to the effect that they obtain the same legal relationship with her as they have with [their father]. In doing so, we attach importance to the interests mentioned in paragraph 40 of the *Advisory opinion* of the European Court of Human Rights, including in particular the legal close relationship with the persons who have responsibility for taking care of them during their upbringing and legal inheritance rights.

We find that the interests in preventing the implementation of agreements on commercial surrogacy arrangements are not particularly weighty in the present case where the children have now lived with [the first applicant and the father] for almost seven years, and where [the father] has been recognised for the whole time as the lawful father and holder of custody of the children. The agreement on the surrogacy arrangement has thus been fully performed for his part. In these circumstances, the fact that [the first applicant and the father] once remunerated the Ukrainian surrogate mother

cannot, in our opinion, result in the children being barred from obtaining recognition that the person whom they have regarded as their mother for their entire life is also their mother from a legal point of view.

Against this background, we find that the children's right to respect for their private life under Article 8 of the European Convention on Human Rights implies that the relationship between the children and [the first applicant] must be legally recognised, and that for such recognition it does not suffice that she has shared custody."

RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. The Adoption Act

18. The relevant provisions of the Adoption Act read as follows:

Section 2

"Adoption can be granted only when it can be assumed, on the basis of an examination, that it is in the best interests of the potential adoptee and when it is desired that the potential adoptee should be or has been raised by the adopter, or adoption should be granted for another particular reason."

Section 15

"Adoption cannot be granted if any of the persons required to consent to the adoption pay or receive remuneration or any other kind of consideration whatsoever, including compensation for loss of earnings. The Family Law Agency (formerly the State Administration) may require from any person having knowledge of the circumstances that he or she provides all information necessary to clarify whether remuneration, and so on, as mentioned in the first sentence has been paid or received ..."

Section 33

"(1) No assistance may be provided or received for the purpose of establishing contact between a woman and another person who wants the woman to bear a child for him or her.

(2) No advertising is permitted for the purpose of establishing the connection mentioned in subsection (1)."

19. Section 2 of the Adoption Act is applicable in all decisions on adoption, including stepchild adoption. Applications for stepchild adoption are, according to the information provided by the Government, normally processed within approximately eighteen weeks. Through a stepchild adoption, the legal status of the child is the same as for a child born to a married couple.

20. Section 15 of the Adoption Act was given its current wording when Parliament adopted Act No. 233 of 2 April 1997 on the changing of the Adoption Act, the Nationality Act, and the Act on Names (Ratification of the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption, Henceforth the Hague

Convention, see paragraph 31 below) (*lov nr. 233 af 2. April 1997 om ændring af adoptionsloven, indfødsretsloven og navneloven (Ratifikation af Haagerkonventionen af 29. maj 1993 om beskyttelse af børn og om samarbejde med hensyn til internationale adoptioner*). The purpose of this Act was to enable Denmark to ratify the Hague Convention. However, it applies to all kinds of adoption, both nationally and internationally. Section 33 of the Adoption Act was given its present content when Parliament adopted Act No. 326 of 4 June 1986 amending the Adoption Act and the Nationality Act (Facilitating adoption, etc.) (*lov nr. 326 af 4. juni 1986 om ændring af adoptionsloven og indfødsretsloven (Formidling af adoption m.v.)*). The purpose of the Act was, *inter alia*, to ban the facilitating of surrogacy agreements. According to the *travaux préparatoires* to the Act, the main concern was the commercial exploitation of surrogate mothers and the risk of children being turned into a commodity. This concern was described as follows:

> "Agreements on the 'delivery of a child' against remuneration seem to conflict with the fundamental principles of our society. It ought to be impossible to buy or sell children, and this also applies to unborn children. Infertility problems should not become actual 'trading' in children. To this is added that in connection with agreements involving remuneration, there is a risk that a woman who chooses to give birth to a child for another person may be influenced more by the payment offered than by the best interests of the child when choosing the 'parents' of that child."

21. Before the bill was adopted by Parliament, the Legal Affairs Committee (*Retsudvalget*) in its report on the bill noted, *inter alia*, the following:

> "The Bill clearly prohibits intermediary services and advertising in connection with surrogacy agreements and also prohibits any type of payment to the surrogate mother.
>
> The Committee is satisfied with these clear prohibitions and hopes that an unambiguous and tough line will be taken in the administration of the Bill to prevent any attempt to circumvent the rules of law. In response to questions from the Committee, the Minister of Justice has indicated that in the administration of the law, the rules will be strictly applied to seek to bring an end to any type of intermediary services and so on, which operate on the fringes of the law. The Committee concurs with this assessment and places great emphasis on strict adherence to the rules."

22. Section 15 of the Adoption Act was given its present content when Parliament adopted Act No. 233 of 2 April 1997 on amending the Adoption Act, the Nationality Act, and the Names Act (Ratification of the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption) (*lov nr. 233 af 2. April 1997 om ændring af adoptionsloven, indfødsretsloven og navneloven (Ratifikation af Haagerkonventionen af 29. maj 1993 om beskyttelse af børn og om samarbejde med hensyn til internationale adoptioner*). The purpose of the above-mentioned Act was to enable Denmark to ratify the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry

Adoption ("the Hague Adoption Convention"). In the draft bill, the considerations for section 15 were described as follows:

> "It is proposed that section 15 of the Adoption Act be amended to ensure that it complies with the prohibition against remuneration in Article 4(c)(3) and (d)(4) of the Hague Convention, whilst at the same time providing for the Convention's fundamental interest in preventing trafficking in children and unethical procedures."

23. The ban in section 15 on adoption if one of the parties has paid or received remuneration is not limited to situations covered by the Hague Adoption Convention. Whereas the Hague Adoption Convention is generally seen as containing basic rules on adoption, section 15 applies to all kinds of adoption, both nationally and internationally.

24. Following the judgment by the Supreme Court in the present case, both the Agency on Family Law (*Familieretshuset,* which on 1 April 2019 replaced the State Administration in taking decisions on stepchild adoption) and the National Social Appeals Board confirmed that they would apply section 15 of the Adoption Act in accordance with the Supreme Court judgment. Thus, at the present time section 15 is no longer applied as containing an absolute ban on stepchild adoption with regard to children born through a commercial surrogacy agreement.

25. At the same time, the relevant ministry – the Ministry of Social Affairs and Senior Citizens (*Social- og Ældreministeriet*) – initiated the preparation of legislation aiming to bring the wording of section 15 into line with the Supreme Court judgment. However, those preparations have been put on hold awaiting the outcome of the case at hand before the Court.

B. The Children Act

26. The relevant provision of the Children Act reads as follows:

Section 30

> "The woman who gives birth to a child conceived through assisted reproduction[1] is deemed to be the mother of the child."

27. Section 30 of the Children Act establishes the fact that the woman giving birth to a child is always deemed to be the mother of the child and as such a legal parent of the child. This also applies to situations where the egg from which the child was developed was donated to the mother. Thus, a

[1] The reference in section 30 to "assisted reproduction" is to the treatment offered to couples or single women who are unable to conceive a child themselves. It is the general understanding that the scope of section 30 is not limited to "assisted reproduction", but that it applies to all women giving birth to a child, no matter how the child was conceived. On 10 November 2021, the Ministry of Social Affairs and Senior Citizens introduced a bill (L 65) to Parliament, proposing to delete the reference to "assisted reproduction" in section 30 of the Children Act.

woman who donated an egg to the woman giving birth to a child is not deemed the legal mother of the child.

28. The legal consequences of section 30 are that a surrogate mother, having given birth to the child, is deemed the mother and legal parent of the child even if she, with reference to a surrogacy agreement made under the legislation of the country in which she gave birth to the child, is not deemed the legal mother. Because of section 30, surrogacy agreements are not valid under Danish law, and an intended parent who is not the genetic father is not recognised as a legal parent to the child. Under Danish law, an intended parent may only become a legal parent to the child through (stepchild) adoption, and the surrogate mother may only stop being a legal parent if the child is adopted.

29. Section 30 establishes the fundamental principle in Danish law on motherhood, and, as it forms part of Danish international private law, it also applies to children born outside of Denmark if the child becomes subject to the jurisdiction of Danish authorities after the birth. Thus, it follows from Danish international private law that parenthood for an intended parent, which is established in another country, is not recognised in Denmark because such recognition is manifestly contrary to the public policy (*ordre public*) of Denmark.

C. The Danish Council of Ethics on the issue of commercial surrogacy

30. The issue of commercial surrogacy has been considered by the Council of Ethics (*Det Etiske Råd*), which is an independent body, consisting of seventeen members, established in 1987 to advise Parliament, ministers and public authorities on ethical issues in healthcare while respecting the integrity and dignity of humans and future generations. In 2013 the Council of Ethics published a report, "International Trade in Human Eggs, Surrogacy and Organs" (*International handel med menneskelige æg, surrogatmoderskab og organer*). According to the report, all members of the Council found commercial surrogacy ethically problematic because it violated the dignity of the persons involved and contained elements of exploitation. The Council also submitted that surrogacy agreements might change the basic perception of parenthood and human reproduction. A majority of the members of the Council found that surrogacy reduced the female body to a "cocoon for the production of an individual."

D. The Hague Convention

31. The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption contains the following provisions:

Article 4

"An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin:

...

c) have ensured that

(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,

(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,

(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and

(4) the consent of the mother, where required, has been given only after the birth of the child; and

d) have ensured, having regard to the age and degree of maturity of the child, that

(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,

(2) consideration has been given to the child's wishes and opinions,

(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and

(4) such consent has not been induced by payment or compensation of any kind."

E. The United Nations Convention on the Rights of the Child

32. The United Nations Convention on the Rights of the Child has general provisions in Articles 3, 8 and 35 on, *inter alia*, the best interests of the child and measures to prevent the sale and trade in children for any purpose or in any form. In Article 21, the Convention provides as follows on adoption:

Article 21

"States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

...

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it."

F. The European Convention on the Adoption of Children (Revised)

33. The European Convention on the Adoption of Children (CETS no. 202), set out, among other things:

Article 17 – Prohibition of improper gain

> “No one shall derive any improper financial or other gain from an activity relating to the adoption of a child.”

The Explanatory Report to the said Convention set out (§ 77):

> “This article stresses that any improper gain arising out of an adoption must be prohibited by law. It prohibits only improper financial or other sorts of gain. All proper gain is therefore not prohibited: the reimbursement of direct and indirect costs and expenses of an adoption and the payment of reasonable remuneration in relation to services rendered are allowed.”

G. Comparative law

34. The legal situation in forty-three member States for children born through a surrogacy agreement was summarised in the *Advisory opinion*, §§ 22-24, and showed that there was thus no consensus among the Council of Europe member States on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

35. The applicants complained that the Supreme Court’s judgment of 16 November 2020 amounted to an infringement of their right to respect for private and family life as guaranteed by Article 8 of the Convention, which reads as follows:

> “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

36. The Government submitted that the case should be declared inadmissible as manifestly ill-founded.

37. The applicants disagreed.

38. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

39. The applicants maintained that they had been refused the possibility of being recognised as having a legal parent-child relationship, as required by Article 8, despite them having lived together as a family for more than eight years. They referred, among other things, to the reasoning of the minority of the Supreme Court, in particular that it would be in the interests of the children to be adopted by the first applicant, since they had lived together for so long and they would thereby obtain the same legal relationship with her as they had with their father. It did not suffice for that recognition that she had shared custody. There were no explicit or weighty counterarguments, including the prevention of commercial surrogacy, which could outweigh the interests of the children in the present case.

40. The Government submitted, *inter alia*, that the interference was prescribed by law, pursued a legitimate aim and was necessary in a democratic society, and that the Supreme Court had carefully considered the case in the light of Article 8, and had struck a fair balance between, on the one hand, the clear and understandable interests of the children in being adopted by the first applicant and, on the other hand, the general interests of children worldwide in being protected from being turned into a commodity and of vulnerable women in being protected from exploitation. Thus, the Supreme Court had succeeded in its difficult and sensitive task of striking a fair balance between the relevant competing interests in a complex case, taking into account the best interests of the child. Moreover, the case concerned difficult ethical and moral issues which the national legislature and courts were best suited to assess. The current state of the law expressed the legislature's deliberate choice and there was no European consensus. Accordingly, the member States should be granted a wide margin of appreciation.

41. The third-party intervener Ordo Iuris provided an overview of surrogacy agreements in the light of European and international law, and the practice in other countries. They submitted in particular that if the Convention did not guarantee a "right to surrogacy", it must be assumed that it did not guarantee "a right to recognise the effects of surrogacy" either.

2. The Court's assessment

42. It is not in dispute between the parties that the refusal to let the first applicant adopt the second and third applicants amounted to an interference in the applicants' right to respect for family and private life, that the interference was prescribed by law, namely section 15 of the Adoption Act, and that it pursued the legitimate aim of protecting the rights and freedom of others. The Court sees no reason to hold otherwise.

43. In determining whether the interference in question was "necessary in a democratic society", the Court will consider whether in the light of the case as a whole, the reasons adduced to justify that measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 (see, among other authorities, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 177, 24 January 2017, and the sources cited therein).

44. In cases arising from individual applications, the Court's task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it. Consequently, 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 surrogacy arrangements (see, for example, *Valdís Fjölnisdóttir and Others v. Iceland*, no. 71552/17, § 67, 18 May 2021).

45. The States must in principle be afforded a wide margin of appreciation regarding matters which raise delicate moral and ethical questions on which there is no consensus at European level (see, *inter alia*, *Mennesson v. France*, no. 65192/11, §§ 78-79, ECHR 2014 (extracts); *Valdís Fjölnisdóttir and Others*, cited above, § 70; and *A.M. v. Norway*, no. 30254/18, § 131, 24 March 2022).

46. In addition, the quality of the parliamentary and judicial review of the necessity of a general measure, such as in the present case the ban on adoption if the persons required to consent to it were paid or received remuneration, is of particular importance, including to the operation of the relevant margin of appreciation (see, among other authorities, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts); *Correia de Matos v. Portugal* [GC], no. 56402/12, §§ 117 and 129, 4 April 2018; and *M.A. v. Denmark* [GC], no. 6697/18, §§ 147-49, 9 July 2021).

47. Lastly, the Court's subsidiary role in the Convention protection system has an impact on the scope of the margin of appreciation. The Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. Through their democratic legitimation, the national authorities are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, *inter alia*, *M.A. v. Denmark*, cited above, § 147; see also Protocol No. 15, which entered into force on 1 August 2021, which inserted the principle of subsidiarity into the Preamble to the Convention).

48. In the present case, the Court considers that a distinction has to be drawn between the applicants' right to respect for their family life and their right to respect for their private life (see also *Mennesson*, cited above, § 86).

(a) Whether there was a violation of the applicants' right to respect for family life

49. The applicants have not pointed to any particular obstacles or practical difficulties in enjoying family life together on account of the refusal in question. In the domestic proceedings, the courts focused on the children's right to respect for their private life. It thus appears that the Supreme Court proceeded on the assumption that the applicants' right to respect for their family life, in so far as it was affected, was outweighed by the public interests at stake. The Court sees no reason to hold otherwise. It notes that the applicants have lived together uninterruptedly since February 2014, when the twins were brought to Denmark. The children immediately obtained Danish nationality because of their biological father. Lastly, on 22 March 2018 the authorities approved the first applicant and her husband being given joint custody of the children.

50. Thus, it does not appear that the applicants have encountered any obstacles or practical difficulties in enjoying family life together on account of the refusal to let the first applicant adopt the second and third applicants (contrast *Mennesson*, cited above, §§ 87-93). Accordingly, and having regard to the margin of appreciation afforded to the respondent State, the Court considers that the conclusions of the Danish courts, including that of the Supreme Court, 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 (ibid., § 94, and see also *Valdís Fjölnisdóttir and Others*, cited above, § 75*)*.

51. There has accordingly been no violation of Article 8 of the Convention with regard to the applicants' right to respect for their family life under Article 8 of the Convention.

(b) Whether there was a violation of the applicants' right to respect for private life

52. The Court refers to the general principles set out in *Mennesson* (cited above, §§ 75-81) and *Paradiso and Campanelli* (cited above, §§ 179-84). In the former it stated:

> "75. The Court notes the Government's submission that, in the area in question, the Contracting States enjoyed a substantial margin of appreciation in deciding what was "necessary in a democratic society". It also notes that the applicants conceded this but considered that the extent of that margin was relative in the present case.
>
> 76. The Court shares the applicants' analysis.
>
> 77. It reiterates that the scope of the States' margin of appreciation will vary according to the circumstances, the subject matter and the context; in this respect one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, for example,Wagnerand J.M.W.L., and Negrepontis-Giannisis, both cited above, §§128 and 69 respectively). Accordingly, on the one hand, where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means

of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wide. On the other hand, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (see, in particular, *S.H. and Others v. Austria*, cited above, § 94).

78. The Court observes in the present case that there is no consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children thus conceived abroad. A comparative-law survey conducted by the Court shows that surrogacy is expressly prohibited in fourteen of the thirty-five member States of the Council of Europe – other than France – studied. In ten of these it is either prohibited under general provisions or not tolerated, or the question of its lawfulness is uncertain. However, it is expressly authorised in seven member States and appears to be tolerated in four others. In thirteen of these thirty-five States it is possible to obtain legal recognition of the parent-child relationship between the intended parents and the children conceived through a surrogacy agreement legally performed abroad. This also appears to be possible in eleven other States (including one in which the possibility may only be available in respect of the father-child relationship where the intended father is the biological father), but excluded in the eleven remaining States (except perhaps the possibility in one of them of obtaining recognition of the father-child relationship where the intended father is the biological father) ...

79. This lack of consensus reflects the fact that recourse to a surrogacy arrangement raises sensitive ethical questions. It also confirms that the States must in principle be afforded a wide margin of appreciation, regarding the decision not only whether or not to authorise this method of assisted reproduction but also whether or not to recognise a legal parent-child relationship between children legally conceived as the result of a surrogacy arrangement abroad and the intended parents.

80. However, regard should also be had to the fact that an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned. The margin of appreciation afforded to the respondent State in the present case therefore needs to be reduced.

81. Moreover, the solutions reached by the legislature – even within the limits of this margin – are not beyond the scrutiny of the Court. It falls to the Court to examine carefully the arguments taken into consideration and leading to the solution reached and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by that solution (see, *mutatis mutandis*, *S.H. and Others v. Austria*, cited above, § 97). In doing so, it must have regard to the essential principle according to which, whenever the situation of a child is in issue, the best interests of that child are paramount (see, among many other authorities, *Wagner and J.M.W.L.*, cited above, §§ 133-34, and *E.B. v. France* [GC], no. 43546/02, §§ 76 and 95, 22 January 2008)."

53. In addition, in respect of the margin of appreciation in relation to 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, the Court recalls its recent finding in *C.E. and Others v. France* (nos. 29775/18 and 29693/19, § 100, 24 March 2022) that two factors carry particular weight; the primary interests of the child, and the consequently reduced margin of appreciation of the State.

54. Moreover, *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, French Court of Cassation, 10 April 2019), set out:

> "In a situation where, as in the scenario outlined in the questions put by the Court of Cassation, a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father has been recognised in domestic law:
>
> 1. the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the 'legal mother';
>
> 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 of 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."

55. In its judgment of 16 November 2020, and in line with the *Advisory opinion* and *Mennesson* (ibid., § 40) the Supreme Court concentrated on the right to respect for private life in respect of the second and third applicant. The Supreme Court appears to have taken it for granted that the first applicant's right to respect for her private life, being her right to personal development through her relationship with the children, and her interest in continuing that relationship with them (see, in particular, *Paradiso*, cited above, §§ 198 and 207), in so far as it was affected, was outweighed by the public interests at stake (ibid., § 215). The Courts sees no reason to hold otherwise. Accordingly, there has been no violation of Article 8 of the Convention with regard to the first applicant's right to respect for her private life.

56. Turning to the second and third applicants' right to respect for their private life, the Court will in the following focus on the reasoning by the Supreme Court, which explicitly assessed whether the decision to refuse the first applicant's adoption of the second and third applicants, under section 15 of the Adoption Act, was in compliance with Article 8 of the Convention. Referring in particular to *Mennesson* (cited above) and the *Advisory opinion*, the Supreme Court concluded that section 15, as it stood at the time, contained an absolute ban on granting adoption if the person required to consent had been paid or received remuneration, which did not, as required, take the best interests of the child into account. The Supreme Court therefore found that section 15 of the Adoption Act needed to be amended, and that until an amendment had entered into force, the authorities should in all cases involving the section in question carry out an individual assessment of whether refusing an application for adoption would be contrary to Article 8 of the Convention. Consequently, section 15 now, as interpreted by the Supreme Court, allows stepchild adoption of children born through a

surrogacy agreement, if the adoption is in the best interests of the child and a refusal would contravene Article 8 of the Convention (see paragraph 24 above). The Supreme Court carried out its assessment of the present case on the basis of those premises. Accordingly, it did not limit its examination to section 15, it also assessed the individual circumstances of the persons involved.

57. The Supreme Court weighed the interests of the second and third applicants in being adopted by the first applicant against the general interests in protecting children against being turned into a commodity and in preventing the exploitation of vulnerable women. They acknowledged the vital interests of the second and third applicants in being adopted by the first applicant in order for their identity as her children to be legally recognised. They noted, however, that in the present case, the children had obtained Danish nationality at birth, and they were therefore entitled to reside in Denmark. The first applicant had shared custody with the biological father, and in the event of legal separation or divorce, or the death of the biological father, she would be able to retain custody under the general rules of the Parental Responsibility Act. Moreover, she would be able to make provision for the children in her will under the rules of the Inheritance Act, and for inheritance tax purposes the children would be in the same position as if they were her children. In respect of the interests of general deterrence safeguarded by the prohibition against adoption in section 15 of the Adoption Act, it was apparent from the preparatory notes to the Act that the legislature did not want to prevent surrogacy arrangements not involving payment, whereas they found agreements on the "delivery of a child" against payment to be in conflict with the fundamental principles of society, that it should not be possible to buy and sell unborn children, that infertility problems should not become actual "trading" in children, and that in connection with agreements involving payment, there was a risk that a woman who chose to give birth to a child for another might be influenced more by the payment offered than by the best interests of the child when choosing the "parents" of her child. The Supreme Court observed that these interests, including the interests in countering the exploitation of vulnerable women in commercial surrogacy arrangements, generally aimed to discourage commercial surrogacy arrangements and to protect children against being turned into a commodity. Conclusively, the majority found, on the basis of an overall assessment, that the refusal to grant the adoption could not be deemed to constitute a violation of Article 8.

58. The minority of the Supreme Court did not find that the interest underlying section 15 of the adoption Act, including the interests in preventing commercial surrogacy arrangements and the implementation of such, could outweigh the best interests of the children in the present case. In their view it was in the children's best interest to obtain the same legal relationship with the first applicant as they had with their father, in particular

since the children had lived with the first applicant and the father for almost seven years, and the latter had been recognised for all that time as the lawful father and holder of custody of the children. The fact that the first applicant and the father once remunerated the Ukrainian surrogate mother could not, in their opinion, result in the children being barred from obtaining recognition that the person whom they had regarded as their mother for their entire life was also their mother from a legal point of view.

59. The Court is fully aware that the Supreme Court had a difficult task of having to weigh the best interests of the children in the present case against the interests underlying section 15 of the Adoption Act. The latter was given its current wording in 1997 in order to enable Denmark to ratify the Hague Convention (see paragraph 20 above), which in Article 4(3)(c) sets out that an adoption shall take place only if the State have ensured that the consents have not been induced by payment or compensation of any kind (see paragraph 31 above). Denmark also had other international obligations in respect of inter-country adoption, albeit with less strict requirements, see in particular, Article 21 of the United Nations Convention on the Rights of the Child setting out that the States should take all appropriate means to ensure that the placement does not result in improper financial gain for those involved (see paragraph 32 above) and Article 17 of the European Convention on the Adoption of Children setting out that no one should derive any improper financial or other gain from an activity relating to the adoption of a child (see paragraph 33 above).

60. The Court also accepts that the Danish legislature, by enacting a prohibition on adoption under section 15 of the Adoption Act if the person required to consent had been paid or renumerated, was seeking to avoid commercial exploitation of surrogate mothers and the risk of children being turned into a commodity (see also, *inter alia*, *Paradiso*, cited above, § 202).

61. Nevertheless, as the Supreme Court concluded itself, in all cases involving section 15 of the Adoption Act, an individual assessment had to be carried out as to whether refusing an application for adoption would be contrary to Article 8 of the Convention (see paragraphs 24 and 55 above).

62. The Supreme Court were unanimous in finding that it would be in the children's interest to be adopted by the first applicant in order for their identity as her children to be legally recognised. However, having regard to the various specific cumulative solutions provided for by Danish law, including that the first applicant had been given joint custody of the children, and that she could retain custody in the event of legal separation or divorce or the death of the biological father, the majority found "nothing to suggest that it would have a significant impact on the private life of the children if the first applicant was not granted adoption".

63. The Court recalls that in its *Advisory opinion,* it found that the child's right to respect for private life within the meaning of Article 8 of the Convention does not require a specific form of legal recognition such as entry

in the register of births, marriages and deaths of 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.”

64. The question therefore arises, which other means – if not adoption of the child by the intended parent – could satisfy the requirement of legal recognition in the present case.

65. In this respect the Court refers to its judgments and decisions adopted subsequent to the *Advisory opinion* on the issue of children born out of surrogacy and claims of legal recognition thereof.

66. *Valdís Fjölnisdóttir and Others v. Iceland* (cited above), concerned a married couple, two women, who engaged the paid services of a surrogacy agency in the United States. The child was not biologically related to any of the intended mothers. Upon their return to Iceland, the authorities refused to register the intended mothers as the parents of the child. However, the child was immediately placed in foster care with the intended mothers, and it was given Icelandic citizenship. Subsequently, the women divorced, and withdrew their application for adoption as they were no longer eligible to adopt together. The child was put into foster care with each of the intended mothers, alternately, for a year each time, while enjoying equal access to the other. The Court made a holistic examination and gave weight to the facts that the State had taken measures to have the child fostered by the intended mothers; to secure custody and access after their divorce; and to provide the child with a citizenship, which had the effect of regularising and securing his stay and rights in the country. Moreover, the intended mothers could still apply to adopt the child, as individuals or together with their new spouses. Therefore, in 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 them (ibid., § 75), the Court found no violation of Article 8 in respect of the intended mothers’ and the child’s right to respect for family life. The Court saw no reason to reach a different conclusion in respect of the complaint concerning respect for their private life.

67. *A.M. v. Norway* (cited above) concerned a woman, who divorced a man, but whom she later succeeded in a surrogacy arrangement in the United States. The man was the biological father of the child. Upon return to Norway, the domestic authorities refused her request to be recognised as the child’s mother, either by acknowledging the birth certificate issued in the United States or by approving her requests for parenthood (which could have been done by adoption, if the biological father had consented). The Court found no violation of the intended mother’s rights to respect for private life. The child was not an applicant in the case.

68. *C.E. and Others v. France*, cited above, concerned two cases. The first related to the rejection by the domestic courts of an application for full adoption of a child, made by the biological mother's former partner. The second concerned the domestic courts' refusal to issue a document attesting to a matter of common knowledge (*acte de notoriété*) recognising a legal parent-child relationship, on the basis of de facto enjoyment of status (*possession d'état*), between a child and the biological mother's former partner. The Court emphasised that legal instruments existed in France enabling the relationship between a child and an adult to be recognised. For instance, the child's biological mother could obtain a court order for the exercise of joint parental responsibility with her partner or former partner. While an order of that kind did not entail the establishment of a legal parent-child relationship, it nevertheless allowed the partner or former partner to exercise certain rights and duties associated with parenthood, and thus amounted to a degree of legal recognition of the relationship. The Court found no violation of Article 8 in both cases. Firstly, after noting that since the couples' separation, and despite the lack of legal recognition of a relationship between the children and the adults in question, the persons concerned had led a family life comparable to that led by most families after the parents separated, the Court held that there had been no violation of the right to respect for family life. Secondly, the Court sought to ascertain whether the refusals complained of had breached the right to respect for private life. In doing so the Court stressed the existing legal instruments in France set out above. Moreover, since the publication of the Bioethics Act of 2 August 2021, female couples who had had recourse to assisted reproductive technology (ART) abroad before 4 August 2021 had the possibility, for a three-year period, of jointly recognising a child who had a legal parent-child relationship only with the woman who had given birth; this had the effect of establishing a legal relationship with the other woman. That option had been available in one of the two cases. In the other case, as the child was now an adult, her adoption by the applicant in question was possible under the simple adoption procedure. The Court therefore concluded that, in view of the margin of appreciation left to the respondent State, which, was narrower where children's best interests were in issue, the respondent State had not failed in its obligation to guarantee effective respect for the private life of the persons concerned.

69. *H. v The United Kingdom* ((dec), no. 32185/20, 31 May 2022) concerned a child, H, born out of surrogacy. The arrangement had been entered into by a same sex couples A and B, with a married couple C and D. C had become pregnant using donated eggs, and sperm from both A and B. According to the birth certificate, and by virtue of the Human Fertilisation and Embryology Act C and D were H's parents. By a court order, they all had parental responsibility, and by a child arrangement order, H were to live with A and B, and C and D should have regular contact. A and B did not seek a

parental order as C and D did not consent. H complained that the recording of D, rather than A, as her father on her birth certificate, breached her right to respect for private life. The Court found the application inadmissible as being manifestly ill-founded. It noted among other things, that the applicant had not been wholly deprived of a legal relationship with A, and that she had not been deprived of the possibility of establishing the details of her identity. Therefore, insofar as there had been an interference, it could only arise from whatever degree of legal uncertainty that might flow from the automatic recognition of D rather than A, as her father on her birth certificate. The Court found such an interference to be very limited and observed that to date it had not held that the intended parents must immediately and automatically be recognised as such in law. On the contrary, the Court had acknowledged that the child's best interests may include fundamental components other than the legal recognition of the intended parents, such as protection against the risks of abuse which surrogacy arrangements may have. Finally, the Court noted that in reaching its conclusion, it had not been necessary to consider whether there existed a possibility for the legal recognition of the intended parents (for example, through an application for parental responsibility, a child arrangements order or a parental order), since that had not been the subject of the complaint.

70. It follows from the aforementioned judgments and decisions that the Court has adopted a holistic approach, taking into account not only the situation when the child was born or even when it considered the complaint, but also whether there was a possibility for subsequent legal recognition (see, for example, *Valdís Fjölnisdóttir and Others v. Iceland,* cited above, § 74). Moreover, in each case, the Court has determined *in concreto*, the effect of the interference on the applicants' right to private life, since it is not the Court's task to review, *in abstracto*, the compatibility with the Convention of the law at issue (see, among many authorities, *Mifsud v. Malta*, no. 62257/15, § 67, 29 January 2019). It is noteworthy that the above-mentioned cases did not concern a refusal to adopt decided on by the authorities. In the above-mentioned cases, either the parties had not lodged a request for adoption, or it had been withdrawn, or the granting of such depended on the consent of the biological parent. Nevertheless, it appears from the specific circumstances of the above-mentioned cases, that "another means" could be putting the child into foster care with the intended mothers, or issuing a court order for the exercise of joint parental responsibility, or jointly recognising a child who had a legal parent-child relationship only with the woman who had given birth.

71. In the present case it was the authorities, who refused to let the first applicant adopt the second and third applicants. Instead, the first applicant was granted shared custody with the biological father. Moreover, Danish law provided for various legal possibilities. Thus, in the event of legal separation or divorce or the death of the biological father, the first applicant could retain

custody under the general rules of the Parental Responsibility Act, and she would be able to make provision for the children in her will under the rules of the Inheritance Act, and for inheritance tax purposes the children would be in the same position as if they were her children.

72. The fact remains, though, that besides adoption, domestic law does not provide for other possibilities of recognition of a legal parent-child relationship with the intended mother. Accordingly, as pointed out by the applicants, when they were refused adoption, they were *de facto* refused being recognised as having a legal parent-child relationship. 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 (see the *Advisory opinion,* § 40).

73. In terms of inheritance, it is also clear that although the first applicant could make a will to that effect, the children would not be her heirs by virtue of a legal parent-child relationship, unlike the situation for other children in Denmark.

74. The Court also notes that in the present case the children had lived with the first applicant, being their intended mother, and their biological father, since they arrived in Denmark in February 2014, that is almost seven years (when the Supreme Court passed its judgment). The children had thus for a significant time considered them both to be their parents, and it was clearly in their best interest to obtain the same legal relationship with the first applicant as they had with their father. Furthermore, there were no opposing parental interests between the first applicant and the biological father of the children, which may be the case, when intended parents in surrogacy arrangements break up and new partners come into the picture. Nor were there any other persons claiming parentage, which may be the case in assisted reproduction, when a number of different individuals may have been involved in the child's conception (see, contrast, the above-mentioned cases).

75. The Court is therefore not convinced that in the particular circumstances of the present case, the cumulative solutions provided for by Danish law had such an impact on the private life of the children that they could make up for the refusal to let them be adopted by the first applicant.

76. In addition, recalling the essential principle according to which, whenever the situation of a child is in issue, the best interests of that child are paramount (see, *inter alia*, *Mennesson*, cited above, § 81) and that two factors carry particular weight; the primary interests of the child, and the consequently reduced margin of appreciation of the State (see *C.E. and Others v. France,* cited above, § 100), the Court is not satisfied that the authorities of the respondent State, when refusing to let the second and third applicants be adopted by the first applicant, struck a fair balance between, on the one hand, the specific children's interest in obtaining a legal parent-child relationship with the intended mother, and, on the other, the rights of others,

namely those who, in general and the abstract, risked being negatively affected by commercial surrogacy arrangement.

77. It follows that there has been a violation of Article 8 of the Convention in respect of the second and third applicants' right to respect for their private life.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

79. The applicants each claimed 5,000 Euros (EUR) in compensation for non-pecuniary damage.

80. The Government submitted that there was no basis for awarding the first applicant non-pecuniary damage. Moreover, in respect of the children a violation in itself would constitute sufficient just satisfaction. Their claim was excessive.

81. The Court considers it undeniable that the second and third applicants sustained non-pecuniary damage on account of the violation of Article 8 of the Convention (see paragraphs 56 and 69 above). Making its assessment on an equitable basis as required by Article 41 of the Convention, it awards each of those applicants EUR 5,000 under this head (see, *inter alia*, *Mennesson v. France*, no. 65192/11, § 116, ECHR 2014 (extracts) and *Labassee v. France*, no. 65941/11, § 85, 26 June 2014).

B. Costs and expenses

82. The applicants did not claim any compensation for costs and expenses. In these circumstances, the Court is not called upon to make any award under this head.

C. Default interest

83. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaint under Article 8 admissible;

2. *Holds*, unanimously, that there has been no violation of Article 8 of the Convention with regard to the applicants' right to respect for their family life;

3. *Holds*, unanimously, that there has been no violation of Article 8 of the Convention with regard to the first applicant's right to respect for her private life;

4. *Holds*, by four votes to three, that there has been a violation of Article 8 of the Convention with regard to the second and third applicants' right to respect for their private life;

5. *Holds*, by four votes to three,
   (a) that the respondent State is to pay to the second and the third applicant, each of them, within three months, EUR 5,000 (five thousand euros), plus any tax that may be chargeable to them, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 December 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Carlo Ranzoni
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Judges Kjølbro, Koskelo and Yüksel are annexed to this judgment.

C.R.N
H.B.

JOINT DISSENTING OPINION OF JUDGES KJØLBRO, KOSKELO AND YÜKSEL

84. We have regrettably not been able to agree with the majority in their conclusion that there has been a violation of Article 8 in respect of the two children in the present case, the gist of which is that the intended mother of the children, who were born to the couple through a commercial surrogacy arrangement abroad, was not allowed to adopt the children (stepchild adoption). The children's legal situation in Denmark was secured by the granting of citizenship as well as the award of joint parental responsibility to the intended mother and her husband, the biological father.

Margin of appreciation

85. The respondent State is one among the clear majority of States Parties which do not permit commercial surrogacy arrangements. Many jurisdictions lack a clear legal framework in this field.

86. According to the Court's case-law, a wide margin is usually accorded to the States in matters where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, as well as where the State is required to strike a balance between competing private and public interests or Convention rights (see, for instance, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 182, 24 January 2017).

87. There is no doubt that commercial surrogacy is a subject where all those factors point to a wide margin of appreciation. In this context, we would recall that the case of *Mennesson v. France* (no. 65192/11, §§ 40-42, ECHR 2014) did not arise from a commercial surrogacy arrangement (see paragraph 8 of that judgment). Furthermore, the Court has acknowledged that adoption is also an issue where the States enjoy a wide margin, and that the Court's task is not to substitute itself for the competent domestic authorities in determining the most appropriate policy for regulating the adoption of children, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 128, 28 June 2007). Similarly, the Court has recently stated 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 surrogacy arrangements (see *Valdís Fjölnisdóttir and Others v. Iceland*, no. 71552/17, § 67, 18 May 2021). The latter position is also reiterated in the present judgment (see paragraphs 44-45 and 52 of the judgment).

88. While it is correct, and we also accept, that the margin of appreciation should be reduced in circumstances where the requirement to protect the best interests of a child is at stake (see *C.E. and Others v. France*, nos. 29775/18 and 29693/19, § 100, 24 March 2022), the majority in the present context take this approach so far as to practically eliminate altogether, in substance, the margin of appreciation available to the Contracting States.

The phenomenon of commercial surrogacy

89. There is no need to enter here into any extensive discussion of commercial surrogacy and the controversies relating to it. It suffices to state that the reasons behind opinions and policies that are opposed to commercial surrogacy are essentially twofold. Firstly, those reasons reflect the view that human beings should not be turned into commodities that can be acquired with money. Secondly, they reflect the inherent risk of exploitation of vulnerable women who might be persuaded to offer their reproductive capacity for service to others in exchange for payment whereby, in addition, various intermediaries can derive financial gain from such commercial arrangements.

90. In a 2018 study on the subject authored by the UN Special Rapporteur, Ms Maud de Boer-Buquicchio, the issues, problems and divergent views relating to commercial surrogacy are well elucidated[1]. The study notes that as intercountry adoptions have fallen in number and increasingly become subject to international standards, the numbers of international surrogacy arrangements have rapidly increased in the absence of international standards[2]. The report addresses the necessity of maintaining key human rights standards "against the pressures created by the large-scale practice of a market- and contract-based form of commercial surrogacy"[3]. The study focuses on the imperative of preventing practices which in effect constitute "sale of children", prohibited under Article 35 of the United Nations Convention on the Rights of the Child (UNCRC) "for any purpose or in any form", and analyses surrogacy with reference to that prohibition. In that regard, the core problem is that the transfer of the child is the essence of the commercial surrogacy arrangement and is therefore part of the consideration for the payment of the surrogate mother[4]. The study further discusses the regulatory requirements that would have to be satisfied with a view to ensuring that commercial surrogacy avoids constituting "sale of children". It appears that in the current context, the legal frameworks under which commercial surrogacy operates in jurisdictions where it is not prohibited fall short of those requirements. Indeed, the Special Rapporteur considers that

[1] Report A/HRC/37/60, available under the link: A/HRC/37/60 (undocs.org)
[2] Paragraph 13.
[3] Paragraph 28.
[4] Paragraphs 51 and 75.

States should prohibit commercial surrogacy until and unless a proper regulatory system is put in place.

91. The UN Committee on the Rights of the Child has also stated that unless properly regulated, surrogacy can constitute sale of children[5].

92. Our purpose here is not to expound personal opinions regarding this subject matter but to illustrate the serious nature of the issues relating to commercial surrogacy, which militate against an approach that would practically eliminate any margin of manoeuvre for Contracting States opposed to commercial surrogacy as currently practised in jurisdictions from which children born through surrogacy are brought in.

The normative principle relating to the "best interests of the child"

93. The majority recall, and rely on, "the essential principle according to which, whenever the situation of a child is in issue, the best interests of that child are paramount" (see paragraph 76 of the judgment). It is an intriguing feature in the Court's case-law that the phrase referring to the child's interests as "paramount" is regularly cited, notwithstanding the fact that this is not the standard adopted in the special international-law instrument in the field of children's rights. It is well-known that according to Article 3 § 1 of the UNCRC, the requirement is that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The latter standard is also the one enshrined in the EU Charter of Fundamental Rights (Article 24 § 2). Whereas "paramount" in the dictionary sense of the word means "more important than anything else", this is clearly not the connotation of "a primary consideration".

94. One searches in vain for any explanation as to why the standard in this regard should be stricter under the European Convention on Human Rights than under the UNCRC or the EU Charter. The Court has never articulated the reasons for such a difference, nor clarified the meaning of the notion of "paramount" as used in the context of this Convention. This is all the more striking as the Court has otherwise emphasised that the Convention should be interpreted in harmony with the general principles of international law (see *X v. Latvia* [GC], no. 27853/09, § 92, ECHR 2013).

95. On the other hand, the Court has never spelled out that "paramount" should indeed be understood literally, as "more important than anything else". Actually, it is rather obvious that the word could not be given such a meaning in the context of the application of the provisions of the Convention. It cannot be argued, for instance, that in the context of the application of Articles 2, 3,

[5] CRC/C/OPSC/USA/CO/2, paragraph 29; CRC/C/IND/CO/3-4, paragraph 57(d); CRC/C/MEX/CO/4-5, paragraph 69(b); CRC/C/OPSC/USA/CO/3-4, paragraph 24; and CRC/C/OPSC/ISR/CO/1, paragraph 28.

5 or 7 the best interests of a child could operate as a limitation of someone else's rights under the said provisions that would not otherwise be permissible; the absolute nature of the rights involved may not be diluted even though it might be in the best interests of a child to do so. To give an illustration in concrete terms: in a *Gäfgen*-type scenario, the consideration of the child's best interests did not then, and would not now, affect the application of Article 3 (see *Gäfgen v. Germany* [GC], no. 22978/05, § 107, ECHR 2010, where the Court held that the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities to save a child's life). Or, to take another example from the context of Article 7, a criminal court would not be justified in deviating from the principle of *nullum crimen sine lege* even if it were in the best interests of a child victim for it to do so. In the latter situation, the demand to accommodate the best interests of children would instead require a response by the legislator.

96. Even in the context of Convention rights that are not of an absolute nature, it can hardly be correct to argue that the protection of the best interests of a child should mean that in individual cases no other considerations can be taken into account under any circumstances, or that those interests must always be regarded as more important than anything else. In reality, the Court has clearly not followed such an absolute approach. For instance, in cases of opposition between the interests of the child and those of one or both parents, it requires that the domestic authorities should seek to reconcile the rights of the parties instead of only paying attention to the individual best interests of the child. Actually, there are instances where the Court has expressly criticised the domestic authorities for "focusing on the interests of the child" (see *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 220, 10 September 2019).

97. In sum, the Court's case-law presents no clear or coherent picture as to what is meant by the child's best interests being "paramount", or why it has chosen to rely on that test instead of the one adopted in the UNCRC or the EU Charter.

The "best interests" test in the context of adoption

98. We are fully aware that in the specific context of adoption, the wording of the UNCRC does state that the best interests of the child shall be "the paramount consideration" (Article 21). According to our understanding, however, this phrase must be read and interpreted in the light of its context and key purpose, namely the prevention of abusive practices serving the interests of adults rather than children, including adoptions amounting to the "sale of children". Thus, the basic aim of the international regulation of adoption has been to counter problems similar to those arising in the context of commercial surrogacy. In this sense, the UNCRC expressly requires, *inter alia*, all appropriate measures to be taken in intercountry adoption to ensure

that the placement does not result in improper financial gain for those involved in it. In the light of this, the choice of the word "paramount" in that context appears to be linked to the objective of combating such problems. Against that background, it would in our opinion be misguided to rely on the word "paramount" so as to leave States with no option, in the context of commercial surrogacy, but to confirm, by accepting formal adoption, the consequences of practices which may amount to the "sale of children", prohibited under the UNCRC.

99. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, which also aims "to prevent the abduction, the sale of, or traffic in children", is intended to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child[6]. The Convention expressly requires measures to be taken to ensure that the consents have not been induced by payment or compensation of any kind and have not been withdrawn (Article 4 § 3). Furthermore, it requires the competent authorities to take all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention (Article 8). We are of course aware that the present case does not formally concern intercountry adoption. The point, however, is to illustrate that both of the above international instruments, the UNCRC and the Hague Convention, aim to prevent the same kind of problems as those arising in the context of commercial surrogacy.

Assessment in the present case

100. In the present case, there is no doubt that the Danish authorities, including the Supreme Court, treated the best interests of the children concerned as a primary consideration, albeit not as the sole one. The Supreme Court carried out an individualised review of the applicants' situation, taking account of the relevant case-law of the Court, before reaching a reasoned decision. It is a well-established principle of this Court that where the domestic authorities have "carefully examined the facts, applied the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the individual interests against the public interest in a case, the Court would require strong reasons to substitute its view for that of the domestic courts" (see *M.A. v. Denmark* [GC], no. 6697/18, § 149, 9 July 2021; *Levakovic v. Denmark*, no. 7841/14, § 45, 23 October 2018; *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012; and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 88, 7 February 2012). In the light of the foregoing discussion, it is our view that the majority have not shown sufficiently strong reasons for the Court to substitute its view for that of the domestic authorities.

[6] Article 1(a)

101. In this connection we would emphasise that the children were not left without legal protection, either with regard to their right to remain in Denmark – they were granted Danish nationality – or in terms of their legal relationship with the intended mother, as parental responsibility was bestowed jointly on her and their father. It has also been established that the children's right to inherit from the intended mother could be secured through a will, subject to the same tax treatment as in the case of inheritance based on biological affiliation.

102. In particular, given the fact that parental responsibility for the children on the part of both intended parents was legally established, we find it difficult to accept that the rights provided under Danish law should be considered incapable of satisfying the requirements of "other means" of establishing a "legal parent-child relationship" as contemplated in the Court's *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, French Court of Cassation, 10 April 2019). In our view, the reference to "other means" should not be interpreted as narrowly as by the majority in this case. We note that in another very recent judgment, the majority of another Chamber of the Court found a violation of Article 8 in respect of a child born through surrogacy abroad in circumstances where, unlike in the present case, the intended non-biological parent was without parental responsibility for the child during the period concerned (see *D.B. and Others v. Switzerland*, nos. 58817/15 and 58252/15, 22 November 2022, not yet final).

103. In this context it is worth noting the shortage of options available to a State whose policy is opposed to commercial surrogacy, when it comes to countermeasures against recourse by its residents to commercial surrogacy abroad. Penal sanctions against the intending parents would remain a possibility but the Danish authorities have not chosen that option, the exercise of which might also have drastic repercussions on minor children in the family. We do not venture to speculate whether our colleagues in the majority might accept such a scenario, that is, the imposition of criminal sanctions on the intending parents, as being compatible with the idea that the children's best interests should be paramount in the sense of being more important than anything else.

104. As regards the time aspect, it is both correct and entirely reasonable that the Court, in the above-mentioned Advisory Opinion, required that any "other means" than recognition of foreign birth certificates be capable of being implemented promptly and effectively in accordance with the child's best interests. In the present circumstances, the main delay arose in the context of the adoption proceedings, where the domestic authorities had to reach decisions on novel issues and make assessments as to how they should address a difficult conflict of values and principles. It appears that nationality

was granted promptly, and as regards the award of joint custody to the parents, it is not clear when such a request was first lodged. In any event, there is no indication in the file that the best interests of the children would have been endangered during the time taken by the domestic authorities to resolve that matter (see, *mutatis mutandis*, *Valdís Fjölnisdóttir and Others*, cited above, § 72). Therefore, we do not consider that there are sufficient grounds in the present case for finding a violation of Article 8 because of the time aspect alone.

Concluding remarks

105. In *Paradiso and Campanelli* (cited above), decided by the Grand Chamber some years ago, the Court held that there had been no violation of Article 8 in a situation where the intended parents, having brought a child born through surrogacy to Italy, were prevented from adopting the child and where the child was taken into public care with a view to adoption by other persons. In that case, unlike the present one, only the intended parents were applicants before the Court, not the child. However, such a difference alone, pertaining as it does to the procedural constellation at this international level, cannot serve as a sustainable dividing line for the approach to be taken in the matter of principle. This is so especially in the light of how the decision-making operates at the domestic level. If a particular child has the right to be adopted by the intended parent(s), this also entails a right for the latter to adopt that child. The adoption either takes place for both the child and the adult who is the intended parent, or it does not take place at all. And if a child has the right to be adopted by a given person, a procedural avenue must be made available to enable such a decision to be reached. Thus, the approach taken by the majority, based on the idea that only the maximum achievement of the child's best interests is good enough and that no other considerations can matter, appears to come very close to acknowledging that there is a "right to a child" through commercial surrogacy.

106. We would also recall that in *Paradiso and Campanelli* the Court accepted that, by prohibiting private adoption based on a contractual relationship between individuals and restricting the right of adoptive parents to introduce foreign minors into Italy solely to cases in which the rules on international adoption had been respected, the Italian legislature was seeking to protect children against illicit practices, some of which may amount to human trafficking (see paragraph 202 of that judgment). The Court also acknowledged that the domestic authorities had to make a difficult choice between allowing the applicants to continue their relationship with the child, thereby legalising the unlawful situation created by them as a *fait accompli*, or taking measures with a view to providing the child with another family in accordance with the domestic legislation on adoption (see paragraph 209 of that judgment). Most recently, in *H v. the United Kingdom* ((dec.), no. 32185/20, § 56, 31 May 2022), the Court stated that the child's best

interests may include fundamental components other than the legal recognition of the intended parents, such as protection against the risks of abuse which surrogacy arrangements entail.

107. The present outcome, effectively dictating the policy of the Contracting States in a highly sensitive matter, arises from the narrowest possible Chamber majority. This is hardly an optimal situation. Overall, the current state of the Court's case-law in this field will be a source of considerable legal uncertainty, unless and until the Grand Chamber seizes the opportunity to create greater clarity.

108. In this regard it should be noted that the approach taken is also bound to have further implications in other types of situations arising in variable family constellations. For instance, upholding the child's best interest as the sole, "paramount" consideration might entitle the child to be adopted not just by one couple but two, in circumstances where a child lives with two couples, whether of different sex or the same sex, in which one spouse of each is genetically related to the child in question. While some States may already provide for such possibilities in their domestic law and practice, it is debatable to what extent it is appropriate for the Court to impose such arrangements on all of them, regardless of the evolution of domestic laws and policies in this field.

109. It would seem reasonable in our view not to deprive the Contracting States of any margin of appreciation in delicate and complex matters of family law on the grounds that in any individual circumstances the child's best interests must be elevated from a "primary consideration" to the sole permissible one, on the basis of a literal understanding of the notion of "paramount", to the exclusion of any general policy considerations prevailing under the relevant domestic law.