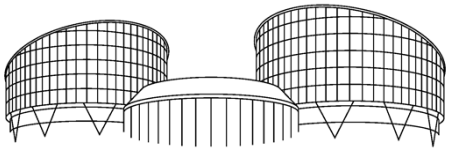

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF PARADISO AND CAMPANELLI v. ITALY

(Application no. 25358/12)

JUDGMENT

STRASBOURG

24 January 2017

This judgment is final but it may be subject to editorial revision.

In the case of Paradiso and Campanelli v. Italy,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Luis López Guerra, *President,*
Guido Raimondi,
Mirjana Lazarova Trajkovska,
Angelika Nußberger,
Vincent A. De Gaetano,
Khanlar Hajiyev,
Ledi Bianku,
Julia Laffranque,
Paulo Pinto de Albuquerque,
André Potocki,
Paul Lemmens,
Helena Jäderblom,
Krzystof Wojtyczek,
Valeriu Griţco,
Dmitry Dedov,
Yonko Grozev,
Síofra O'Leary, *judges,*

and Roderick Liddell, *Registrar,*

Having deliberated in private on 9 December 2015 and 2 November 2016,

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

PROCEDURE

1. The case originated in an application (no. 25358/12) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Italian nationals, Mrs Donatina Paradiso and Mr Giovanni Campanelli ("the applicants"), on 27 April 2012.

2. The applicants were represented by Mr P. Spinosi, a lawyer practising in Paris. The Italian Government ("the Government") were represented by their co-Agent, Mrs P. Accardo.

3. The applicants alleged, in particular, that the measures taken by the national authorities in respect of the child T.C. were incompatible with their right to private and family life, as protected by Article 8 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 27 January 2015, a Chamber of that Section composed of Işıl Karakaş, President, Guido Raimondi, András Sajó, Nebojša Vučinić, Helen Keller, Egidijus Kūris and Robert Spano, judges,

and also of Stanley Naismith, Section Registrar, declared the application admissible regarding the complaint raised by the applicants on their own behalf under Article 8 of the Convention concerning the measures taken in respect of the child and the remainder of the application inadmissible, and held, by five votes to two, that there had been a violation of Article 8. The joint partly dissenting opinion of Judges Raimondi and Spano was annexed to the judgment. On 27 April 2015 the Government requested that the case be referred to the Grand Chamber under Article 43 of the Convention. On 1 June 2015 the panel of the Grand Chamber granted that request.

5. The composition of the Grand Chamber was decided in accordance with Article 26 §§ 4 and 5 of the Convention and Rule 24.

6. The applicants and the Government each filed further written observations (Rule 59 § 1).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 December 2015 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms P. Accardo, *Co-Agent*,
Ms M.L. Aversano, Office of the Government Agent,
Ms A. Morresi, Ministry of Health,
Ms G. Palmieri, lawyer,
Mr G. D'Agostino, Ministry of Justice, *Advisers*;

(b) *for the applicants*

Mr P. Spinosi, lawyer, *Counsel,*
Mr Y. Pelosi, lawyer,
Mr N. Hervieu, lawyer, *Advisers.*

The Court heard addresses by Mr Spinosi, Ms Aversano, Ms Morresi and Ms Palmieri and also their replies to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants – a married couple – were born in 1967 and 1955 respectively and live in Colletorto.

A. The child's arrival in Italy

9. After trying to have a child and having unsuccessfully resorted to medically assisted reproduction techniques, the applicants put themselves forward as adoptive parents.

10. On 7 December 2006 the applicants obtained official authorisation from the Campobasso Minors Court to adopt a foreign child within the meaning of Law no. 184 of 1983, entitled "The Child's Right to a Family" (hereafter, "the Adoption Act"), subject to the condition that the child's age was to be compatible with the limits foreseen by the Act (see paragraph 63 below). The applicants state that they waited in vain for a child who was eligible for adoption.

11. They subsequently decided to try resorting to assisted reproduction techniques again and to a surrogate mother in Russia. To that end, they contacted a Moscow-based clinic. The first applicant stated that she travelled to Moscow, transporting from Italy the second applicant's seminal fluid, duly conserved, which she handed in at the clinic.

A surrogate mother was found and the applicants entered into a gestational surrogacy agreement with the company Rosjurconsulting. After a successful *in vitro* fertilisation on 19 May 2010, two embryos were implanted in the surrogate mother's womb on 19 June 2010.

12. On 16 February 2011 the Russian clinic certified that the second applicant's seminal fluid had been used for the embryos to be implanted in the surrogate mother's womb.

13. The first applicant travelled to Moscow on 26 February 2011, the clinic having indicated that the child was due to be born at the end of the month.

14. The child was born in Moscow on 27 February 2011. On the same day the surrogate mother gave her written consent to the child being registered as the applicants' son. Her written declaration, bearing the same date and read aloud at the hospital in the presence of her doctor, the chief physician and the head of the hospital department, is worded as follows (English translation of the original Russian version):

> "I, the undersigned... have given birth to a boy in the ... maternity hospital in Moscow. The child's parents are an Italian married couple, Giovanni Campanelli, born on ... and Donatina Paradiso, born on..., who expressed in writing their wish to have their embryos implanted in my womb.
>
> On the basis of the foregoing and in accordance with section 16(5) of the Federal Law on Civil Status and Article 51(4) of the Family Code, I hereby give my consent for the above couple to be entered in the birth record and the birth certificate as parents of the child to whom I have given birth..."

15. In the days following the child's birth, the first applicant moved with him into a flat in Moscow, rented by her in advance. The second applicant,

who had remained in Italy, was able to communicate with her regularly via internet.

16. On 10 March 2011 the applicants were registered as the new-born baby's parents by the Registry Office in Moscow. The Russian birth certificate, which indicated that the applicants were the child's parents, was certified in accordance with the provisions of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

17. On 29 April 2011 the first applicant went to the Italian Consulate in Moscow, with the birth certificate, in order to obtain the documents that would enable her to return to Italy with the child. The Italian Consulate issued the documents enabling the child to leave for Italy with the first applicant.

18. On 30 April 2011 the first applicant and the child arrived in Italy.

19. In a note of 2 May 2011 – which was not filed in the proceedings before the Court – the Italian Consulate in Moscow informed the Campobasso Minors Court, the Ministry of Foreign Affairs and the Colletorto Prefecture and Municipality that the paperwork in respect of the child's birth contained false information.

20. A few days later the second applicant contacted the Colletorto municipality, requesting that the birth certificate be registered.

B. The reaction of the Italian authorities

21. On 5 May 2011 the prosecutor's office opened criminal proceedings against the applicants, who were suspected of "misrepresentation of civil status" within the meaning of Article 567 of the Criminal Code, of "use of falsified documents" within the meaning of Article 489 of the Criminal Code and of the offence set out in section 72 of the Adoption Act, since they had brought the child to Italy in breach of the procedure provided for by the provisions on international adoption contained therein (see paragraph 67 below).

22. In parallel, on 5 May 2011, the Public Prosecutor's Office at the Campobasso Minors Court requested the opening of proceedings to make the child available for adoption, since he was to be considered as being in a state of abandonment for the purposes of the law. On the same date the Minors Court appointed a guardian *ad litem* (*curatore speciale*) and opened proceedings to make the child available for adoption.

23. On 16 May 2011 the Minors Court placed the child under guardianship at the request of the Public Prosecutor. The child's guardian asked the court to suspend the applicants' parental responsibility, in application of section 10 § 3 of the Adoption Act.

24. The applicants challenged the measures in respect of the child.

25. Following a request of the Minors Court on 10 May 2011, the applicants were visited by a team of social workers on 12 May 2011. Their report, dated 18 May 2011, indicated that the applicants were viewed positively and respected by their fellow citizens, and that they had a comfortable income and lived in a nice house. According to the report, the child was in excellent health and his well-being was self-evident, since he was being cared for by the applicants to the highest standards.

26. On 25 May 2011 the first applicant, assisted by her lawyer, was questioned by the Larino *carabinieri*. She stated that she had travelled to Russia alone in September 2008, transporting her husband's seminal fluid. She stated that she entered into a contract with the company Rosjurconsulting, which had undertaken to find a surrogate mother willing to be implanted with genetic material from the first applicant and her husband through the Vitanova Clinic in Moscow. The applicant explained that this practice was perfectly legal in Russia and had made it possible for her to obtain a birth certificate which identified the applicants as parents. In June or July 2010 the first applicant had been contacted by the Russian company, which informed her that a surrogate mother had been found, and she had given her consent to the medical procedure.

27. On 27 June 2011 the applicants were heard by the Minors Court. The first applicant stated that, after eight unsuccessful attempts at *in vitro* fertilisation, which had endangered her health, she had resorted to the Russian clinic, since it was possible in that country to use ova from a donor, which were subsequently implanted in the surrogate mother.

28. On 7 July 2011 the court ordered that DNA testing be carried out in order to establish whether the second applicant was the child's biological father.

29. On 11 July 2011 the Ministry of the Interior asked the Registry Office to refuse to enter the particulars of the birth certificate in the civil-status register.

30. On 1 August 2011 the second applicant and the child underwent DNA testing. The result of these tests showed that there was no genetic link between them.

31. Following the outcome of these tests, the applicants sought an explanation from the Russian clinic. Months later, in a letter of 20 March 2012, the clinic's management informed them that it had been surprised by the results of the DNA test. It stated that there had been an internal inquiry, since an error had clearly occurred, but it had proved impossible to identify the individual responsible for the error, given that there had been dismissals and recruitment of other staff in the meantime.

32. On 4 August 2011 the Registry Office of the Colletorto Municipality refused to register the Russian birth certificate. The applicants lodged an appeal with the Larino Court against this refusal. The subsequent proceedings are set out in paragraphs 46-48 below.

33. The Public Prosecutor asked the Larino Court to give the child a new identity and to issue a new birth certificate.

C. The subsequent proceedings before the minors courts

1. The decision of the Minors Court of 20 October 2011

34. As part of the proceedings to make the child available for adoption which were then pending before the Minors Court (see paragraph 22 above), the applicants asked a psychologist, Dr I., to prepare a report on the child's well-being. The report drawn up by Dr I. on 22 September 2011, after four meetings with the child, indicates that the applicants – who were attentive to the child's needs – had developed a deep emotional bond with him. The report indicated that the grandparents and other family members also surrounded the child with affection, and that he was healthy, lively and responsive. Dr I. concluded that the applicants were suitable parents for the child, both from a psychological perspective and in terms of their ability to educate him and bring him up. She added that possible removal measures would have devastating consequences for the child, explaining that he would go through a depressive phase on account of a sense of abandonment and the loss of the key persons in his life. In her opinion, this could lead to somatic symptoms and compromise the child's psycho-physical development, and, in the long term, symptoms of psychotic pathology could emerge.

35. The applicants asked for the child to be placed with them, with a view to adopting him if necessary.

36. By an immediately enforceable decision of 20 October 2011, the Campobasso Minors Court ordered that the child be removed from the applicants, taken into the care of the social services and placed in a children's home (*casa famiglia*).

37. The relevant passages of the Minors Court's decision read as follows:

> "...
>
> In their evidence Mr Campanelli and Mrs Paradiso stated that Mrs Paradiso had travelled to Russia carrying her husband's semen in a special container, and had there entered into an agreement with the company Rosjurconsulting. Under this agreement, Mrs Paradiso had delivered her husband's semen to a pre-determined clinic. One or more eggs from an unknown female donor had been fertilised *in vitro* with this semen, and then implanted into another woman, whose identity is known and who had subsequently given birth to the child in question on 27 February 2011. In exchange, Mr Campanelli and Mrs Paradiso had paid a large amount of money. Mrs Paradiso stated that the woman who had given birth to the child had waived her rights to him and had consented to him being referred to on the birth certificate, drawn up in Russia, as the son of Mr Campanelli and Mrs Paradiso (a copy of the informed consent, given on 27 February 2011 by the woman who gave birth to the child, is on file in these proceedings).

A court-appointed expert witness was then instructed to establish whether the minor child was the biological son of Giovanni Campanelli. In her report the court-appointed expert witness, Ms [L.S.], concluded that the results obtained by means of typing of the DNA of Giovanni Campanelli and the DNA of the minor child [T.C.] rule out Giovanni Campanelli as the child's biological father.

In today's hearing Mr Campanelli and Mrs Paradiso referred to their previous evidence and Mrs Paradiso repeated that she had taken her husband's semen to Russia to be used for the purpose of the intended fertilisation.

However, the conclusions of the court-appointed expert witness have not been challenged.

At the close of the hearing, the Public Prosecutor requested that the application by Mr Campanelli and Mrs Paradiso be refused, that the minor child be placed in the care of third parties and that a temporary guardian be appointed for him. The child's guardian *ad litem* asked that the child be placed in care under section 2 of the Adoption Act and that a guardian be appointed. Mr Campanelli and Mrs Paradiso requested primarily that the court award them temporary care of the child with a view to subsequent adoption; in the alternative, they requested the suspension of these proceedings pending the criminal classification of the offences, and the suspension of the above-mentioned criminal proceedings against them and of the proceedings before the Campobasso Court of Appeal to challenge the refusal to register the child's birth certificate; again in the alternative, they requested the suspension of these proceedings under section 14 of Law no. 184/1983 for the purpose of a possible repatriation of the minor child to Russia, or, failing that, for the child to be placed with them under section 2 of the cited law.

That being the case, the court finds that the statements by Mr Campanelli and Mrs Paradiso regarding the delivery to Russia of Giovanni Campanelli's genetic material are not supported by any evidence. On the other hand, it has been established that the minor [T.C.] is neither the biological son of Donatina Paradiso, nor, given the evidence of the expert report, of Giovanni Campanelli. At the present time the only certainty is the identity of the woman who gave birth to the baby. The biological parents of the baby, that is, the man and the woman who provided the gametes, remain unknown.

In the light of this evidence, the present case cannot be viewed as a case of so-called gestational surrogacy, which is the case where the surrogate mother who gives birth to the baby has no genetic link to him or her, the fertilisation having taken place with the egg(s) of a third woman. Indeed, in order to be able to talk of gestational or traditional surrogacy (in the latter, the surrogate mother makes her own ovules available) there must be a biological link between the child and at least one of the two intended parents (in this specific case, Mr Campanelli and Mrs Paradiso), a biological link which, as has been seen, is non-existent."

In the court's view, the applicants had thus placed themselves in an unlawful situation:

"It follows that by bringing a baby to Italy, passing him off as their own son, in blatant infringement of the provisions of our legislation (Law no. 184 of 4 May 1983) governing inter-country adoption of children, Mr Campanelli and Mrs Paradiso have acted unlawfully. Besides any criminal offences which may have been committed (infringement of section 72(2) of Law no. 184/1983), which are not within the jurisdiction of this court, it is noted that the agreement entered into between Mrs Paradiso and the company Rosjurconsulting had unlawful elements since, given

the terms of the agreement (the delivery of Mr Campanelli's genetic material for the fertilisation of another woman's ovules), it was in breach of the ban on the use of assisted reproductive technology (A.R.T.) of a heterologous type laid down by section 4 of Law no. 40 of 19 February 2004.

In any event, it is pointed out that despite being in possession of the authorisation for inter-country adoption issued by order of this court on 7 December 2006, Mr Campanelli and Mrs Paradiso, as has been stated, intentionally evaded the provisions of Law no. 184/1983, which provide not only that the intended adoptive parents must apply to an authorised body (section 31) but also for the involvement of the Commission for Inter-country Adoption (section 38), the only body competent to authorise entry and permanent residence of a foreign child in Italy (section 32)."

The court therefore found it necessary, first and foremost, to put an end to this unlawful situation:

"It is therefore necessary, above all, to prevent this unlawful situation from continuing, since to maintain it would be equivalent to ratifying unlawful conduct in open violation of the provisions of our legislation.

Accordingly, it is necessary to remove the minor child from Mr Campanelli and Mrs Paradiso and place him in an appropriate structure with a view to identifying a suitable couple to foster the child as soon as possible. The Social Services Department of the Municipality of Colletorto is therefore instructed to identify an appropriate structure and to place the child in it. The Italian legislation on adoption applies to this child in accordance with section 37a of Law No. 184/1983, there being no doubt that he is in Italy in a state of abandonment, having been deprived of his biological parents and other relatives, and the mother who gave birth to him having renounced him.

Admittedly, it cannot be denied that the child will in all likelihood suffer harm from being separated from Mr Campanelli and Mrs Paradiso. However, given the age of the child and the short time he has spent with them, the court cannot agree with the conclusions of the report by psychologist [Dr I.] (instructed by Mr Campanelli and Mrs Paradiso), finding that it is certain that the child's separation from them would entail devastating consequences. Indeed, according to the literature on this subject, the mere separation from the main care-givers is not a causal agent of a psychopathological state in a child unless other causal factors are present. The trauma caused by the separation from Mr Campanelli and Mrs Paradiso will not be irreparable, given that a search will begin immediately for a couple able to attenuate the consequences of the trauma, through a compensatory process that will encourage a new adaptation.

It is also pointed out that the fact that Mr Campanelli and Mrs Paradiso (and in particular Mrs Paradiso) have put up with the hardships and the difficulties of A.R.T (Mrs Paradiso has also stated that during one of these interventions her life was at risk) and have preferred, despite being in possession of an approval for inter-country adoption, to circumvent Italian legislation on this subject gives rise to the doubt and the fear that the minor child may be an instrument to fulfil a narcissistic desire of Mr Campanelli and Mrs Paradiso or to exorcise an individual or joint problem. In the light of the conduct of Mr Campanelli and Mrs Paradiso during the events under examination, all of this throws a consistent shadow over their possession of genuine affective and educational abilities and of the instinct of human solidarity which must be present in any person wishing to bring the children of others into their lives as their own children.

> The separation of the minor child from Mr Campanelli and Mrs Paradiso thus corresponds to the best interests of the child."

38. According to the applicants, the court's decision was enforced on the same day, without their having been informed of the decision in advance.

2. The appeal against the decision of the Minors Court

39. The applicants lodged an appeal (*reclamo*) before the Campobasso Court of Appeal. They argued, *inter alia*, that the Italian courts could not contest the Russian birth certificate. They further requested that no measures be taken concerning the child while the criminal proceedings against them and the proceedings challenging the refusal to enter the birth certificate in the Italian civil-status register were pending.

3. The Campobasso Court of Appeal's decision of 28 February 2012

40. By a decision of 28 February 2012, the Campobasso Court of Appeal dismissed the appeal.

The Court of Appeal found that the child T.C. was "in a state of abandonment" (*in stato di abbandono*) within the meaning of section 8 of the Adoption Act, as the applicants were not his parents. In those circumstances, the question of whether or not the applicants were criminally liable and whether or not there had been an error in the use of seminal fluid of unknown origin was not, in its view, relevant. In the Court of Appeal's opinion, it was not appropriate to await the outcome of the criminal trial or of the proceedings brought by the applicants to challenge the refusal to enter the particulars of the birth certificate in the register. The Court of Appeal also considered that section 33 of Law no. 218/95 (the Private International Law Act) did not prevent the Italian courts from refusing to comply with certified information from a foreign State, and that there was no issue of lack of jurisdiction, since, according to section 37*bis* of the Adoption Act, "... the Italian law governing adoption, fostering, and necessary measures in case of urgency shall be applicable to a foreign minor child who is in [Italy] in a state of abandonment" (cf. also Cass 1128/92)".

41. No appeal to the Court of Cassation lay against that decision (see paragraph 68 below).

D. Preventive seizure of the birth certificate

42. In the meantime, on 30 October 2011 the public prosecutor at the Larino Court had ordered the preventive seizure of the Russian birth certificate, on the ground that it was an essential item of evidence. In the prosecutor's view, in all probability the applicants had not only committed the offences with which they were charged, but they had attempted to conceal them. They had, according to him, *inter alia*, stated that they were

the biological parents and had then corrected their versions of events as these were successively disproved.

43. The applicants challenged the preventive seizure order.

44. By a decision of 20 November 2012, the Campobasso Court dismissed the applicants' appeal on the ground of the strong suspicions that they had committed the offences in question. In particular, the court noted the following facts: the first applicant had spread a rumour that she was pregnant; she had gone to the Italian Consulate in Moscow and implied that she was the natural mother; she had subsequently admitted that the child had been born to a surrogate mother; she had stated to the *carabinieri* on 25 May 2011 that the second applicant was the biological father, which had been disproved by the DNA tests; she had thus made false statements; she had been very vague as to the identity of the genetic mother; the documents concerning the surrogate motherhood stated that the two applicants had been seen by the Russian doctors, which did not correspond to the fact that the second applicant had not travelled to Russia; the documents relating to the birth did not give any precise date. The court considered that the only certainty was that the child had been born and that he had been handed over to the first applicant against payment of almost 50,000 euros (EUR). In the court's view, the hypothesis that the applicants had behaved illegally with a view to having the particulars of the birth certificate entered in the civil-status register and to circumventing the Italian legislation thus appeared well-founded.

45. In November 2012 the Public Prosecutor transmitted the decision regarding the preventive seizure to the Minors Court and indicated that a conviction under section 72 of the Adoption Act would deprive the applicants of the possibility of fostering (*affido*) the child and of adopting him or other minors. In the Public Prosecutor's view, there was therefore no other solution but to proceed with the adoption procedure for the child, and his temporary placement with a foster family had therefore been requested, in accordance with sections 8 and 10 of the Adoption Act. The Public Prosecutor repeated his request and emphasised that the child had been removed more than a year previously, and that he had since been living in a children's home (*casa famiglia*), where he had developed meaningful relationships with the persons responsible for his care. He explained that the child had thus still not found a family environment to replace the one that had been illegally provided by the couple who had brought him to Italy. According to the Public Prosecutor, the child seemed destined for another separation, even more painful than that from the mother who had given birth to him and then from the woman who claimed to be his mother.

E. The proceedings brought by the applicants to challenge the refusal to enter the particulars of the birth certificate in the civil-status register

46. An appeal having been lodged to contest the Registry Office's refusal to enter the particulars of the Russian birth certificate in the civil-status register, the Larino Court declined jurisdiction on 29 September 2011. The proceedings were subsequently resumed before the Campobasso Court of Appeal. The applicants insisted that the particulars of the Russian birth certificate be entered in the Italian register.

47. By an immediately enforceable decision of 3 April 2013, the Campobasso Court of Appeal ruled on the transcription of the birth certificate into the Italian register.

By way of introduction, the Court of Appeal dismissed the objection raised by the guardian to the effect that the applicants did not have standing to bring an action before that court; it acknowledged that the applicants had standing to bring proceedings in that they were referred to as the "parents" in the birth certificate that they wished to have entered in the civil-status register.

However, the Court of Appeal considered it clear that the applicants were not the biological parents and concluded that there had not therefore been a gestational surrogacy. It noted that the parties were in agreement that the Russian legislation presupposed a biological link between the child and at least one of the intended parents before the term surrogate motherhood could be used. It concluded that the birth certificate was fraudulent (*ideologicamente falso*) and in breach of Russian law. In the Court of Appeal's view, given that there was nothing to show that the child had Russian citizenship, the applicants' argument that Italian law was inapplicable ran counter to section 33 of the Private International Law Act, which stated that the legal parent-child relationship was determined by the national law governing the child at the time of his or her birth.

The Court of Appeal added that it was contrary to public order to register the contested birth certificate, since it was fraudulent. It stated that although the applicants had pleaded their good faith, alleging that they were unable to explain why the second applicant's seminal fluid had not been used in the Russian clinic, this made no difference to the situation and did not alter the fact that the second applicant was not the biological father.

48. In conclusion, the Court of Appeal held that it was legitimate to refuse to register the Russian birth certificate and to grant the Public Prosecutor's request that a new birth certificate be issued. The Court of Appeal therefore ordered that a new birth certificate be issued, indicating that the child was the son of persons unknown, born in Moscow on 27 February 2011, and that he would be given a new name, determined in accordance with Presidential Decree no. 396/00.

F. The fate of the child

49. Following execution of the decision issued by the Minors Court on 20 October 2011, the child was placed in a children's home for about fifteen months, in a location that was unknown to the applicants. All contact between the applicants and the child was prohibited. They were unable to obtain any news of him.

50. In January 2013 the child was placed in a family with a view to his adoption.

51. At the beginning of April 2013 the guardian asked the Minors Court to give the child a formal identity, so that he could be registered for school without complications. He stated that the child had been placed in a family on 26 January 2013, but that he did not have an identity. This "inexistence" had a significant impact on administrative matters, particularly with regard to deciding under what name the child was to be registered for school, for vaccination records, and for residence. While accepting that this situation corresponded to the aim of preventing the applicants from discovering the child's whereabouts, for his own protection, the guardian explained that a temporary formal identity would enable the secrecy surrounding the child's real identity to be maintained, while simultaneously enabling him to have access to public services; for the time being, he was entitled only to use emergency medical services.

52. The case file indicates that this request was granted by the Minors Court and that the child received a formal identity.

53. The Government have indicated that the child has now been adopted.

G. The outcome of the proceedings before the Minors Court

54. The proceedings to make the child available for adoption were resumed before the Minors Court of Campobasso (see paragraph 22 above). The applicants confirmed their opposition to the child's placement with third persons. The guardian asked for a statement ruling that the applicants no longer had *locus standi*.

The Public Prosecutor asked the Minors Court not to declare the child available for adoption using the name originally given to him, on the ground that, in the meantime, he had opened a second set of proceedings requesting that the child be declared available for adoption under his new identity (child of unknown parents).

55. On 5 June 2013, the Minors Court held that the applicants no longer had standing to act in the adoption proceedings, given that they were neither the child's parents nor members of his family within the meaning of section 10 of the Adoption Act. The court stated that it would settle the question of the child's adoption in the context of the other set of adoption proceedings, referred to by the Public Prosecutor.

H. The outcome of the criminal proceedings brought against the applicants

56. No information has been provided by the parties concerning subsequent developments in the criminal proceedings brought against the applicants. It seems that those proceedings are still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Italian law

1. Private International Law Act

57. Under section 33 of the Private International Law Act 1995 (Law no. 218), the legal parent-child relationship is determined by the national law governing the child at the time of his or her birth.

2. Simplification of Civil Status Act

58. Presidential Decree no. 396 of 3 November 2000 (Simplification of Civil Status Act) provides that declarations of birth concerning Italian nationals which have been drawn up abroad must be transmitted to the consular authorities (section 15). The consular authorities transmit a copy of the documents, for the purpose of their entry in the civil-status register, to the municipality in which the individual concerned intends to take up residence (section 17). Documents drawn up abroad cannot be entered in the register if they are contrary to public order (section 18). In order to have full legal force in Italy, foreign decisions (*provvedimenti*) in respect of persons' capacity or the existence of family relationships must not be contrary to public order (section 65).

3. Medically Assisted Reproduction Act

59. Section 4 of Law no. 40 of 19 February 2004 (the Medically Assisted Reproduction Act) prohibited the use of heterologous assisted reproduction techniques. Failure to comply with this provision entailed a financial penalty ranging from EUR 300,000 to EUR 600,000.

60. In judgment no. 162 of 9 April 2014, the Constitutional Court found these provisions to be contrary to the Constitution where the above prohibition concerned a heterosexual couple suffering from proven and irreversible sterility or infertility.

61. In the same judgment, the Constitutional Court held that the prohibition on surrogate motherhood imposed by section 12 § 6 of the Act, was, on the contrary, legitimate. That provision makes it an offence to carry out, organise or advertise the commercialisation of gametes, embryos or surrogate motherhood. The penalties incurred are imprisonment, ranging

from three months to two years, and a fine, ranging from EUR 600,000 to 1,000,000.

62. In judgment no. 96 of 5 June 2015, the Constitutional Court again examined the prohibition on using heterologous reproduction techniques and held that the relevant provisions were unconstitutional in respect of couples who are fertile but are carriers of serious genetically transmitted diseases.

4. The relevant provisions in respect of adoption

63. The provisions concerning the procedure for adoption are set out in Law no. 184/1983 ("the Adoption Act"), as amended by Law no. 149 of 2001, entitled "The Child's Right to a Family".

Section 2 of the Act provides that a minor who has temporarily been deprived of a satisfactory family environment may be placed with another family, if possible including other minor children, or with a single person, or with a family-type community, for the purposes of providing him or her with support, an upbringing and education. If it is not possible to provide him with a satisfactory family environment, a minor may be placed in a public or private children's home, preferably in the area in which he has been living.

Section 5 of the Act provides that the family or person with whom the minor has been placed must provide him or her with support, an upbringing and education, taking account of instructions from the guardian and in compliance with the judicial authority's directions. In any event, the foster family exercises parental responsibility with regard to relations with the school and the national health service. The foster family must be heard in the proceedings on placement and the proceedings concerning the order that the child is available for adoption.

Section 6 of the Act lays down age limits for adopting. The difference in age between the child and the adopting parent must be a minimum of eighteen years and a maximum of forty-five years, a limit which may be extended to fifty-five years for the second adopting parent. The minors courts may derogate from these age limits where they consider that the fact of not proceeding with the child's adoption would be harmful to him or her.

Furthermore, section 7 provides that adoption is possible for minors who have been declared available for adoption.

Section 8 provides that "the Minors Court may, even of its own motion, declare ... a minor available for adoption if he or she is in a state of abandonment in the sense of being deprived of all emotional or material support from the parents or the members of his or her family responsible for providing such support other than in temporary cases of *force majeure*". Section 8 continues: "A minor shall continue to be considered in a state of abandonment ... even if he or she is in a children's home or has been placed in a foster home." Lastly, section 8 provides that a case of *force majeure*

shall be deemed to have ceased where the parents or other members of the minor's family responsible for providing support refuse assistance from the authorities and the court considers their refusal unjustified. The fact that a minor is in a state of abandonment may be reported to the authorities by any member of the public or noted by a court of its own motion. Furthermore, any public official and any member of the minor's family who is aware that a child is in a state of abandonment must report the situation to the authorities. Children's homes must keep the judicial authorities regularly informed of the situation of minors whom they take into their care (section 9).

Section 10 then provides that, pending a minor's placement in a foster home before adoption, the court may order any temporary measure which is in the minor's interests, including, if necessary, the suspension of parental responsibility.

Sections 11 to 14 provide that enquiries shall be made so as to clarify the minor's situation and determine whether he or she is in a state of abandonment. In particular, section 11 provides that where, in the course of these enquiries, it transpires that the child does not have contact with any member of his or her family up to the fourth degree, the court may issue a declaration that he or she is available for adoption, unless an adoption application has been made within the meaning of section 44 of the Act.

If, at the end of the procedure provided for in the above sections, the minor is still in a state of abandonment within the meaning of section 8, the Minors Court shall declare him or her available for adoption if: (a) the parents or other members of the family have not appeared in the course of the proceedings; (b) it is clear from interviews with them that they are still failing to provide the child with emotional and material support and are unable to remedy the situation; and (c) measures ordered under section 12 have not been implemented through the parents' fault (section 15). Section 15 also provides that a declaration that a minor is available for adoption shall be made in a reasoned decision of the Minors Court sitting in chambers, after it has heard the Public Prosecutor, the representative of the children's home in which the minor has been placed or any foster parent, the guardian, and the minor if he or she is aged over twelve years or, if aged under twelve, where this is deemed necessary.

Section 17 provides that an objection to a decision declaring a child available for adoption must be lodged within thirty days of the date of notification to the requesting party.

Under section 19, parental responsibility is suspended while a minor is available for adoption.

Lastly, section 20 provides that a minor shall no longer be available for adoption if he or she has been adopted or has come of age. Moreover, a declaration that a child is available for adoption may be annulled, either by the court of its own motion or at the request of the parents or the Public

Prosecutor, if the conditions laid down in section 8 have in the meantime ceased to apply. However, if the minor has been placed with a family with a view to adoption (*affidamento preadottivo*) under sections 22-24, the declaration that he or she is available for adoption cannot be annulled.

64. Section 44 provides for certain cases of special adoption: adoption is possible for minors who have not yet been declared available for adoption. In particular, section 44 (d) authorises adoption when it is impossible to place the child in alternative care pending adoption.

65. Section 37*bis* of this Act provides that Italian law applies to foreign minors who are in Italy and who are in "a state of abandonment" with regard to adoption, placement and urgent measures.

66. In order to be able to adopt a foreign minor, persons wishing to adopt must contact an organisation that is authorised to look for a child (section 31) and the Commission for International Adoptions (section 38). The latter is the only body that is competent to authorise the entry and permanent residence of a foreign minor in Italy (section 32). Once the minor has arrived in Italy, the minors court orders that the information on the adoption decision be transcribed into the civil-status register.

67. Under section 72 of the Act, any person who – in violation of the provisions set out in paragraph 66 above – brings into the territory of the State a foreign minor, in order to obtain money or other benefits, and in order that the minor be entrusted permanently to Italian citizens, is committing a criminal offence punishable by a prison term of between one and three years. This sanction also applies to those persons who, in exchange for money or other benefits, accept the "placement" of foreign minors on a permanent basis. Conviction for this offence entails disqualification from fostering children (*affido*) and from becoming a guardian.

5. Appeal on points of law under Article 111 of the Constitution

68. Under Article 111 § 7 of the Italian Constitution, appeals to the Court of Cassation to allege violations of the law are always possible against judgments or measures affecting personal freedom. The Court of Cassation extended the scope of this remedy to civil proceedings where the impugned decision has a substantial impact on situations (*decisoria*) and where it cannot be varied or revoked by the same court which delivered it (*definitiva*).

Decisions concerning urgent measures with regard to a child in a state of abandonment, taken by the minors court on the basis of section 10 of the Adoption Act (Articles 330 et seq. of the Civil Code, Article 742 of the Code of Civil Procedure) may be varied or revoked. They may be the subject of a complaint before the court of appeal. No appeal on points of law can be made in respect of decisions that may be varied and revoked at

any point (Court of Cassation, Section I, judgment of 18 October 2012, no. 17916).

6. The law establishing the minors courts

69. Royal Decree no. 1404 of 1934, which subsequently became Law no. 835 of 1935, established the minors courts. This law has since been amended on several occasions.

Under section 2, all minors courts are made up of an appeal court judge, a judge of first-instance and two lay judges. The latter are chosen from specialists in biology, psychiatry, criminal anthropology, pedagogy or psychology.

B. The Court of Cassation's case-law

1. Prior to the hearing before the Grand Chamber

70. The Court of Cassation (Section I, judgment no. 24001 of 26 September 2014) ruled in a civil case concerning two Italian nationals who had travelled to Ukraine to have a child with the help of a surrogate mother. The Court of Cassation held that the decision to take the child into care was lawful. Having noted the absence of genetic links between the child and the intended parents, the Court of Cassation concluded that the impugned situation was illegal under Ukrainian law, since the latter required a biological link with one of the intended parents. The Court of Cassation reiterated that the prohibition on surrogate motherhood was still in force in Italy. It explained that the prohibition on surrogate motherhood in Italian law was a criminal-law one, and was intended to protect the surrogate mother's human dignity and the practice of adoption. It added that only a legally recognised adoption, organised in accordance with the regulations, would allow non-genetic parenthood to be validated. It stated that the assessment of the child's best interests had been carried out in advance by the legislature, and the court had no discretion in this matter. It concluded that there could be no conflict of interest with the child's interests where the court applied the domestic law and refused to take into account a legal parent-child relationship established abroad following a gestational surrogacy arrangement.

2. Subsequent to the Grand Chamber hearing

71. The Court of Cassation (Section V, judgment no. 13525 of 5 April 2016) ruled in criminal proceedings against two Italian nationals who had travelled to Ukraine in order to conceive a child and had used an ova donor and a surrogate mother. Ukrainian law required that one of the two parents be the biological parent. The acquittal judgment delivered at first instance had been challenged by the public prosecutor before the Court of Cassation.

That court dismissed the public prosecutor's appeal on points of law, thus confirming the acquittal, which had been based on the finding that the defendants had not been in breach of section 12 § 6 of Law no. 40 of 19 February 2004 (the Medically Assisted Reproduction Act), given that they had had recourse to an assisted reproduction technique which was legal in the country in which it was practised. In addition, the Court of Cassation considered that the fact that the defendants had submitted a foreign birth certificate to the Italian authorities did not constitute the offence of "making a false statement as to identity" (Article 495 of the Criminal Code) or "falsifying civil status" (Article 567 of the Criminal Code), since the certificate in question was legal under the law of the issuing country.

72. The Court of Cassation (Section I, judgment no. 12962/14 of 22 June 2016) ruled in a civil case in which the claimant had asked to be able to adopt her companion's child. The two women had travelled to Spain to use assisted reproduction techniques that were forbidden in Italy. One of them was the "mother" under Italian law, and the seminal fluid had been provided by an unknown donor. The claimant had been successful at first and second instance. On an appeal by the public prosecutor, the Court of Cassation dismissed the latter's submissions, and thus accepted that a child born through assisted reproduction techniques within a same-sex female couple could be adopted by the woman who had not given birth to that child. In reaching that conclusion the Court of Cassation took into account the stable emotional bond between the claimant and the child, and the best interests of the minor child. The Court of Cassation referred to section 44 of the Adoption Act, which provides for special circumstances.

C. Russian law

73. At the relevant time, namely until February 2011, when the child was born, the only relevant legislation in force was the Family Code of 29 December 1995. That Code provided that a married couple could be recognised as the parent couple of a child born to a surrogate mother where the latter has given her written consent (Article 51 § 4 of the Family Code). The Family Code was silent on the question whether or not the intended parents should have a biological link to the child in the event of a gestational surrogacy agreement. Implementing Decree no. 67, which was adopted in 2003 and remained in force until 2012, was also silent on this point.

74. Subsequent to the child's birth, the Basic Law on the Protection of Citizens' Health, which was enacted on 21 November 2011 and entered into force on 1 January 2012, introduced provisions to regulate medical activities, including assisted reproduction. Section 55 of this law defines gestational surrogacy as the fact of bearing and handing over a child on the

basis of a contract concluded between the surrogate mother and the intended parents, who provide their own genetic material.

Decree no. 107, issued by the Minister of Health on 30 August 2012, defines gestational surrogacy as a contract entered into between the surrogate mother and the intended parents who have used their genetic material for the conception.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents

75. The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents was concluded on 5 October 1961. It applies to public documents – as defined in Article 1 – which have been drawn up in the territory of one Contracting State and which must be produced in the territory of another Contracting State.

Article 2

"Each Contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears."

Article 3

"The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates."

Article 5

"The certificate shall be issued at the request of the person who has signed the document or of any bearer. When properly filled in, it will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears. The signature, seal and stamp on the certificate are exempt from all certification."

The explanatory report on this Convention indicates that the certificate does not attest to the truthfulness of the content of the original document. This limitation on the legal effects deriving from the Hague Convention is intended to preserve the right of the signatory States to apply their own choice-of-law rules when they are required to determine the probatory force to be attached to the content of the certified document.

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

76. The relevant provisions of the United Nations Convention on the Rights of the Child, concluded in New York on 20 November 1989, read as follows:

Preamble

"The States Parties to the present Convention,

...

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

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

...

Have agreed as follows:

...

Article 3

1. 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.

...

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

...

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will...

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, *inter alia*, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.

When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

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:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(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;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

..."

77. In its General Comment no. 7 (2005) on implementing child rights in early childhood, the Committee on the Rights of the Child wished to encourage the States Parties to recognise that young children are holders of all rights enshrined in the Convention on the Rights of the Child and that early childhood is a critical period for the realisation of these rights. In particular, the Committee refers to the best interests of the child:

"13. Article 3 sets out the principle that the best interests of the child are a primary consideration in all actions concerning children. By virtue of their relative immaturity, young children are reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect their well-being, while taking account of their views and evolving capacities. The principle of best interests appears repeatedly within the Convention (including in articles 9, 18, 20 and 21, which are most relevant to early childhood). The principle of best interests applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth, and well-being, as well as measures to support and assist parents and others who have day-to-day responsibility for realizing children's rights:

(a) *Best interests of individual children*. All decision-making concerning a child's care, health, education, etc. must take account of the best interests principle, including decisions by parents, professionals and others responsible for children. States parties are urged to make provisions for young children to be represented independently in all

legal proceedings by someone who acts for the child's interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences;

..."

C. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

78. The relevant provisions of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, concluded in The Hague on 29 May 1993, are worded as follows:

Article 4

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

(a) have established that the child is adoptable;

(b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;

(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."

D. The principles adopted by the *Ad Hoc* Committee of Experts on Progress in the Biomedical Sciences of the Council of Europe

79. The Council of Europe *Ad Hoc* Committee of Experts on Progress in the Biomedical Sciences (CAHBI), which preceded the present Steering

Committee on Bioethics, published in 1989 a series of Principles. Principle 15, on "Surrogate Motherhood", is worded as follows:

> "1. No physician or establishment may use the techniques of artificial procreation for the conception of a child carried by a surrogate mother.
>
> 2. Any contract or agreement between [the] surrogate mother and the person or couple for whom she carried the child shall be unenforceable.
>
> 3. Any action by an intermediary for the benefit of persons concerned with surrogate motherhood as well as any advertising relating thereto shall be prohibited.
>
> 4. However, States may, in exceptional cases fixed by their national law, provide, while duly respecting paragraph 2 of this principle, that a physician or an establishment may proceed to the fertilisation of a surrogate mother by artificial procreation techniques, provided that:
>
> a. the surrogate mother obtains no material benefit from the operation;
>
> b. the surrogate mother has the choice at birth of keeping the child."

E. The work of the Hague Conference on Private International Law

80. The Hague Conference on Private International Law has examined the issues of private international law concerning the status of children, particularly with regard to the recognition of parentage. Following an extensive consultation process which resulted in a comparative report (Preliminary Documents nos. 3B and 3C of 2014), in April 2014, the Council on General Affairs and Policy agreed that the work should be continued to explore the feasibility of preparing a multilateral instrument. Preliminary Document no. 3A of February 2015, entitled "The Parentage/Surrogacy project: an updating note" describes the important human-rights concerns raised by the current situation regarding international surrogacy arrangements, and the increasing prevalence of such arrangements. The Hague Conference thus considered that there is now a pressing human-rights requirement, including from the perspective of children's rights, for its work in this area.

IV. COMPARATIVE LAW MATERIAL

81. In the cases of *Mennesson v. France* (no. 65192/11, §§ 40-42, ECHR 2014 (extracts) and *Labassee v. France* (no. 65941/11, §§ 31-33, 26 June 2014), the Court outlined the results of a comparative-law analysis covering thirty-five States Parties to the Convention other than France. It showed that surrogacy is expressly prohibited in fourteen of those States; in ten other States, in which there are no regulations on gestational surrogacy, it is either prohibited under general provisions or not tolerated, or the question of its legality is uncertain; it is authorised in seven of these

thirty-five member States (subject to compliance with certain strict conditions).

In thirteen of these thirty-five States it is possible for the intended parents to obtain legal recognition of the parent-child relationship between them and a child born from gestational surrogacy carried out legally in another country.

THE LAW

I. SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

82. In the proceedings before the Grand Chamber, both parties submitted observations concerning the complaints that had been declared inadmissible by the Chamber.

83. The Government submitted that the applicants had not exhausted the domestic remedies in so far as they complained about the refusal to recognise the foreign birth certificate. The applicants had not appealed to the Court of Cassation against the decision issued by the Campobasso Court of Appeal on 3 April 2013, by which it confirmed the refusal to register the birth certificate.

84. The Court notes that the Chamber allowed the objection of failure to exhaust domestic remedies with regard to the complaint that it had been impossible to have the details of the Russian birth certificate registered in Italy. In consequence, that complaint was declared inadmissible (see § 62 of the Chamber judgment). It follows that this complaint falls outside the scope of the examination by the Grand Chamber since, according to the Court's settled case-law, the "case" referred to the Grand Chamber is the application as it has been declared admissible by the Chamber (see, among other authorities, *K. and T. v. Finland* [GC], no. 25702/94, § 141, ECHR 2001-VII).

85. The applicants asked the Grand Chamber to take into account the complaints submitted by them on behalf of the child, since they were relevant to the merits (see *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III; *K. and T. v. Finland*, cited above, § 141). The best interests of the child were at the heart of the case, yet they had not been taken into account at all by the national authorities.

86. In this connection, the Court notes that the Chamber found that the applicants did not have the standing to act before the Court on behalf of the child and it dismissed the complaints raised on his behalf as being incompatible *ratione personae* (see §§ 48-50 of the Chamber judgment). Accordingly, this part of the application is not within the scope of the case before the Grand Chamber (see *K. and T. v. Finland,* cited above, § 141).

87. Nonetheless, the question whether the best interests of the child are to be taken into consideration in examining the complaints raised by the applicants on their own behalf is an issue which forms part of the dispute before the Grand Chamber.

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. The parties' submissions

1. The Government

88. The Government raised two preliminary objections.

89. First, they alleged that the applicants had not exhausted domestic remedies in that they had not challenged the decision by the Minors Court of 5 June 2013 denying them standing to take part in the adoption proceedings. The Government argued that the remedies available under Italian law were effective.

90. Secondly, the Government asked the Court to dismiss the application as incompatible *ratione personae*, on the ground that the applicants did not have *locus standi* before the Court.

2. The applicants

91. The applicants pointed out that the Chamber had already ruled on these objections and had dismissed them. With particular regard to the objection that they had failed to exhaust domestic remedies in relation to the decision of 5 June 2013 denying them standing to take part in the adoption proceedings, the applicants stressed that when the Minors Court excluded them from the proceedings, more than twenty months had elapsed since the day that the child had been removed. The applicants considered that the passage of time had made the child's return perfectly illusory, given that he now lived with another family. They further noted that the Government had not provided any judicial precedent in support of their argument.

B. The Court's assessment

92. The Court notes that the objections raised by the Government have already been examined by the Chamber (see §§ 55-64 of the Chamber judgment).

93. It notes that the Chamber dismissed them (see §§ 64 and 57 respectively of the Chamber judgment) and that the Government have repeated these objections on the basis of the same arguments. The Court considers that with regard to these two objections there is nothing to warrant departing from the Chamber's conclusions.

94. In conclusion, the Government's objections must be dismissed.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

95. The applicants alleged that the measures taken by the Italian authorities in respect of the child, which resulted in the latter's permanent removal, had infringed their right to respect for private and family life, guaranteed by Article 8 of the Convention.

96. The Government contested that argument.

97. The relevant parts of Article 8 of the Convention provide:

> "1. Everyone has the right to respect for his private and family life ...
>
> 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. The Chamber judgment

98. After having declared inadmissible the complaint raised by the applicants on behalf of the child, and also their complaint based on the refusal to recognise the birth certificate issued in Russia, the Chamber focused on the measures which had led to the child's permanent removal.

As the birth certificate had not been recognised under Italian law, the Chamber considered that there was no legal relationship strictly speaking between the applicants and the child. However, the Chamber concluded that there had existed a *de facto* family life within the meaning of Article 8. In reaching that conclusion, it took into account the fact that the applicants had shared with the child the first important stages of his young life, and that they had acted as parents towards the child. In addition, the Chamber considered that the second applicant's private life was also at stake, given that, at domestic level, he had sought to confirm the existence of a biological link with the child through a DNA test. In conclusion, the Chamber held that the contested measures amounted to an interference in the *de facto* family life existing between the applicants and the child (see §§ 67-69 of the Chamber judgment), and also in the second applicant's private life (see § 70 of the Chamber judgment).

99. Further, noting that the courts had applied Italian law to determine the child's parentage and had concluded that the latter had been "in a state of abandonment" in the absence of a genetic link with the applicants, the Chamber found that the national courts had not taken an unreasonable decision. In consequence, the Chamber accepted that the interference had been "in accordance with the law" (see § 72 of the Chamber judgment).

100. The Chamber then held that the measures taken in respect of the child had pursued the aim of "prevention of disorder", in so far as the applicants' conduct was contrary to Italian legislation on international

adoption and on medically assisted reproduction. In addition, the measures in question had been intended to protect the child's "rights and freedoms" (see § 73 of the Chamber judgment).

101. Having acknowledged the existence of a family life, the Chamber assessed jointly the private interests of the applicants and the best interests of the child, and weighed them up against the public interest. It was not convinced of the adequacy of the elements relied on by the Italian authorities in concluding that the child ought to be taken into the care of the social services. The Chamber based its reasoning on the principle that the removal of a child from the family setting is an extreme measure to which recourse should be had only as a very last resort, to fulfil the aim of protecting a child who is faced with immediate danger (in this regard, the Chamber referred to the following judgments: *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 148, ECHR 2000-VIII; *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 136, ECHR 2010; *Y.C. v. the United Kingdom*, no. 4547/10, §§ 133-138, 13 March 2012; and *Pontes v. Portugal*, no. 19554/09, §§ 74-80, 10 April 2012). On the basis of the evidence in the file, the Chamber held that the national courts had taken decisions without any specific assessment of the child's living conditions with the applicants, and of his best interests. Accordingly, it concluded that there had been a violation of Article 8 of the Convention on the ground that the national authorities had failed to strike the fair balance that ought to be maintained between the general interest and the private interests at stake (see §§ 75-87 of the Chamber judgment).

B. The parties' observations

1. The applicants

102. The applicants stated at the outset that the Court was required to rule solely on the disputed measures taken by the Italian authorities in respect of the child, and then only on the basis of Article 8 of the Convention, for the purpose of determining whether there had been a violation of the applicants' private and family life. In their view, given the Chamber's decision to declare inadmissible the complaint concerning the refusal to register the child's Russian birth certificate in Italy, the Court was not required to rule on whether a State's decisions to authorise or prohibit the practice of gestational surrogacy on its territory, or the conditions for recognition of a parent-child relationship in respect of children legally conceived in another country, were compatible with the Convention.

103. The applicants argued that the ties which bound them to the child amounted to family life, coming within the scope of Article 8 of the Convention. They referred to the Court's case-law in this regard.

104. They submitted that the family life created between them and the child born to a surrogate mother was in accordance with Russian law as applicable at the relevant time. It was therefore based on a legal tie of lawful parenthood, attested by the birth certificate issued by the competent authorities. The lawfulness of this legal parent-child tie was not affected by the fact that it had transpired that there was no biological father-child relationship binding the intended father and the child, since the presence of such a biological tie had not been required by Russian law at the time.

105. In the applicants' view, the parental authority exercised by them in respect of the child – and, in consequence, the existence of a legal parent-child relationship – had been recognised by the Italian authorities, in that those authorities had suspended and revoked it.

106. The child had been born as the result of a serious and duly considered parental project. The couple had demonstrated their attachment to the child even before his birth (the applicants referred to *Anayo v. Germany*, no. 20578/07, § 61, 21 December 2010) and had taken steps to make an effective family life possible. The applicants stated that, following the child's birth, the first applicant had rapidly taken him into her care and had taken up residence with him in a flat in Moscow, forming strong emotional bonds. On his arrival in Italy, the child lived with the applicants in an environment which, both materially and emotionally, was welcoming, secure and conducive to his harmonious development. The applicants pointed out that the family had lived together for eight months, including six months in Italy. Although this period was relatively short, it corresponded to the first important stages in the child's young life. The applicants also pointed out that the shortness of the period in question had not resulted from any decision on their part, given that the abrupt termination of their cohabitation arose solely from the measures taken by the Italian authorities.

107. The applicants added that the absence of a biological link could not suffice to preclude the existence of a family life. Furthermore, they stated that they had been convinced that there existed a biological link between the second applicant and the child and that there was no reason to doubt their good faith. In any event, the clinic's error entailed no legal consequences with regard to the lawfulness of the parent-child relationship established in Russia since, at the relevant time, Russian law did not require that intended parents provide their own genetic material. Accordingly, under the applicable rules at the time, the gestational surrogacy arrangement entered into by the applicants was entirely legal under Russian law. The applicants submitted that it had only been since 1 January 2012, when Federal Law no. 323 FZ of 21 November 2011 entered into force, that intended parents were forbidden from using a gamete provider.

108. The applicants considered that the measures adopted by the Italian authorities amounted to an interference in their family life. In their opinion, that interference had a formal basis in law, as the impugned measures had

been taken under the provisions of the Italian Adoption Act. However, these measures resulted from an arbitrary analysis by the domestic courts, in so far as they had concluded that the child had been "in a state of abandonment". The applicants also submitted that although the practice of gestational surrogacy was prohibited by the Medically Assisted Reproduction Act (sections 6 and 14), criminal proceedings had nonetheless never been taken against surrogate mothers or intended parents. In the absence of an extraterritoriality clause, gestational surrogacy arrangements entered into legally in another State could not, in their view, be prosecuted in the Italian courts. Given that it was impossible to prosecute gestational surrogacy as such, other provisions were used as the basis for criminal proceedings. This was the case for the applicants, who had faced prosecution since 5 May 2011 for falsifying civil status (Article 567 of the Criminal Code), use of falsified documents (Article 489 of the Criminal Code) and breach of the provisions of the Adoption Act.

109. The applicants contested the argument that the legitimate aim of the measures in question had been to protect the rights and freedoms of the child. The Italian courts had based their decisions exclusively on the illegality of the situation created by the applicants and had confined themselves to asserting – with no regard to the Russian legislation – that the surrogacy arrangement in Russia had been contrary to Italian law. Thus, the primary aim of the Minors Court had been to prevent the continuation of the illegal situation. The applicants considered that the decisions of that court indicated solely a wish to punish them for their conduct. The child's interests were mentioned merely to assert that the impact of the impugned measures on him would be minimal.

110. As to the necessity of those measures, the applicants noted that although recourse to a surrogacy arrangement raised sensitive ethical questions, that consideration was not a valid ground for a "carte blanche justifying any measure". Although the States enjoyed a wide margin of appreciation in authorising or prohibiting the practice of gestational surrogacy arrangements on their territory, they considered that this was not the subject of the present application. The Court was required in the present case to determine whether the measures resulting in the child's irreversible removal had struck a fair balance between the interests at stake, namely those of the applicants, those of the child, and those of public order. From that standpoint, the applicants considered it appropriate to bear in mind that in all decisions concerning a child, his or her best interests ought to be the primary consideration. Thus, the immediate and irremediable severing of family ties had been held to be consistent with Article 8 only in circumstances where the children concerned were exposed to serious and sustained risks to their health and wellbeing. However, that had not been the situation here, according to the applicants, who submitted that the child's

best interests had not been taken into consideration by the national authorities at any point.

111. The applicants argued that their interests and those of the child had converged on the date that the impugned measures were implemented. These measures had destroyed the family unit's existence and had led to an irreversible severing of family ties, with irremediable consequences, in the absence of circumstances justifying that outcome. The Minors Court had refrained from examining the actual conditions of the child's life, and had presumed that he was deprived of emotional or material support from the parents. In the applicants' view, the domestic courts had expressed doubt as to their emotional and educative capabilities solely on the basis of the unlawfulness of their conduct, and had held that they had resorted to a gestational surrogacy arrangement on account of their narcissism. The applicants pointed out, however, that they had previously been assessed as fit to become adoptive parents by those same authorities. Moreover, the social workers, acting on an instruction by the Minors Court, had drawn up a report that was highly favourable to continuation of joint life with the child. There had been clear inadequacies in the decision-making process which led to the contested measures. Thus, the applicants considered that they had been held to be incapable of bringing up and loving the child solely on the basis of presumptions and inferences, without any expert report having been ordered by the courts.

112. The applicants also pointed out that the authorities had not considered possible alternatives to taking the child into care on an irreversible basis.

113. They explained that on 20 October 2011 social-services employees arrived at the home of the applicants, who had not been informed of the court's decision, and had taken away the child. This operation had given rise to fear and distress. Thus, even at the point of executing the measures, the authorities' actions had been disproportionate.

114. Lastly, the applicants emphasised that the Italian authorities had taken no steps to preserve the relationship between them and the child with a view to maintaining the possibility of rebuilding the family; on the contrary, they had forbidden any contact with the child and had placed him in an unknown location. For the applicants, the impact of those measures had been irremediable.

115. The applicants asked the Court to hold that there had been a violation of Article 8 of the Convention. While aware that a long period of time had elapsed since the child was taken into care, and that it was in the child's interest not to be subjected to a further change in his family situation, the applicants considered that the award of a sum by way of just satisfaction would not be sufficient. They sought to resume contact with the child.

2. The Government

116. The Government submitted that the Chamber had interpreted Article 8 § 1 of the Convention too broadly, and Article 8 § 2 too restrictively.

117. Referring to paragraph 69 of the Chamber judgment, in which the Chamber had concluded that a *de facto* family life existed between the applicants and the child, the Government considered that the Chamber's assertion would have been valid if the tie between the applicants and the child had been a genuine biological one (even if only on the father's side) established by a legally valid birth certificate, and above all if the duration of cohabitation were sufficient to establish the existence of a genuine family life shared by parents and child and the real exercise of parental responsibility. The Government noted, however, that neither of the applicants had a biological link to the child. They concluded that family life had never begun in the present case.

118. The impugned birth certificate also contravened public order in that it referred to the parents as the "biological parents" which, according to the Government, was untrue. The Government also disagreed with the applicants' argument that the birth certificate issued by the Russian authorities had been in accordance with Russian law. They explained that Russian legislation specifically required the existence of a biological tie between the child and at least one of the intended parents. Indeed, this point had been taken into consideration by the Campobasso Court of Appeal when it decided not to authorise registration of the birth certificate (judgment of 3 April 2013).

119. The Government further submitted that in 2011 the applicants no longer met the age criteria that would have enabled them to adopt the child in question. They added that *de facto* family life could not be founded on an unlawful situation such as that brought about by the applicants, who could have adopted a child, given that they had obtained the relevant authorisation to adopt in 2006. The applicants could have chosen not to break the law.

120. Moreover, the Government pointed out that, under the Court's case-law, Article 8 did not guarantee either the right to found a family or the right to adopt.

121. The Government accused the applicants of having taken the responsibility of bringing to Italy a child who was completely unrelated to them, in breach of the relevant legislation. Their actions had been deliberate, and the fact that they had entered into a contract to purchase a newborn baby had compromised their position from the outset. The Government could not envisage any measure which could render this situation lawful.

122. Furthermore, the Government argued that the State enjoyed a wide margin of appreciation with regard to surrogate motherhood and assisted reproduction techniques. The transportation of the second applicant's seminal fluid was in breach of the Medically Assisted Reproduction Act and

Legislative Decree no. 191/2007 implementing Directive 2004/23/EC on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells. In addition, having regard to the fact that the child had no biological ties to the applicants, the Government expressed doubts as to the validity of the consent given by the surrogate mother and to the lawfulness of the protocol followed in Russia.

123. Part of the Government's observations focused on the issue of non-recognition of the foreign birth certificate (a complaint declared inadmissible by the Chamber); they pointed out that, under the Italian Civil Code, the only possible *biological* mother was the woman who had *given birth* to the child, which was not the case here.

124. As to the measures to remove the child on a permanent basis, the Government submitted that these had had a legal basis and agreed with the Chamber that they corresponded to a legitimate aim.

125. As to their necessity, the Government emphasised that Italian law recognised a parent-child relationship only in the event of a biological tie or an adoption which complied with the safeguards set out in the Adoption Act. They argued that it was through this legislative, political and ethical choice that the Italian State had decided to protect the interests of minors and to satisfy the requirements of Article 3 of the UN Convention on the Rights of the Child. This choice afforded no discretion to the courts.

126. In the Government's view, the measures taken by the domestic courts were based on a careful assessment of the situation. The Government pointed out that the minors courts, which reached their decisions on a collegial basis, were composed of two professional judges and two lay judges who had specific training in psychiatry, biology, criminal anthropology, pedagogy or psychology. In the present case, the Campobasso Court had taken into account the child's psychosocial profile in assessing his interests, and expressed doubts as to the applicants' abilities to love and educate the child.

127. The Government stressed that the impugned measures had been taken to ensure that the child could enjoy a private and family life in another family that was capable of protecting his health and providing for his sound and safe development and a definite identity. The Italian authorities had sought to strike a balance between competing interests, including those of the child, whose best interests were treated as the primary consideration. In the Government's view, they had complied with the national legislation, in line with the margin of appreciation afforded to them in this area, and had reacted to the conduct of the applicants, who had breached the law on assisted reproduction.

128. The Government observed that the Court of Cassation had reached the same conclusion with regard to similar measures taken by the authorities in a comparable case, where the child had been born in Ukraine (see

paragraph 70 above). The Government asked the Court to respect the principle of subsidiarity and the margin of appreciation left to the States and not to substitute its assessment for that of the national authorities.

129. In view of these considerations, the Government submitted that the application raised no issues under Article 8 of the Convention.

130. Lastly, the Government turned in the final section of their observations to gestational surrogacy and the Medically Assisted Reproduction Act, which prohibits this practice. They emphasised that the applicants had had recourse to an ethically unacceptable commercial practice in respect of which no European consensus existed. The Government criticised the Chamber judgment on the ground that it did not contain a chapter on comparative European law on gestational surrogacy arrangements. In view of the absence of a common standard, and the fact that certain States allowed the practice of surrogate motherhood, the Government condemned the growth of "reproductive tourism" and noted that the legal issues in this area were thorny ones, given the lack of harmonisation in the States' legal systems. They considered that, in the light of the lack of consensus in the States' domestic laws, and an absence of international regulations, the Court ought to allow the States a wide margin of appreciation in this area.

C. The Court's assessment

1. Preliminary considerations

131. The Court notes at the outset that the child T.C. was born from an embryo obtained from an ova donation and a sperm donation provided by unknown donors, and was brought into the world in Russia by a Russian woman who waived her rights to him. There was therefore no biological tie between the applicants and the child. The applicants paid approximately EUR 50,000 to receive the child. The Russian authorities issued a birth certificate stating that they were the parents under Russian law. The applicants then decided to bring the child to Italy and to live there with him. The child's genetic origins remain unknown. The present case thus concerns applicants who, acting outside any standard adoption procedure, brought to Italy from abroad a child who had no biological tie with either parent, and who had been conceived – according to the domestic courts – through assisted reproduction techniques that were unlawful under Italian law.

132. The Court notes that in the cases of *Mennesson v. France* (no. 65192/11, ECHR 2014 (extracts)) and *Labassee v. France* (no. 65941/11, 26 June 2014), two pairs of intended parents had resorted to gestational surrogacy in the United States and had settled with their children in France. In those cases the existence of a biological tie between the father and the children was proven and the French authorities had never envisaged

separating the children from the parents. The issue at the heart of those cases was the refusal to register the particulars of a birth certificate drawn up abroad in undisputed compliance with the legislation of the country of origin, and the children's right to obtain recognition of the legal parent-child relationship. The parents and children were all applicants before the Court.

133. Unlike the above-cited *Mennesson* and *Labassee* cases, the present Article 8 complaint does not concern the registration of a foreign birth certificate and recognition of the legal parent-child relationship in respect of a child born from a gestational surrogacy arrangement (see paragraph 84 above). What is at issue in the present case are the measures taken by the Italian authorities which resulted in the separation, on a permanent basis, of the child and the applicants. Indeed, the domestic courts stated that the case did not involve a "traditional" surrogacy arrangement, given that the applicants' biological material had not been used. They emphasised the failure to comply with the procedure laid down by the legislation on international adoption and the breach of the prohibition on using donated gametes within the meaning of section 4 of the Medically Assisted Reproduction Act (see the relevant passage of the decision by the Minors Court, paragraph 37 above).

134. Therefore the legal questions at the heart of the case are: whether, given the circumstances outlined above, Article 8 is applicable; in the affirmative, whether the urgent measures ordered by the Minors Court, which resulted in the child's removal, amount to an interference in the applicants' right to respect for their family life and/or their private life within the meaning of Article 8 § 1 of the Convention and, if so, whether the impugned measures were taken in accordance with Article 8 § 2 of the Convention.

135. Lastly, the Court points out that the child T.C. is not an applicant in the proceedings before the Court, the Chamber having dismissed the complaints raised by the applicants on his behalf (see paragraph 86 above). The Court is called upon to examine solely the complaints raised by the applicants on their own behalf (see, *a contrario*, *Mennesson,* cited above, §§ 96-102, and *Labassee,* cited above, §§ 75-81).

2. Applicability of Article 8 of the Convention

136. The Court reiterates that the Chamber concluded that there existed a *de facto* family life between the applicants and the child (see § 69 of the Chamber judgment). It further considered that the situation complained of also related to the second applicant's private life, in that what was at stake for him was the establishment of a biological tie with the child (see § 70 of the Chamber judgment). It followed that Article 8 of the Convention was applicable in the present case.

137. The Government challenged the existence of a family life in the present case, relying essentially on the absence of a biological link between

the applicants and the child and on the illegality of the applicants' conduct under Italian law. They submitted that, in view of the applicants' unlawful conduct, no tie protected by Article 8 of the Convention could exist between them and the child. They also argued that the applicants had lived with the child for only eight months.

138. The applicants asked the Court to recognise the existence of a family life, in spite of the lack of a biological tie with the child and the non-recognition of a parent-child relationship under Italian law. Essentially, they argued that a legal parental relationship was recognised in Russian law and that they had formed close emotional ties with the child during the first eight months of his life.

139. The Court must therefore reply to the question whether the facts in the present case fall within the applicants' family life and/or private life.

(a) Family life

i. Relevant principles

140. The existence or non-existence of "family life" is essentially a question of fact depending upon the existence of close personal ties (see *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31, and *K. and T. v. Finland*, cited above, § 150). The notion of "family" in Article 8 concerns marriage-based relationships, and also other *de facto* "family ties" where the parties are living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy (see *Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297-C; *Johnston and Others v. Ireland*, 18 December 1986, § 55, Series A no. 112; *Keegan v. Ireland*, 26 May 1994, § 44, Series A, no. 290; and *X, Y and Z v. the United Kingdom*, 22 April 1997, § 36, *Reports* 1997-II).

141. The provisions of Article 8 do not guarantee either the right to found a family or the right to adopt (see *E.B. v. France* [GC], no. 43546/02, § 41, 22 January 2008). The right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family (see *Marckx*, cited above, § 31), or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father (see *Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI), or the relationship that arises from a genuine marriage, even if family life has not yet been fully established (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* 28 May 1985, § 62, Series A no. 94), or the relationship between a father and his legitimate child even if it proves, years later, to have had no biological basis (see *Nazarenko v. Russia*, no. 39438/13, § 58, ECHR 2015 (extracts)), or the relationship that arises from a lawful and genuine adoption (see *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, § 148, ECHR 2004-V (extracts)).

ii. Application to the present case

142. It is not contested that there is no biological tie between the applicants and the child. However, the parties submitted differing arguments as to whether the applicants were bound to the child by a legal parental relationship that was recognised under Russian law (see paragraphs 107 and 118 above).

143. Admittedly, as the Government indicated in their observations (see paragraph 118 above), the question of the birth certificate's compliance with Russian law was examined by the Campobasso Court of Appeal which confirmed the refusal to register the disputed certificate, holding that it was in breach of Russian law (see paragraph 47 above). The applicants did not challenge this argument before the Court of Cassation (see paragraph 84 above).

144. However, the wording of the provisions of Russian law applicable on 27 February 2011, the date of the child's birth, and on 10 March 2011, the date on which the applicants were registered as parents in Moscow, seems to confirm the applicants' argument before the Court that the existence of a biological tie between the child and the intended parents was not explicitly required under Russian law at the relevant time (see paragraphs 73-74 and 107 above). In addition, the certificate in question merely indicates that the applicants were the "parents", without specifying whether they were the biological parents (see paragraph 16 above).

145. The Court notes that the question of the birth certificate's compatibility with Russian law was not examined by the Minors Court in the context of the urgent measures adopted in respect of the child.

146. Before the Italian courts, the parental authority exercised by the applicants in respect of the child was recognised by implication in so far as a request was made for its suspension (see paragraph 23 above). However, the parental authority in question was uncertain, for the following reasons.

147. The applicants' situation was in conflict with national law. According to the Campobasso Minors Court (see paragraph 37 above), and irrespective of the criminal-law aspects, there had been illegality, firstly in that they had brought to Italy a foreign child who had no biological ties with either parent, in breach of the rules laid down on international adoption, and, secondly, in that they had entered into an agreement providing for the handing over of the second applicant's seminal fluid in order to fertilise ovocytes from another woman, which was in breach of the prohibition in Italian law on heterologous assisted reproduction.

148. The Court must ascertain whether, in the circumstances of the case, the relationship between the applicants and the child came within the sphere of family life within the meaning of Article 8. The Court accepts, in certain situations, the existence of *de facto* family life between an adult or adults and a child in the absence of biological ties or a recognised legal tie, provided that there are genuine personal ties.

149. In spite of the absence of a biological tie and of a parental relationship that was legally recognised by the respondent State, the Court has found that there existed family life between the foster parents who had cared for a child on a temporary basis and the child in question, on account of the close personal ties between them, the role played by the adults *vis-à-vis* the child, and the time spent together (see *Moretti and Benedetti v. Italy*, no. 16318/07, § 48, 27 April 2010, and *Kopf and Liberda v. Austria,* no. 1598/06, § 37, 17 January 2012). In the case of *Moretti and Benedetti*, the Court attached importance to the fact that the child had arrived in the family at the age of one month and that, for nineteen months, the applicants had shared the first important stages of his young life with the child. It also noted that the court-ordered reports on the family showed that the child was well integrated in the family and deeply attached to the applicants and to their children. The applicants had also provided for the child's social development. These elements were sufficient for the Court to find that there existed between the applicants and the child a close inter-personal bond and that the applicants behaved in every respect as her parents, so that "*de facto*" "family ties" existed between them (see *Moretti and Benedetti*, cited above, §§ 49-50). The *Kopf and Liberda* case concerned a foster family which had cared, over a period of about forty-six months, for a child who had arrived in their home at the age of two. Here too the Court concluded that family life existed, given that the applicants had a genuine concern for the child's well-being and that an emotional bond had developed between the individuals concerned (see *Kopf and Liberda*, cited above, § 37).

150. In addition, in the case of *Wagner and J.M.W.L. v. Luxembourg* (no. 76240/01, § 117, 28 June 2007) – which concerned the inability to obtain legal recognition in Luxembourg of a Peruvian judicial decision pronouncing the second applicant's full adoption by the first applicant – the Court recognised the existence of family life in the absence of legal recognition of the adoption. It took into consideration that *de facto* family ties had existed for more than ten years between the applicants and that the first applicant had acted as the minor child's mother in every respect.

151. It is therefore necessary, in the instant case, to consider the quality of the ties, the role played by the applicants *vis-à-vis* the child and the duration of the cohabitation between them and the child. The Court considers that the applicants had developed a parental project and had assumed their role as parents *vis-à-vis* the child (see, *a contrario*, *Giusto, Bornacin and V. v. Italy* (dec.), no. 38972/06, 15 May 2007). They had forged close emotional bonds with him in the first stages of his life, the strength of which was, moreover, clear from the report drawn up by the team of social workers following a request by the Minors Court (see paragraph 25 above).

152. With regard to the duration of the cohabitation between the applicants and the child in this case, the Court notes that the applicants and

the child lived together for six months in Italy, preceded by a period of about two months' shared life between the first applicant and the child in Russia.

153. It would admittedly be inappropriate to define a minimal duration of shared life which would be necessary to constitute *de facto* family life, given that the assessment of any situation must take account of the "quality" of the bond and the circumstances of each case. However, the duration of the relationship with the child is a key factor in the Court's recognition of the existence of a family life. In the above-cited case of *Wagner and J.M.W.L.*, the cohabitation had lasted for more than ten years. Equally, in the *Nazarenko* case (cited above, § 58), in which a married man had assumed the parental role before discovering that he was not the child's biological father, the period spent together had lasted more than five years.

154. It is true that, in the present case, the duration of cohabitation with the child was longer than that in the case of *D. and Others v. Belgium* ((dec.) no. 29176/13, § 49, 8 July 2014), in which the Court held that family life, protected by Article 8, had existed for only two months before the temporary separation of a Belgian couple and a child born in Ukraine to a surrogate mother. In that case, however, there was a biological tie with at least one of the parents and cohabitation had subsequently resumed.

155. As to the second applicant's argument that he had been persuaded that he was the child's biological father, given that his seminal fluid had been handed over to the clinic, the Court considers that that belief – which was proved to be unfounded in August 2011 by the result of the DNA test – cannot compensate for the short duration of the period in which he lived together with the child (see, *a contrario*, *Nazarenko*, cited above, § 58) and does not therefore suffice to establish a *de facto* family life.

156. Although the termination of their relationship with the child is not directly imputable to the applicants in the present case, it is nonetheless the consequence of the legal uncertainty that they themselves created in respect of the ties in question, by engaging in conduct that was contrary to Italian law and by coming to settle in Italy with the child. The Italian authorities reacted rapidly to this situation by requesting the suspension of parental authority and opening proceedings to make the child available for adoption (see paragraphs 22-23 above). The present case differs from the above-cited cases of *Kopf, Moretti and Benedetti,* and *Wagner*, where the child's placement with the applicants was respectively recognised or tolerated by the authorities.

157. Having regard to the above factors, namely the absence of any biological tie between the child and the intended parents, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bonds, the Court considers that the conditions enabling it to conclude that there existed a *de facto* family life have not been met.

158. In these circumstances, the Court concludes that no family life existed in the present case.

(b) Private life

i. Relevant principles

159. The Court reiterates that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which does not lend itself to exhaustive definition. It covers the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91) and, to a certain degree, the right to establish and develop relationships with other human beings (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B). It can sometimes embrace aspects of an individual's physical and social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I). The concept of private life also encompasses the right to "personal development" or the right to self-determination (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III), and the right to respect for the decisions both to have and not to have a child (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-I, and *A, B and C v. Ireland* [GC], no. 25579/05, § 212, ECHR 2010).

160. In its judgment in the case of *Dickson v. the United Kingdom* ([GC], no. 44362/04, § 66, ECHR 2007-V), concerning the refusal to grant the applicants – a prisoner and his wife – artificial insemination facilities, the Court concluded that Article 8 was applicable, in that the refusal of artificial insemination facilities at issue concerned their private and family lives, specifying that those notions incorporate the right to respect for their decision to become genetic parents. In the case of *S.H. and Others v. Austria* ([GC], no. 57813/00, § 82, ECHR 2011) – which concerned couples wishing to have a child using gametes from donors – the Court held that the right of a couple to conceive a child and to make use of medically assisted reproduction for that purpose is also protected by Article 8, as such a choice is an expression of private and family life.

ii. Application to the present case

161. The Court considers that there is no valid reason to understand the concept of "private life" as excluding the emotional bonds created and developed between an adult and a child in situations other than the classic situations of kinship. This type of bond also pertains to individuals' life and social identity. In certain cases involving a relationship between adults and a child where there are no biological or legal ties the facts may nonetheless fall within the scope of "private life" (see *X. v. Switzerland*, no. 8257/78, Commission decision of 10 July 1978, Decisions and Reports 5, and, *mutatis mutandis*, *Niemietz*, cited above, § 29).

162. In particular, in the above-cited case of *X. v. Switzerland*, the Commission examined the situation of an individual who had been entrusted by friends with the care of their child, a task which she fulfilled. When, several years later, the authorities decided that the child could no longer remain with the individual in question, since the parents had asked to resume caring for him, the applicant lodged an appeal in order to be able to keep the child, relying on Article 8 of the Convention. The Commission held that the applicant's private life was involved, in that she was deeply attached to the child.

163. In the present case, the Court notes that the applicants had a genuine intention to become parents, initially by attempts to conceive via *in vitro* fertilisation, then by applying for and obtaining formal approval to adopt, and, lastly, by turning to ova donation and the use of a surrogate mother. A major part of their lives was focused on realising their plan to become parents, in order to love and bring up a child. Accordingly, what is at issue is the right to respect for the applicants' decision to become parents (see *S.H. and Others v. Austria*, cited above, § 82), and the applicants' personal development through the role of parents that they wished to assume *vis-à-vis* the child. Lastly, given that the proceedings before the Minors Court concerned the issue of biological ties between the child and the second applicant, those proceedings and the establishment of the genetic facts had an impact on the second applicant's identity and the relationship between the two applicants.

164. In the light of these considerations, the Court concludes that the facts of the case fall within the scope of the applicants' private life.

(c) Conclusion

165. In view of the foregoing, the Court concludes that there was no family life between the applicants and the child. It considers, however, that the impugned measures pertained to the applicants' private life. It follows that Article 8 of the Convention applies under this head.

3. Compliance with Article 8 of the Convention

166. The applicants in the present case were affected by the judicial decisions which resulted in the child's removal and his being placed in the care of the social services with a view to adoption. The Court considers that the measures taken in respect of the child – removal, placement in a home without contact with the applicants, being placed under guardianship – amounted to an interference with the applicants' private life.

167. Such interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned.

(a) "In accordance with the law"

168. The applicants submitted that the manner of applying Italian law and, in particular, section 8 of the Adoption Act – defining a minor child in a state of abandonment as one who is deprived of all emotional or material support from the parents or the members of his family responsible for providing such support – amounted to an arbitrary choice on the part of the Italian courts.

169. The Court reiterates that, according to its settled case-law, the expression "in accordance with the law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V, and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 140, ECHR 2012). However, it is for the national authorities, notably the courts, to interpret and apply domestic law (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A; *Kopp v. Switzerland*, 25 March 1998, § 59, *Reports* 1998-II; and *Centro Europa 7 S.r.l. and Di Stefano,* cited above, § 140; see also *Delfi AS v. Estonia* [GC], no. 64569/09, § 127, ECHR 2015).

170. Like the Chamber (see § 72 of the Chamber judgment), the Grand Chamber considers that the choice by the national courts to apply the Italian law on parentage, and not to base their decisions on the birth certificate issued by the Russian authorities and certified by them, was compatible with the 1961 Hague Convention (see paragraph 75 above). Under Article 5 of that Convention, the only effect of the certificate was to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears. According to the explanatory report to that Convention, the certificate does not attest to the truthfulness of the content of the original document. This limitation on the legal effects deriving from the Hague Convention is intended to preserve the right of the signatory States to apply their own choice-of-law rules when they are required to determine the probatory force to be attached to the content of the certified document.

171. In the present case the domestic courts applied the Italian rule on conflict of laws which provides that the legal parent-child relationship is determined by the national law governing the child at the time of his or her birth (Private International Law Act, see paragraph 57 above). However, as the child had been conceived from the gametes of unknown donors, his nationality was not established in the eyes of the Italian courts.

172. Section 37*bis* of the Adoption Act provides that, for the purposes of adoption, placement and urgent measures, Italian law is applicable to foreign minors who are in Italy (see paragraphs 63 and 65 above). The situation of the child T.C., whose nationality was unknown, and who had

been born abroad to unknown biological parents, was equated with that of a foreign minor.

173. In such a situation, the Court considers that the application of Italian law by the national courts, giving rise to the finding that the child was in a "state of abandonment", was foreseeable.

174. It follows that the interference with the applicants' private life was "in accordance with the law".

(b) Legitimate aim

175. The Government agreed with the Chamber judgment, which had accepted that the measures in question were intended to ensure "the prevention of disorder" and to protect the child's "rights and freedoms".

176. The applicants disagreed that those measures served to protect the child's "rights and freedoms".

177. In so far as the applicants' conduct ran counter to the Adoption Act and the Italian prohibition on heterologous artificial reproduction techniques, the Grand Chamber accepts the Chamber's view that the measures taken in respect of the child pursued the aim of "preventing disorder". Moreover, it accepts that those measures were also intended to protect the "rights and freedoms" of others. The Court regards as legitimate under Article 8 § 2 the Italian authorities' wish to reaffirm the State's exclusive competence to recognise a legal parent-child relationship – and this solely in the case of a biological tie or lawful adoption – with a view to protecting children.

178. The impugned measures thus pursued legitimate aims.

(c) Necessity in a democratic society

i. Relevant principles

179. The Court reiterates that in determining whether an impugned measure was "necessary in a democratic society", it 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 many other authorities, *Parrillo v. Italy* [GC], no. 46470/11, § 168, ECHR 2015; *S.H. and Others v. Austria,* cited above, § 91; and *K. and T. v. Finland*, cited above, § 154).

180. 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 (see *S.H. and Others v. Austria*, cited above, § 92, and *Olsson v. Sweden (no. 1)*, 24 March 1988, § 54, Series A no. 130). 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 and with the help of a medically-assisted reproduction technique, both of which are prohibited in the respondent State.

181. According to the Court's established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests (see *A, B and C v. Ireland*, cited above, § 229). In determining whether an interference was "necessary in a democratic society" the Court will take into account that a margin of appreciation is left to the national authorities, whose decision remains subject to review by the Court for conformity with the requirements of the Convention (see *X, Y and Z v. the United Kingdom,* cited above, § 41).

182. The Court reiterates that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when deciding any case under Article 8 of the Convention (see, among many other authorities, *S.H. and Others v. Austria*, cited above, § 94; and *Hämäläinen v. Finland* [GC], no. 37359/09, § 67, ECHR 2014). 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 *Evans*, cited above, § 77). Where, however, 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 wider (see *Evans*, cited above, § 77; and *A, B and C v. Ireland*, cited above, § 232). There will usually be a wide margin of appreciation accorded if the State is required to strike a balance between competing private and public interests or Convention rights (see *Evans*, cited above, § 77, and *Dickson*, cited above, § 78).

183. While the authorities enjoy a wide margin of appreciation in the area of adoption (see *Wagner and J.M.W.L.*, cited above, § 128) or in assessing the necessity of taking a child into care (see *Kutzner v. Germany*, no. 46544/99, § 67, ECHR 2002-I), in particular where an emergency situation arises, the Court must still be satisfied in the particular case that there existed circumstances justifying the removal of the child (see *Zhou v. Italy*, no. 33773/11, § 55, 21 January 2014).

184. As regards the Court's recognition that 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, the Court refers, in particular, to the nuanced approach adopted on the issue of heterologous assisted fertilisation in *S.H. and Others v. Austria* (cited above, §§ 95-118) and to the analysis of the margin of appreciation in the context of surrogacy arrangements and the legal

recognition of the parent-child relationship between intended parents and the children thus legally conceived abroad in *Mennesson* (cited above, §§ 78-79).

ii. Application of the principles to the present case

185. The applicants alleged that the child's removal had been neither necessary nor based on relevant and sufficient reasons, and that the domestic courts took their decision based solely on the defence of public order, without assessing the interests at stake. In this connection, they pointed out that the reports drawn up by the welfare service and the consultant psychologist appointed by them – which were extremely positive as to their capacity to love and care for the child – had been completely disregarded by the courts.

186. The Government argued that the decisions taken by the courts had been necessary in order to restore legality and that the child's interests had been taken into account in those decisions.

187. The Court must therefore assess the measures ordering the child's immediate and permanent removal and their impact on the applicants' private life.

188. It notes in this connection that the national courts based their decisions on the absence of any genetic ties between the applicants and the child and on the breach of domestic legislation concerning international adoption and on medically assisted reproduction. The measures taken by the authorities were intended to ensure the immediate and permanent rupture of any contact between the applicants and the child, and the latter's placement in a home and also under guardianship.

189. In its decision of 20 October 2011, the Campobasso Minors Court had regard to the following elements (see paragraph 37 above). The first applicant had stated that she was not the genetic mother; the ova came from an unknown woman; the DNA tests carried out on the second applicant and the child had shown that there was no genetic tie between them; the applicants had paid a considerable amount of money; contrary to his statements, there was nothing to prove that the second applicant's genetic material had actually been taken to Russia. In those circumstances, this was not a case involving traditional surrogate motherhood, since the child had no genetic ties with the applicants. The only certainty was the identity of the surrogate mother, who was not the genetic mother and who had waived her rights to the child after his birth. The identity of the genetic parents remained unknown. The applicants had acted unlawfully since, firstly, they had brought a child to Italy in breach of the Adoption Act. According to that statute, before bringing a foreign child to Italy, candidates for international adoption were required to apply to an authorised organisation and then to request the involvement of the Commission for Inter-country Adoption, the only body competent to authorise entry and permanent residence of a

foreign child in Italy. Section 72 of the Act made conduct contravening these rules liable to prosecution, but assessment of the criminal-law aspect of the situation was not within the competence of the minors courts. Secondly, the agreement concluded between the applicants and the company Rosjurconsulting was in breach of the Medically Assisted Reproduction Act, section 4 of which prohibited heterologous assisted fertilisation. It was necessary to bring this unlawful situation to an end, and the only way to do so was to remove the child from the applicants.

190. The Minors Court recognised that the child would suffer harm from the separation but, given the short period spent with the applicants and his young age, it considered that this trauma would not be irreparable, contrary to the opinion of the psychologist appointed by the applicants. It indicated that a search should begin immediately for another couple who could care for the child and attenuate the consequences of the trauma. In addition, having regard to the fact that the applicants had preferred to circumvent the Adoption Act in spite of the authorisation obtained by them, it could be thought that the child resulted from a narcissistic desire on the part of the couple or that he was intended to resolve problems in their relationship. In consequence, the court expressed doubts as to the applicants' genuine affective and educational abilities.

191. Furthermore, the Campobasso Court of Appeal upheld the decision of the Minors Court, and also held that the child was in a "state of abandonment" within the meaning of the Adoption Act. It emphasised the urgency in deciding on the measures in his respect, without awaiting the outcome of the proceedings on registration of the birth certificate (see paragraph 40 above).

α. The margin of appreciation

192. The Court must examine whether those grounds are relevant and sufficient and whether the national courts struck a fair balance between the competing public and private interests. In doing so, it must first determine the breadth of the margin of appreciation to be accorded to the State in this area.

193. According to the applicants, the margin of appreciation is restricted, given that the subject of the present case is the child's permanent removal and that the child's best interests ought to be paramount (see paragraph 110 above). In the Government's submission, the authorities enjoy a wide margin of appreciation with regard to surrogate motherhood and techniques for medically assisted reproduction (see paragraph 122 above).

194. The Court observes that the facts of the case touch on ethically sensitive issues – adoption, the taking of a child into care, medically assisted reproduction and surrogate motherhood – in which member States enjoy a wide margin of appreciation (see paragraph 182 above).

195. In contrast to the situation in the *Mennesson* judgment (cited above, §§ 80 and 96-97), the questions of the child's identity and recognition of genetic descent do not arise in the present case since, on the one hand, any failure by the State to provide the child with an identity cannot be pleaded by the applicants, who do not represent him before the Court and, on the other, there are no biological links between the child and the applicants. In addition, the present case does not concern the choice to become genetic parents, an area in which the State's margin of appreciation is restricted (see *Dickson*, cited above, § 78). Nonetheless, even where, as here, the State enjoys a wide margin of appreciation, the solutions reached are not beyond the scrutiny of the Court. It is for the latter to examine carefully the arguments taken into consideration when reaching the impugned decision and to determine whether a fair balance has been struck between the competing interests of the State and those of the individuals directly affected by the decision (see, *mutatis mutandis*, *S.H. and Others v. Austria*, cited above, § 97).

β. Relevant and sufficient reasons

196. As regards the reasons put forward by the domestic authorities, the Court observes that they relied in particular on two strands of argument: they had regard, firstly, to the illegality of the applicants' conduct and, secondly, to the urgency of taking measures in respect of the child, whom they considered to be "in a state of abandonment" within the meaning of section 8 of the Adoption Act.

197. The Court has no doubt that the reasons advanced by the domestic courts are relevant. They are directly linked to the legitimate aim of preventing disorder, and also that of protecting children – not merely the child in the present case but also children more generally – having regard to the prerogative of the State to establish descent through adoption and through the prohibition of certain techniques of medically assisted reproduction (see paragraph 177 above).

198. Turning to the question of whether the reasons given by the domestic courts were also sufficient, the Grand Chamber reiterates that, unlike the Chamber, it considers that the facts of the case fall not within the scope of family life but only within that of private life. Thus, the case is not to be examined from the perspective of preserving a family unit, but rather from the angle of the applicants' right to respect for their private life, bearing in mind that what was at stake was their right to personal development through their relationship with the child.

199. In the particular circumstances of the case, the Court considers that the reasons given by the domestic courts, which concentrated on the situation of the child and the illegality of the applicants' conduct, were sufficient.

γ. Proportionality

200. It remains to be examined whether the impugned measures were proportionate to the legitimate aims pursued and in particular whether the domestic courts, acting within the wide margin of appreciation accorded to them in the present case, have struck a fair balance between the competing public and private interests.

201. The domestic courts attached considerable weight to the applicants' failure to comply with the Adoption Act and to the fact that they had recourse abroad to methods of medically assisted reproduction that are prohibited in Italy. In the domestic proceedings, the courts, focused as they were on the imperative need to take urgent measures, did not expand on the public interests involved; nor did they explicitly address the sensitive ethical issues underlying the legal provisions breached by the applicants.

202. In the proceedings before the Court, the respondent Government submitted that in Italian law descent may be established either through the existence of a biological relationship or through an adoption respecting the rules set out in the law. They argued that, in making this choice, the Italian legislature was seeking to protect the best interests of the child as required by Article 3 of the Convention on the Rights of the Child. The Court accepts 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 to cases in which the rules on international adoption have been respected, the Italian legislature is seeking to protect children against illicit practices, some of which may amount to human trafficking.

203. Furthermore, the Government relied on the argument that the decisions taken had to be seen against the background of the prohibition of surrogacy arrangements under Italian law. There is no doubt that recourse to such an arrangement raises sensitive ethical questions on which no consensus exists among the Contracting States (see *Mennesson*, cited above, § 79). By prohibiting surrogacy arrangements, Italy has taken the view that it is pursuing the public interest of protecting the women and children potentially affected by practices which it regards as highly problematic from an ethical point of view. This policy is considered very important, as the Government have pointed out, where, as here, commercial surrogacy arrangements are involved. That underlying public interest is also of relevance in respect of measures taken by a State to discourage its nationals from having recourse abroad to such practices which are forbidden on its own territory.

204. In sum, for the domestic courts the primary concern was to put an end to an illegal situation. Having regard to the considerations set out above, the Court accepts that the laws which had been contravened by the applicants and the measures which were taken in response to their conduct served to protect very weighty public interests.

205. With regard to the private interests at stake, there are those of the child on the one hand and those of applicants on the other.

206. In respect of the child's interests, the Court reiterates that the Campobasso Minors Court had regard to the fact that there was no biological tie between the applicants and the child and held that a suitable couple should be identified as soon as possible to take care of him. Given the child's young age and the short period spent with the applicants, the court did not agree with the psychologist's report submitted by the applicants, suggesting that the separation would have devastating consequences for the child. Referring to the literature on the subject, it noted that the fact of mere separation from the care-givers, without any other factors being present, would not cause a psychopathological state in a child. It concluded that the trauma caused by the separation would not be irreparable.

207. As to the applicants' interest in continuing their relationship with the child, the Minors Court had noted that there was no evidence in the file to support their claim that they had provided the Russian clinic with the second applicant's genetic material. Moreover, having obtained approval for inter-country adoption, they had circumvented the Adoption Act by bringing the child to Italy without the approval of the competent body, namely the Commission for Inter-Country Adoption. Having regard to that conduct, the Minors Court expressed concern that the child might be an instrument to fulfil a narcissistic desire of the applicants or to exorcise an individual or joint problem. Furthermore, it considered that the applicants' conduct threw a "consistent shadow on their possession of genuine affective and educational abilities" and doubted whether they displayed the "instinct of human solidarity which must be present in any person wishing to bring the children of others into their lives as their own children" (see paragraph 37 above).

208. Before entering into the question of whether the Italian authorities duly weighed the different interests involved, the Court reiterates that the child is not an applicant in the present case. In addition, the child was not a member of the applicants' family within the meaning of Article 8 of the Convention. This does not mean however, that the child's best interests and the way in which these were addressed by the domestic courts are of no relevance. In that connection, the Court observes that Article 3 of the Convention on the Rights of the Child requires that "in all actions concerning children ... the best interests of the child shall be a primary consideration", but does not however define the notion of the "best interests of the child".

209. The present case differs from cases in which the separation of a child from its parents is at stake, where in principle separation is a measure which may only be ordered if the child's physical or moral integrity is in danger (see, among other authorities, *Scozzari and Giunta*, cited above,

§§ 148-151, and *Kutzner,* cited above*,* §§ 69-82). In contrast, the Court does not consider in the present case that the domestic courts were obliged to give priority to the preservation of the relationship between the applicants and the child. Rather, they had to make a difficult choice between allowing the applicants to continue their relationship with the child, thereby legalising the unlawful situation created by them as a *fait accompli*, or taking measures with a view to providing the child with a family in accordance with the legislation on adoption.

210. The Court has already noted that the public interests at stake were very weighty ones. Moreover, it considers that the Italian courts' reasoning in respect of the child's interests was not automatic or stereotyped (see, *mutatis mutandis*, *X. v. Latvia* [GC], no. 27853/09, § 107, ECHR 2013). In evaluating the child's specific situation, the courts considered it desirable to place him with a suitable couple with a view to adoption, and also assessed the impact which the separation from the applicants would have. They concluded in essence that the separation would not cause the child grave or irreparable harm.

211. In contrast, the Italian courts attached little weight to the applicants' interest in continuing to develop their relationship with a child whose parents they wished to be. They did not explicitly address the impact which the immediate and irreversible separation from the child would have on their private life. However, this has to be seen against the background of the illegality of the applicants' conduct and the fact that their relationship with the child was precarious from the very moment that they decided to take up residence with him in Italy. The relationship became even more tenuous once it had turned out, as a result of the DNA test, that there was no biological link between the second applicant and the child.

212. The applicants argued that the procedure suffered from a number of shortcomings. As to the alleged failure to accept an expert opinion, the Court observes that the Minors Court did have regard to the psychologist's report submitted by the applicants. However, it disagreed with its conclusion that the separation from the applicants would have devastating consequences for the child. In this connection, the Court attaches importance to the Government's argument that the Minors Court is a specialised court which sits with two professional judges and two expert members (see paragraph 69 above).

213. As to the applicants' argument that the courts failed to examine alternatives to immediate and irreversible separation from the child, the Court observes that before the Minors Court the applicants had initially requested that the child be temporarily placed with them with a view to subsequent adoption. In the Court's view, it has to be borne in mind that the proceedings were of an urgent nature. Any measure prolonging the child's stay with the applicants, such as placing him in their temporary care, would

have carried the risk that the mere passage of time would have determined the outcome of the case.

214. Moreover, apart from the illegality of the applicants' conduct, the Government pointed out that they had exceeded the age limit for adoption laid down in section 6 of the Adoption Act, namely a maximum difference in age of forty-five years in respect of one adopting parent and fifty-five years in respect of the second. The Court observes that the law authorises the courts to make exceptions from these age-limits. In the circumstances of the present case, the domestic courts cannot be reproached for failing to consider that option.

δ. Conclusion

215. The Court does not underestimate the impact which the immediate and irreversible separation from the child must have had on the applicants' private life. While the Convention does not recognise a right to become a parent, the Court cannot ignore the emotional hardship suffered by those whose desire to become parents has not been or cannot be fulfilled. However, the public interests at stake weigh heavily in the balance, while comparatively less weight is to be attached to the applicants' interest in their personal development by continuing their relationship with the child. Agreeing to let the child stay with the applicants, possibly with a view to becoming his adoptive parents, would have been tantamount to legalising the situation created by them in breach of important rules of Italian law. The Court accepts that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them in the present case.

216. It follows that there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Dismisses*, unanimously, the Government's preliminary objections;

2. *Holds*, by eleven votes to six, that there has been no violation of Article 8 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 January 2017.

Roderick Liddell	Luis López Guerra
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Raimondi;

(b) joint concurring opinion of Judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov;

(c) concurring opinion of Judge Dedov;

(d) joint dissenting opinion of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev.

L.L.G.
R.L.

CONCURRING OPINION OF JUDGE RAIMONDI

(Translation)

1. I am in full agreement with the conclusions reached by the Grand Chamber in this important judgment – conclusions, moreover, which I recommended in my dissenting opinion, drafted jointly with Judge Spano and annexed to the Chamber judgment, namely that no violation can be found in this case of Article 8 of the Convention.

2. If I find it necessary to express myself through a separate opinion, it is purely because I wish to note that the Grand Chamber's decision to analyse this case in the light of protection of the applicants' private life, rather than in the light of their family life, is, in my view, particularly appropriate.

3. Judge Spano and I had noted in our joint dissenting opinion that "We can accept, albeit with some hesitation and subject to the comments set out below, the majority's conclusions that Article 8 of the Convention is applicable in this case (see paragraph 69 of the judgment) and that there has been interference in the applicants' rights. ...In reality, the applicants' *de facto* family life (or private life) with the child was based on a tenuous link, especially if one takes into consideration the very short period during which he resided with them. We consider that the Court, in situations such as that before it in the present case, ought to take account of the circumstances in which the child was placed in the custody of the individuals concerned when examining whether or not a *de facto* family life had been developed. We would emphasise that Article 8 § 1 cannot, in our opinion, be interpreted as enshrining 'family life' between a child and persons who have no biological relationship with him or her, where the facts, reasonably clarified, suggest that the origin of the custody is based on an illegal act, in breach of public order. In any event, we consider that the factors related to possible illegal conduct at the origin of the establishment of a *de facto* family life must be taken into account in the analysis of proportionality required in the context of Article 8."

4. Thus, I agree with the Grand Chamber's analysis (see paragraphs 142-158) which rules out any recognition in the present case of a "family life", particularly in the light of the lack of any biological link between the child and the intended parents, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective, and its conclusion that, despite the existence of a parental project and the quality of the emotional bonds, the conditions enabling it to find that there was a *de facto* family life have not been met.

5. On the other hand, I am fully convinced by the Grand Chamber's reasoning in reaching the conclusion that the impugned measures amounted to an interference in the applicants' "private life" (see, in particular,

paragraphs 161-165 of the judgment), notwithstanding the doubts that I had also expressed in that regard.

JOINT CONCURRING OPINION OF JUDGES DE GAETANO, PINTO DE ALBUQUERQUE, WOJTYCZEK AND DEDOV

1. While we fully agree with the outcome in the instant case, we have serious reservations as to the manner in which the judgment was reasoned. The reasoning reveals, in our view, all the weaknesses and inconsistencies in the approach adopted to date by the Court in Article 8 cases.

2. The application of Article 8 requires a careful definition of that provision's scope of application. According to the judgment, the existence or non-existence of family life is essentially a question of fact, depending upon the existence of close and constant personal ties (see, in particular, paragraph 140). In our view, the proposed formula is simultaneously both too vague and too broad. The approach seems based on the implicit assumption that existing interpersonal ties should enjoy at least *prima facie* protection against State interference. We note in this respect that close and constant personal ties may exist out of the scope of any family life. The reasoning does not explain the nature of those specific interpersonal ties which form family life. At the same time, it seems to attach great importance to emotional bonds (see paragraphs 149, 150, 151 and 157). However, emotional bonds *per se* cannot create family life.

3. The various provisions of the Convention must be interpreted in the context of the entire treaty and of other relevant international treaties. It follows that Article 8 must be read in the context of Article 12, which guarantees the right to marry and to found a family. Both Articles should also be placed against the backdrop of Article 16 of the Universal Declaration of Human Rights and Article 23 of the International Covenant on Civil and Political Rights. This last provision, strongly inspired by Article 16 of the Universal Declaration of Human Rights, is worded as follows:

> "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognised.
>
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.
>
> 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

It is important to note the approach adopted by the Human Rights Committee in General comment No. 19: Article 23 (The Family), § 2). The

family is rightly understood here as a unit which has obtained legal or social recognition in the specific State.

The very notion of *unit* used in the Universal Declaration, the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights (Article 10) presupposes the subjectivity of the family as a whole (i.e. the recognition of the whole family as a right-holder) as well as the stability of interpersonal links within the family. The emphasis placed on the natural and fundamental character of the family in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights positions the family among the most important institutions and values to be protected in a democratic society. Furthermore, the wording and the structure of Article 23 of the ICCPR as well as the wording of Article 12 of the Convention clearly link the notion of family with marriage. In the light of all the above-mentioned provisions, a family is to be understood a natural and fundamental group unit of society, founded primarily by the marriage between a man and a woman. Family life encompasses, in the first place, ties between spouses and between parents and their children. Through marriage the spouses not only enter into certain legal obligations, but also opt for the legal protection of their family life. The Convention offers strong protection of the family founded by way of marriage.

As mentioned above, the notion of family in Articles 8 and 12 of the Convention is based primarily on interpersonal relationships formalised in law as well as relationships of biological kinship. Such an approach does not exclude extending the protection of Article 8 to interpersonal relations with more distant relatives such as those between grand-parents and grand-children. Protection may also be warranted for certain family links established *de facto* (see for instance *Muñoz Díaz v. Spain*, no. 49151/07, ECHR 2009, and *Nazarenko v. Russia*, no. 39438/13, ECHR 2015 (extracts)). The intensity and tools for protection in such situations remain within the discretion of the State's policy, under the Court's supervision.

In the event of *de facto* interpersonal ties which are not formalised under the domestic law, it is necessary to look at several elements in order to determine whether family life exists. Firstly, as the notion of family presupposes the existence of stable ties, it is necessary to look at the nature and stability of the interpersonal links. Secondly, in our view it is not possible to establish the existence of family life without examining the manner in which the interpersonal links have been established. This element should be assessed both from a legal and moral perspective. *Nemo auditur propriam turpitudinem allegans*. The law cannot offer protection to *faits accomplis* in violation of legal rules or fundamental moral principles.

In the instant case the links between the applicants and the child were established in violation of Italian law. They were also established in violation of international adoption law. The applicants concluded a contract

commissioning the conception of a child and his gestation by a surrogate mother. The child was separated from the surrogate mother with whom he had begun to develop a unique link (see below). Furthermore, the possible effects on the child of his unavoidable separation from the persons who had been caring for him for some time must be attributed to the applicants themselves. It is not acceptable to invoke detrimental effects resulting from one's own illegal actions as a shield against State interference. *Ex iniuria ius non oritur*.

4. The judgment stresses as an argument in favour of the applicants the fact that the applicants had developed a "parental project" (see paragraphs 151 and 157). This argument triggers three remarks. Firstly, any parenthood that is not based upon biological links is necessarily based upon a project and is the result of long endeavours. The existence of a "parental project" does not differentiate this case from other cases of parenthood that are not based upon biological links.

Secondly, as mentioned above, the *de facto* link between the applicants and the child was established illegally. The approach adopted by the majority is not persuasive in that the existence of a parental project is considered as an argument in favour of protection, irrespective of the illegal nature of the specific project recognised in the reasoning. The fact that the applicants acted with premeditation in order to circumvent domestic legislation serves only to undermine their position. In the circumstances of the instant case, the existence of a "parental project" is in reality an aggravating circumstance.

Thirdly, parenthood deserves protection irrespective of whether or not it fell within a broader project. There is no reason to consider that Article 8 offers stronger protection to premediated acts.

5. Effective human-rights protection requires clear definitions of the content and scope of the rights protected, as well as of the type of interference against which a specific right offers a shield. We note in this context that according to the majority, "the facts of the case fall within the scope of the applicants' private life" (see paragraph 164).

Moreover: "... what is at issue is the right to respect for the applicants' decision to become parents (see *S.H. and Others v. Austria*, cited above, § 82), and the applicants' personal development through the role of parents that they wished to assume vis-à-vis the child" (see paragraph 163 of the judgment).

The reasoning also states as follows (in paragraph 166): "The applicants in the present case were affected by the judicial decisions which resulted in the child's removal and his being placed in the care of the social services with a view to adoption. The Court considers that the measures taken in respect of the child – removal, placement in a home without contact with the applicants, being placed under guardianship – amounted to an interference with the applicants' private life".

It is difficult to agree with the majority's approach as expressed in the passages quoted above. Firstly, the notion of "the facts of the case" is necessarily much broader than the interference itself, even if the latter must naturally be put in a broader context. Those "facts" may fall within the scope of many Convention rights. The Court is required to assess not the compatibility of the facts of the case with the Convention, but rather the compatibility with the Convention of the specific interference complained of, placed in its broader context. What is important is not whether the "facts of the case" fall within the scope of the applicants' private life, but only whether the interference complained of comes within the scope of the applicants' right to protection of private life.

Secondly, it cannot be claimed that what is at stake is the right to respect for the applicants' decision to become parents. What is stake is not their decision to become parents as such, but the manner in which they went about trying to achieve that goal. The State did not interfere with the applicants' decision to become parents, but only with the implementation of the applicants' decision to become parents in violation of the law.

Thirdly, there is no doubt that the applicants were affected by the judicial decisions which resulted in the child's removal and his being placed in the care of the social services with a view to adoption. This does not justify the conclusion that the measures taken in respect of the child necessarily amounted to an interference with the applicants' private life. Article 8 is not intended to protect against any acts which affect a person, but against specific types of acts which amount to an interference within the meaning of this provision. In order to establish the existence of an interference with a right, it is necessary to establish first the content of the right and the types of interference it protects against.

In conclusion, the reasoning adopted by the majority leaves it unclear what exactly is entailed by private life, what is the scope of the protection of the right recognized in Article 8, and what constitutes an interference within the meaning of Article 8. We regret that the reasoning refrained from clarifying these notions.

6. The Court rightly states (in paragraph 202) that it "accepts 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 to cases in which the rules on international adoption have been respected, the Italian legislature is seeking to protect children against illicit practices, some of which may amount to human trafficking".

The child in the instant case has been indeed a victim of human trafficking. He was commissioned and purchased by the applicants. It should be noted in this respect that the "facts of the case" fall within the ambit of several international instruments.

Firstly, it is necessary to refer here to the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry

Adoption. Under Article 2 of this treaty, an adoption within the scope of the Hague Convention take places only if the required consents have not been induced by *payment or compensation of any kind* and have not been withdrawn.

Secondly, Article 35 of the Convention on the Rights of the Child is of relevance in the instant case. It stipulates:

> "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."

This provision has been complemented by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. We regret that this Protocol has been omitted in the part of the judgment listing the relevant international instruments. It stipulates:

> **"Article 1**
>
> States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.
>
> **Article 2**
>
> For the purposes of the present Protocol:
>
> (a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration; ..."

We note the very broad definition of the sale of children, which encompasses transactions irrespective of their purpose and therefore applies to contracts entered into for the purpose of acquiring parental rights. The above-mentioned international treaties are evidence of a strong international trend towards limiting contractual freedom by proscribing all kinds of contracts having as their object the transfer of children or the transfer of parental rights over children.

Thirdly, the relevant soft law also addresses the issue of gestational surrogacy. Under the principles adopted by the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences of the Council of Europe (a document referred to in paragraph 79 of the judgment):

> "No physician or establishment may use the techniques of artificial procreation for the conception of a child carried by a surrogate mother."

It is also important to note in this context that the Declaration of the Rights of the Child stipulates, more generally:

> "The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of

moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother" (Principle 6 *in principio*).

7. The instant case touches upon the question of gestational surrogacy. For the purposes of this opinion, we understand gestational surrogacy as the situation in which a woman (the surrogate mother) carries in pregnancy a child implanted in her uterus to whom she is genetically a stranger, because the child has been conceived from an ovum provided by another woman (the biological mother). The surrogate mother carries the pregnancy with a pledge to surrender the child to the third parties who commissioned the pregnancy. The persons who commissioned the pregnancy may be the donors of the gametes (the biological parents) but this is not necessarily the case.

We should like to present here briefly our view on this issue, pointing out only a few points among the many aspects of this complex problem.

According to the Committee on the Rights of the Child, surrogacy without regulation amounts to the sale of the child (see the Concluding observations on the second periodic report of the United States of America submitted under article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child, CRC/C/OPSC/USA/CO/2, § 29, and Concluding observations on the consolidated third and fourth periodic reports of India, CRC/C/IND/CO/3-4, §§ 57-58).

In our view, remunerated gestational surrogacy, whether regulated or not, amounts to a situation covered by Article 1 of the Optional Protocol to the Convention on the Rights of the Child and is therefore illegal under international law. We would like to stress in this context that almost all European States currently ban commercial surrogacy (see the comparative-law materials referred to in paragraph 81 of the judgment).

More generally, we consider that gestational surrogacy, whether remunerated or not, is incompatible with human dignity. It constitutes degrading treatment, not only for the child but also for the surrogate mother. Modern medicine provides increasing evidence of the determinative impact of the prenatal period of human life for that human being's subsequent development. Pregnancy, with its worries, constraints and joys, as well as the trials and stress of childbirth, create a unique link between the biological mother and the child. From the outset, surrogacy is focused on drastically severing this link. The surrogate mother must renounce developing a life-long relationship of love and care. The unborn child is not only forcibly placed in an alien biological environment, but is also deprived of what should have been the mother's limitless love in the prenatal stage. Gestational surrogacy also prevents development of the particularly strong bond which forms between the child and a father who accompanies the mother and child throughout a pregnancy. Both the child and the surrogate mother are treated not as ends in themselves, but as means to satisfy the desires of other persons. Such a practice is not compatible with the values

underlying the Convention. Gestational surrogacy is particularly unacceptable if the surrogate mother is remunerated. We regret that the Court did not take a clear stance against such practices.

CONCURRING OPINION OF JUDGE DEDOV

For the first time when ruling in favour of the respondent State the Court has placed greater emphasis on values than on the formal margin of appreciation. The Court has presumed that the prohibition on a private adoption is aimed at protecting children against illicit practices, some of which may amount to human trafficking. This is because human trafficking goes hand in hand with surrogacy arrangements. The facts of this case clearly demonstrate how easily human trafficking might be formally represented as (and covered by) a surrogacy arrangement. However, the phenomenon of surrogacy is itself quite dangerous for the wellbeing of society. I refer not to the commercialisation of surrogacy, but to any kind of surrogacy.

In a successfully developing society all of its members contribute by means of their talents, energy and intellect. Of course they also require property, capital and resources, but the latter are necessary merely as material instruments in order to apply the former. Yet even if the only valid resource available to an individual is a beautiful or healthy body, this is not enough to justify earning money via prostitution, pornography or surrogacy.

The Charter of Fundamental Rights of the European Union provides for the prohibition on making the human body as such a source of financial gain, a provision aimed at protecting the right to the physical and mental integrity of the person (Article 3). Yet this clear declaration was at the centre of debates among experts, who failed to find common reasons to support that declaration and to reach definite conclusions, owing to the complexity of the subject and the diversity of approaches by States to these matters.

There could be many arguments in favour of surrogacy, based, for example, on the concepts of a market economy, diversity and solidarity. Not everyone is capable of using their intellect, as this requires considerable intellectual efforts and life-long learning, which is a very difficult task. It is much easier to earn money using the body, especially if one takes into account that strong demand exists for bodies for the purpose of surrogacy, and this demand has been quite stable for centuries. This could help to resolve unemployment problems and to reduce social tensions. If the human body participates in the economy as a valuable economic resource, this does not mean that progress would stop. Those who prefer to use their brains will continue to develop new technologies and science. In the situation of a radically increasing global population, it could be considered reasonable, from an economic perspective, to exploit the body.

However, we face a millennial dilemma here: human beings will survive through natural adaptation, requiring compromise with human dignity and integrity, or they will try to achieve a new quality of social life for all, which would overcome the need for such compromise. The concept of

fundamental rights and freedoms requires implementing the second option. It is necessary for survival and development. Any compromise with human rights and fundamental values entails the end of any civilisation. Needless to say, this has occurred many times, both in the ancient world and in modern history.

In fact, there are two reasons why the recipients should support surrogacy: to escape the physical problems caused by pregnancy or to have a child in a situation of infertility. Both types of demand would be satisfied unless a social strategy is involved. Social strategy (based on protection of dignity) may change the way in which the demand could be satisfied: adoption (the easiest way to resolve social problems), development of the embryo out of the uterus (this is not currently possible, but may be in the future through new biotechnologies), development of the already-existing biotechnologies for artificial fertilization which would allow every woman to enjoy pregnancy, promoting the concept that life can be full even without children, promoting a culture of education and the creation of new jobs. It is for society to decide on how it wishes to move forward: towards social progress and development or towards stagnation and degradation. But first of all society must determine the values of fundamental rights, whereby this approach to private life cannot be respected at the expense of society's stagnation and degradation. Surrogacy would not be a problem at all if it were used on rare occasions, but we know that it has become a big and lucrative business for the "third world".

As regards solidarity, I do not believe in surrogate motherhood as a voluntary and freely-provided form of assistance for those who cannot have children; I do not believe that this is a sincere and honest statement. Solidarity is intended to help those whose life is at stake, but not those who merely desire to enjoy a full private or family life. Donors should be ready to share through their energy or property (either the surplus or a substantial part of it), but preferably without danger to their own health and life (except in emergency situations, such as fire or other *force majeure*). These factors have played a leading role in the recent European migration crisis, when people send a clear message to their governors: we are ready to accept the immigrants on the basis of solidarity, but we are not ready to put our lives at risk.

The single case when a donor can share some parts of the body with recipients is immediately after his or her death, following conscious consent and other procedural guarantees. Pregnancy and childbirth are highly stressful for the donor in both physical and emotional terms; the consequences are not predictable, and thus, in the absence of an emergency situation, surrogacy cannot be considered a proper way to facilitate social solidarity.

I shall not consider the ethical and moral issues, as they should not be used for systemic analysis. They are not currently helpful in resolving the

problem, given the wide variety of ethical and moral convictions. It would be better to understand the reality.

According to the comparative-law survey, the number of States which prohibit surrogacy is almost equal to those which explicitly tolerate surrogacy carried out abroad. One may even conclude that surrogacy is "winning", as only one third of the Member States have explicitly prohibited it.

The statistics and the facts of the surrogacy cases examined by this Court demonstrate that surrogacy is carried out by poor people or in poor countries. The recipients are usually rich and glamorous. Moreover, the recipients usually participate in or decisively influence the national parliament. Moreover, it is extremely hypocritical to prohibit surrogacy in one's own country in order to protect local women, but simultaneously to permit the use of surrogacy abroad.

Again, this is another contemporary challenge for the concept of human rights: either we create a society which is divided between insiders and outsiders, or we create a basis for worldwide solidarity; we create a society which is divided between developed and undeveloped nations, or we create a basis for the inclusive development and self-realisation for all; we create a basis for equality or we do not. The answer is clear.

The respondent State took a very honest and uncompromising position regarding the prohibition on any type of surrogacy. This is clear from the position of the Government and the Italian Constitutional Court. I believe that this position was reached with the help of Christian values (see *Lautsi and Others v. Italy* [GC], no. 30814/06, ECHR 2011 (extracts)).

In Russia the situation is completely different. The Russian Constitutional Court initially (in 2012) refused to examine the problems with surrogacy when a surrogate mother expressed her wish to keep the child at birth. This problem was promptly resolved in 2013 in the Family Code, in favour of the surrogate mother. That was the first legislative initiative to regulate surrogacy arrangements. I have not heard any voice raised to prohibit surrogacy on the basis of fundamental values. Meanwhile, this method of purchasing a baby has become very popular amongst wealthy individuals and celebrities.

As regards the biological link between the child and the adoptive parents (surrogacy recipients), Judge Knyazev at the Russian Constitutional Court in his separate opinion raised a problem, namely that the right of the surrogate mother to retain the child would breach the constitutional rights of the surrogacy recipients who had provided her with their genetic material. In my view, this is not a major problem, as such parents could be considered donors. The more serious problem is that, from the very outset, surrogacy contravenes fundamental values of human civilisation and adversely affects all participants: the surrogate mother, the adoptive parents and the child.

Some of the adoptive parents are not married or live without a partner. While the Family Code permits surrogacy arrangements to be concluded only by married couples, the Russian courts took an even more "liberal" position and allowed any person, even a fertile woman, to obtain a child in this way. This creates, in my view, a serious problem with regard to State-authorised human trafficking.

I believe that in order to prevent the moral and ethical degradation of society, the Court should support value-based actions and not hide behind the margin of appreciation. These values (dignity, integrity, equality, inclusiveness, curiosity, self-realisation, creativity, knowledge and culture) are not in conflict with respect for private or family life. Respect for family life, through the existence of a biological link, was a decisive criterion in the previous surrogacy cases against France, namely *Mennesson v. France* (no. 65192/11, ECHR 2014 (extracts)) and *Labassee v. France* (no. 65941/11, 26 June 2014), which were decided in favour of the applicants. The lack of a biological link is also a central point of the judgment in the present case; however, if surrogacy is not in principle compatible with the concept of fundamental rights, it should be counterbalanced by an individual penalty and a public debate to prevent such a practice in the future.

I am satisfied that in the present case the Court has taken a first step towards placing greater emphasis on values rather than on the margin of appreciation in "ethical" cases (I ought to mention another recent Grand Chamber case, namely *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, 15 November 2016)). It failed to do so in the above-cited *Lautsi and Others* case or the *Parrillo v. Italy* case ([GC], no. 46470/11, ECHR 2015). Now the Court is really becoming new.

It is very difficult to choose between respect for privacy and interference with the exercise of this right for the sake of protecting morals, given that moral categories are not precise. However, when moral standards are linked to human values, the decision becomes more substantiated in a long-term perspective. This is because values are desperately needed for the progress of society.

Ultimately, surrogacy presents one of those challenges when we must ask ourselves who we are – a civilisation or a biomass? – in terms of the survival of the human race as a whole. The comparative review on surrogacy shows that surrogacy is tolerated in the majority of member States, and hence this phenomenon was not even interpreted from the above perspective. I presume that the real answer lies somewhere in the middle: the civilised nations constitute the basis of international law, and surrogacy does not impede the civilised development of nations. However, if one takes into account the numbers of those involved, directly or indirectly, in any forms of this anti-social way of money-making, whether lawful or not, the real scale of the problem would be impressive. When social solidarity is not

encouraged or effectively protected in practice by the authorities (who merely limit themselves to declarations in official documents), this raises the problems of social discrimination and inequality, which may lead to social destabilisation or degradation, and this threat should not be underestimated.

JOINT DISSENTING OPINION OF JUDGES LAZAROVA TRAJKOVSKA, BIANKU, LAFFRANQUE, LEMMENS AND GROZEV

1. We regret that we cannot share the view of the majority that there has been no violation of Article 8 of the Convention. In our opinion, there has been an interference with the applicants' right to respect for their family life. We are further of the opinion that in the specific circumstances of the present case that right has been violated.

Existence of a family life

2. The majority examine the applicants' complaint from the perspective of the right to respect for their private life. They hold explicitly that no family life existed (see paragraphs 140-158 of the judgment).

We prefer the approach adopted by the Chamber, which held that there had been an interference with the applicants' right to respect for their family life.

3. Our starting point, like the majority's (see paragraph 140 of the judgment), is that the existence or non-existence of "family life" is essentially a question of fact depending upon the real existence in practice of close personal ties (see *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001-VII, and *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 93, 2 November 2010). Article 8 of the Convention makes no distinction between the "legitimate" and the "illegitimate" family (see *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31). The notion of "family" in Article 8 is therefore not confined solely to, for instance, marriage-based relationships, and may encompass other *de facto* "family ties" where the parties are living together, outside marriage, and their relationship has sufficient constancy (see, among other authorities, *Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297-C, and *Mikulić v. Croatia*, no. 53176/99, § 51, ECHR 2002-I).

While biological ties between those who act as parents and a child may be a very important indication of the existence of family life, the absence of such ties does not necessarily mean that there is no family life. The Court has thus accepted, for example, that the relationship between a man and a child, who had very close personal ties between them and who believed for many years that they were father and daughter, until it was eventually revealed that the man was not the child's biological father, amounted to family life (see *Nazarenko v. Russia*, no. 39438/13, § 58, ECHR 2015 (extracts)). The majority further refer, quite rightly, to a number of other cases illustrating that it is the existence of genuine personal ties that is

important, not the existence of biological ties or of a recognised legal tie (see paragraphs 148-150 of the judgment, referring to *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 117, 28 June 2007; *Moretti and Benedetti v. Italy*, no. 16318/07, §§ 49-52, 27 April 2010; and *Kopf and Liberda v. Austria*, no. 1598/06, § 37, 17 January 2012).

4. As to the *de facto* family ties in the present case, we note, with the majority, that the applicants and the child lived together for six months in Italy, preceded by a period of about two months' shared life between the first applicant and the child in Russia (see paragraph 152 of the judgment). Moreover, and more importantly, the applicants had forged closed bonds with the child in the first stages of his life, the strength of which was recognised by a team of social workers (see paragraph 151 of the judgment). In short, there was a genuine parental project, based on high-quality emotional bonds (see paragraph 157 of the judgment).

The majority nevertheless consider that the duration of the cohabitation between the applicants and the child was too short for the cohabitation to be sufficient to establish a *de facto* family life (see paragraphs 152-154 of the judgment). We respectfully disagree. For us it is important that the cohabitation started from the very day the child was born, lasted until the child was removed from the applicants, and would have continued indefinitely if the authorities had not intervened to bring it to an end. The majority dismiss this argument on the ground that the intervention was the consequence of the legal uncertainty created by the applicants themselves "by engaging in conduct that was contrary to Italian law and by coming to settle in Italy with the child" (see paragraph 156 of the judgment). We fear that the majority thus make a distinction between a "legitimate" and an "illegitimate" family, a distinction that was rejected by the Court many years ago (see paragraph 3 above), and do not give full weight to the long-established principle that the existence or non-existence of "family life" is essentially a question of *fact* (*ibid.*).

5. Although the period of cohabitation was in itself relatively short, we consider that the applicants had acted as parents towards the child and conclude that there existed, in the particular circumstances of the present case, a *de facto* family life between the applicants and the child (see the Chamber judgment, § 69).

Whether the interference with the right to respect for family life was justified

6. At the outset, we would like to draw attention to some general principles as they result from the Court's case-law.

In cases concerning the placement of a child for adoption, which entails the permanent severance of family ties, the best interests of the child are paramount (see *Johansen v. Norway*, 7 August 1996, § 78, *Reports of*

Judgments and Decisions 1996-III; *Kearns v. France*, no. 35991/04, § 79, 10 January 2008; *R. and H. v. the United Kingdom*, no. 35348/06, §§ 73 and 81, 31 May 2011; and *Y.C. v. the United Kingdom*, no. 4547/10, § 134, 13 March 2012).

In identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and second, it is in the child's best interests to ensure his development in a safe and secure environment (see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 136, ECHR 2010; and *R. and H. v. the United Kingdom*, cited above, §§ 73-74).

While it is not for the Court to substitute its own assessment for that of the domestic courts with respect to measures concerning children, it must satisfy itself that the decision-making process leading to the adoption of such measures by the domestic courts was fair and allowed those concerned to present their case fully, and that the best interests of the child were defended (see *Neulinger and Shuruk*, cited above, § 139, and *X v. Latvia* [GC], no. 27853/09, § 102, ECHR 2013). We consider that when assessing an application for a child's placement for adoption, the courts must not only examine whether the removal of the child from the persons acting as his or her parents would be in his or her best interests, but must also make a ruling giving specific reasons in the light of the circumstances of the case (see, *mutatis mutandis*, with respect to the decision on an application for a child's return under the Hague Convention on the Civil Aspects of International Child Abduction, *X v. Latvia*, cited above, § 107).

7. In order to verify whether the interference with the applicants' right to respect for their family life, that is, the removal of the child from them, is compatible with Article 8 of the Convention, it is important to note which justification was actually given by the domestic authorities for the interference in question.

In this respect, we note a significant difference between the reasons given by the Campobasso Minors Court and the Campobasso Court of Appeal.

The Minors Court, acting upon an application for urgent measures by the Public Prosecutor, based its decision of 20 October 2011 on the need to prevent an unlawful situation from continuing. The unlawfulness consisted in the breach of two laws. Firstly, by bringing a baby to Italy and passing him off as their own son, the applicants had blatantly infringed the provisions of the Adoption Act (Law no. 184 of 4 May 1983) governing inter-country adoption of children; in any event, the applicants had intentionally evaded the provisions of that Law which provided that the intended adoptive parents had to apply to an authorised body (section 31) and which provided for the involvement of the Commission for Inter-country Adoption (section 38). Secondly, in so far as the agreement entered

into between the first applicant and the company Rosjurconsulting provided for the delivery of the second applicant's genetic material for the fertilisation of another woman's ovules, it was in breach on the ban on the use of assisted reproductive technology of a heterologous type laid down by section 4 of the Medically Assisted Reproduction Act (Law no. 40 of 19 February 2004). The reaction to this unlawful situation was twofold: removal of the child from the applicants and the child's placement in an appropriate structure with a view to identifying a suitable foster couple (see paragraph 37 of the present judgment).

The Court of Appeal dismissed the applicants' appeal on 28 February 2012, but on the basis of a different reasoning. It did not state that the applicants had been in an unlawful situation and that there had been a need to put an end to it. Rather, it held that the child was in a "state of abandonment" in the sense of section 8 of Law no. 184 of 4 May 1983, since he did not receive moral and physical care from his "natural family". This state of abandonment justified the measures taken by the Minors Court, which were of an interlocutory and urgent nature. The Court of Appeal noted that these measures were in line with what would appear to be the outcome of the proceedings on the merits of the Public Prosecutor's application, namely a declaration to make the child eventually available for adoption (see paragraph 40 of the present judgment).

In our opinion, it is primarily, if not exclusively, the reasoning of the Court of Appeal that should be taken into account when examining the justification for the removal of the child from the applicants. Indeed, it is the Court of Appeal that took the final decision, thereby substituting its reasons for those of the Minors Court. Moreover, while the Minors Court first and foremost disapproved the conduct of the applicants and therefore sanctioned them, the Court of Appeal started its analysis on the basis of an assessment of the interests of the child, which is as such the correct approach in cases like the present one (see paragraph 6 above).

Finally, we observe that the majority in their examination of the justification of the interference do not explicitly refer to the decisions taken by the courts in the proceedings relating to the applicants' challenge against the Registry Office's refusal to enter the Russian birth certificate in the civil-status register, in particular the judgment of the Court of Appeal of Campobasso of 3 April 2013 (see paragraphs 47-48 of the present judgment). For that reason, we will also refrain from including the reasoning of the latter court in our analysis.

8. The first question to be examined is whether the interference, that is the removal of the child from the applicants, was in accordance with the law.

Having regard to the reasons given by the Court of Appeal in its judgment of 28 February 2012, we conclude that the removal was based on section 8 of the Adoption Act, which provides that a minor can be declared

available for adoption if he or she is in a state of abandonment in the sense of being deprived of all emotional or material support from the parents or the members of his or her family. Since the applicants were not considered by the court to be the parents, the child was considered to be in a state of abandonment, and therefore declared available for adoption.

We are aware that it is for the domestic courts to interpret and apply domestic law (see paragraph 169 of the judgment). Nevertheless, we cannot but express our surprise as to the finding that the child, who was cared for by a couple that fully assumed the role of parents, was declared to be in a state of "abandonment". If the only reason for such a finding was that the applicants were not, legally speaking, the parents, then we wonder whether the domestic courts' reasoning is not excessively formal, in a manner that is incompatible with the requirements stemming from Article 8 of the Convention in such cases (see paragraph 6 above).

We will not, however, develop this argument further. Even assuming that the interference was in accordance with the law, it cannot, in our opinion, be justified, for the reasons developed below.

9. The next question is whether the interference pursued a legitimate aim.

We note that the Court of Appeal based its decision on the child's removal on the state of abandonment in which the child allegedly found himself. It can be argued that it thus took the impugned measure in order to protect "the rights and freedoms of others", namely the rights of the child.

The majority accept that the measure also pursued another aim, namely that of "preventing disorder". They, like the Chamber, refer to the fact that the applicants' conduct ran counter to the Adoption Act and the Italian prohibition on heterologous artificial reproduction techniques (see paragraph 177 of the judgment). We respectfully disagree. It was only the Minors Court, that is, the first-instance court, which relied on the parents' unlawful conduct; the Court of Appeal refrained from using the possibility of declaring a child available for adoption as a sanction against the applicants.

10. Finally, the question has to be answered whether the interference was necessary, in a democratic society, in order to achieve the aim pursued.

We agree with the majority that this requirement implies, first, that the reasons adduced to justify the impugned measure were relevant and sufficient (see paragraph 179 of the judgment), and secondly, that the measure was proportionate to the aim pursued or that a fair balance was struck between the competing interests (see paragraph 181 of the judgment).

11. Our disagreement with the majority relates to the application of the principles to the facts of the present case.

It is obvious that the assessment of the necessity condition depends largely on which specific legitimate aims are identified as those being pursued by the relevant authorities. As indicated above, we believe that the

Court of Appeal's justification for the child's removal was the situation of that child. By contrast, the majority not only take into account the reasons given by the Minors Court (the illegal situation created by the applicants), but even, following the Government's argument, consider the wider context of the prohibition on surrogacy arrangements under Italian law (on the latter point, see paragraph 203 of the judgment). We believe that the specific facts of the present case, and in particular the judgments handed down by the domestic authorities, do not warrant such a broad approach, in which sensitive policy considerations may play an important role.

We do not intend to express any opinion on the prohibition of surrogacy arrangements under Italian law. It is for the Italian legislature to state the Italian policy on this matter. However, Italian law does not have extraterritorial effects. Where a couple has managed to enter into a surrogacy agreement abroad and to obtain from a mother living abroad a baby, which subsequently is brought legally into Italy, it is the factual situation in Italy stemming from these earlier events in another country that should guide the relevant Italian authorities in their reaction to that situation. In this respect, we have some difficulty with the majority's view that the legislature's reasons for prohibiting surrogacy arrangements are of relevance in respect of measures taken to discourage Italian citizens from having recourse abroad to practices which are forbidden on Italian territory (see paragraph 203 of the judgment). In our opinion, the relevance of these reasons becomes less clear when a situation has been created abroad which, as such, cannot have violated Italian law. In this respect, it is also important to note that the situation created by the applicants in Russia was initially recognised and formalised by the Italian authorities through the consulate in Moscow (see paragraph 17 of the judgment).

12. Whatever the reasons advanced to justify the removal of the child from the applicants, we cannot agree with the majority's conclusion that the Italian courts struck a fair balance between the various interests at stake.

With respect to the public interests at stake, we have already explained that, in our opinion, too much weight has been attached to the need to put an end to an illegal situation (in view of the laws on inter-country child adoption and on the use of assisted reproductive technology) and the need to discourage Italian citizens from having recourse abroad to practices which are forbidden in Italy. These interests were simply not those that the Court of Appeal sought to pursue.

With respect to the interest of the child, we have already noted that we are surprised by the characterisation given to the child's situation as one of being in a "state of abandonment". At no point did the courts ask themselves whether it would have been in the child's interest to remain with the persons who had assumed the role of his parents. The removal was based on purely legal grounds. Facts came into play only to assess whether the consequences of the removal, once decided, would not be too harsh for

the child. We consider that in these circumstances it cannot be said that the domestic courts sufficiently addressed the impact that the removal would have on the child's well-being. This is a serious omission, given that any such measure should take the best interest of the child into account (see paragraph 6 above).

With regard to the interests of the applicants, we believe that their interest in continuing to develop their relationship with a child whose parents they wished to be (see paragraph 211 of the judgment) has not been sufficiently taken into account. This is particularly true for the Minors Court. We cannot agree with the majority's accommodating reference to that court's suggestion that the applicants were fulfilling a "narcissistic desire" or "exorcising an individual or joint problem", and to its doubts about the applicants' "genuine affective and educational abilities" and "instinct of human solidarity" (see paragraph 207 of the judgment). We find that such assessments were of a speculative nature and should not have guided the Minors Court in its examination of the Public Prosecutor's request for urgent measures.

Apart from this treatment by the Minors Court, which seems to have been corrected by the more neutral approach of the Court of Appeal, we would like to recall that the applicants had been assessed as fit to adopt on 7 December 2006, when they received the authorisation to adopt from the Minors Court (see paragraph 10 of the judgment), and that a court-appointed team of social workers in a report of 18 May 2011 had found that the applicants cared for the child "to the highest standards" (see paragraph 25 of the judgment). These positive assessments were not contradicted on the basis of a serious assessment of the best interests of the child, but rather swept away in the light of more abstract and general considerations.

Moreover, as the majority admit, the courts did not address the impact which the immediate and irreversible separation from the child would have on the applicants (see paragraph 211 of the judgment). We find this a serious shortcoming, which cannot be justified by the majority's consideration that the applicants' conduct was illegal and their relationship with the child precarious (ibid.). The mere fact that the domestic courts did not find it necessary to discuss the impact on the applicants of the removal of a child who was the specific subject of their parental project demonstrates, in our opinion, that they were not really seeking to strike a fair balance between the applicants' interests and any opposing interests, whatever these might have been.

13. Having regard to the above, we are therefore, like the Chamber, not convinced that the elements on which the courts relied in concluding that the child ought to be removed from the applicants and taken into the care of the social services were sufficient to conclude that these measures were not disproportionate (see the judgment of the Chamber, § 86).

In our opinion, it has not been shown that the Italian authorities struck the fair balance that had to be maintained between the competing interests at stake.