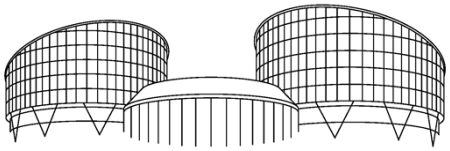

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF A.M. v. NORWAY

(Application no. 30254/18)

JUDGMENT

Art 8 • Art 14 (+ Art 8) • Private life applicable • Lack of legal recognition of parenthood to intended mother with no biological ties to a child born through a gestational surrogacy arrangement abroad • Meticulous balancing exercise between all conflicting interests at stake, including general interests protected by ban on surrogacy • Margin of appreciation not overstepped • No issue of discrimination

STRASBOURG

24 March 2022

FINAL

24/06/2022

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of A.M. v. Norway,

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

Síofra O'Leary, *President,*
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia,
Ivana Jelić,
Arnfinn Bårdsen,
Mattias Guyomar, *judges,*
and Victor Soloveytchik, *Section Registrar*,

Having regard to:

the application (no. 30254/18) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Norwegian national, Ms A.M. ("the applicant"), on 19 June 2018;

the decision to give notice to the Norwegian Government ("the Government") of the complaints concerning Articles 8 and 14 of the Convention;

the decision not to have the applicant's name disclosed;

the parties' observations;

the written comments received from the AIRE Centre (Advice on Individual Rights in Europe), which had been granted leave to intervene as a third party in the proceedings in accordance with Article 36 § 2 of the Convention

Having deliberated in private on 14 September 2021 and 1 February 2022,

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

INTRODUCTION

1. The application concerns complaints under Articles 8 and 14 of the Convention relating to proceedings between the applicant and her ex-partner, and proceedings against relevant administrative decisions, concerning parental rights in respect of a child born by way of gestational surrogacy.

THE FACTS

2. The applicant was born in 1962 and lives in Oslo. She was represented before the Court by Mr K.S.S. Andresen, a lawyer practising in Oslo.

3. The Government were represented by their Agent, Mr M. Emberland of the Attorney General's Office (Civil Matters), assisted by Ms I. Hjort Kraby and Mr H. Vaaler, attorneys at the same office.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND

5. The applicant moved in with E.B. in 2002. After a while, they wanted to have a child and their attempts at conceiving naturally did not succeed, nor did several attempts at *in vitro* fertilisation or egg donation. In 2010 they were in contact with a company based in the United States of America with a view to trying to become parents through surrogacy. A first attempt with a potential surrogate mother did not succeed.

6. The relationship between the applicant and E.B. gradually deteriorated and in September 2012, E.B. moved out. The two nonetheless remained in contact about the surrogacy process in the United States and the applicant contacted a US-based law group with a view to making a new attempt at completing a pregnancy with the help of a surrogate mother. In that connection, the applicant and E.B. signed agreements regulating their relationship with the clinic and the biological mother. They also retained legal assistance from another US-based law group, the International Fertility Law Group (IFLG).

7. By early 2013 the relationship between the applicant and E.B. was definitely over. E.B. bought a new flat and started a relationship with a different partner. The applicant and E.B. still continued their surrogacy cooperation, and another attempt was carried out in March 2013 but was unsuccessful.

8. In May 2013 E.B. had a new blood sample taken in connection with another planned attempt, and thereafter he signed an informed consent form for frozen embryo transfer, dated 28 June 2013.

9. On 21 July 2013 a fertilised donor egg was successfully transferred to a surrogate mother and the parties subsequently received confirmation of the pregnancy in August 2013.

10. The applicant and E.B. instructed the IFLG to make sure that the applicant was recognised as the child's legal mother in the United States. This resulted in the lodging of an application before the District Court of Bexar County, Texas, which gave a ruling on 10 January 2014. The ruling, which became final and enforceable in Texas, recognised the surrogacy agreement as lawful under Texan law, and stated that the applicant was deemed to be the legal mother under Texan law.

11. The child ("X") was born on 19 March 2014 in the United States. E.B.'s sperm had been implanted in an egg donated by an unknown woman. Another American woman gave birth to the child. The applicant was registered as X's mother on the birth certificate, in line with the ruling from the District Court of Bexar County.

12. The applicant and E.B. each rented a flat in the USA following the birth. X stayed with the applicant while E.B. visited daily. No information has been provided as to on what basis X travelled and entered into Norway. Upon their entry there, X stayed with the applicant while E.B. visited daily.

13. On 14 May 2014 the Norwegian Labour and Welfare Administration accepted E.B.'s acknowledgment of paternity of X pursuant to section 7 of the Children Act (see paragraph 94 below). There is no information provided to indicate that changes have been made to the US birth certificate (see paragraph 11 above).

14. On 16 May 2014 the applicant and E.B., having been unable to agree on how to organise daily care and contact in respect of X, signed an agreement which stated that they had a shared responsibility for caring for and raising X, but that they disagreed on where he was to live until a shared arrangement (50/50) could be established and that they would seek advice from a third party to clarify and reach an agreement on this issue.

15. During the subsequent period, X was moved between the applicant and E.B. every day so that he was with each of them for an equal amount of time. This arrangement continued after he started kindergarten in 2015.

16. In a letter of 27 May 2014 the Tax Directorate (*Skattedirektoratet*) stated that, in accordance with an agreement on parental responsibilities in respect of X entered into by the woman who had given birth to him and by E.B., the latter had been registered as having sole parental responsibilities. It was further emphasised that, whereas the birth certificate listed the applicant as X's mother, section 2 of the Children Act (see paragraph 94 below) provided that the woman who had given birth to a child was to be regarded as the mother, and accordingly the applicant could not be registered in the National Population Register as X's mother in the absence of a valid adoption of him. It was stated that until any such adoption, K.J. would be registered as mother.

17. On 6 June 2014 E.B.'s mother sent a notification of concern about X (*bekymringsmelding*) to the child welfare services, which subsequently held several meetings with the applicant and E.B.

18. E.B.'s new partner became pregnant around the end of 2014 or the start of 2015. During that same period, the applicant and E.B. were advised by the child welfare services that the twenty-four-hour-cycle arrangement (see paragraph 15 above) was not in X's best interests. The applicant and E.B. nevertheless continued the arrangement, and it appears from the record of a meeting with the child welfare services on 28 April 2015 that the child welfare services expressed a sceptical attitude about the arrangement. They raised the question of whether the arrangement was intended to continue until X began to show signs of not tolerating it, which could take the form of an attachment disorder. They moreover said that the arrangement had to be regarded as particularly stressful for X because he was starting kindergarten. The possibility of a different arrangement was discussed, and at the meeting the applicant and E.B. drew up a proposal for a new contact arrangement that they would be testing in practice, based on visits every other weekend and during forty-eight-hour periods.

19. On 29 May 2015 a meeting was held between the child welfare services, the applicant, E.B. and E.B.'s new partner. The record of the meeting noted, among other things, that E.B. would prefer that X live permanently with him but that he would agree to the applicant having slightly more contact with X than would be normal in an arrangement of this kind. According to the record, the child welfare services stated that they saw it as unrealistic to achieve better cooperation between the applicant and E.B. as long as they were unable to agree on important issues concerning their rights in relation to X.

20. The record of the meeting concluded by noting that the child welfare services expressed concern that X's caregivers had been unable to agree on contact arrangements that were acceptable to both of them. The child welfare services said, moreover, that they expected the applicant and E.B. to come up with a solution shortly and that they needed to understand that they would not agree, but had to compromise, since they held such strongly diverging views on the contact arrangements. The child welfare services also said that concerns expressed by X's kindergarten had to be taken seriously and meant that the applicant and E.B. could not put off the decision; it was hoped that they would reach an agreement. In the child welfare services' view it would be naïve to think that letting time pass would lead to an agreement and they referred to the fact that X would become a big brother in August, which was a big transition for a small child; therefore, they expected the applicant and E.B. to have foreseeable arrangements in place before then.

21. A new meeting was scheduled for two weeks later with a view to arriving at a new contact arrangement. The applicant and E.B. failed to reach an agreement and the applicant sought legal assistance. This led to correspondence which did not reduce the level of conflict or bring matters any closer to an agreement on X's situation.

22. In an email of 5 August 2015, E.B. sent the applicant a plan for the contact arrangements in respect of X, but no agreement was reached.

23. On 12 August 2015 a situation arose when E.B. had thought that the parties were supposed to meet at the kindergarten at 9 a.m. in connection with X starting his period of adjustment to kindergarten, but the applicant arrived somewhat later, which led to an exchange of views by email.

24. On 14 August 2015 E.B. decided to cut off further contact between the applicant and X, and X since lived with E.B.

II. THE ADMINISTRATIVE PROCEEDINGS CONCERNING RECOGNITION OF MATERNITY OR ADOPTION

25. On 26 August 2015 the applicant applied to the Offices for Children, Youth and Family Affairs (*Barne-, ungdoms- og familieetaten*) for recognition of her maternity of X or, in the alternative, adoption. On 7 September 2015 the Offices for Children, Youth and Family Affairs sent

the applicant a letter with information about the relevant rules and indicated that those rules did not allow her application to be granted. On 23 September 2015 the applicant replied that she upheld her application and argued that the provisions of domestic law ran counter to the Convention and the United Nations Convention on the Rights of the Child (UNCRC).

26. On 1 October 2015 the Offices for Children, Youth and Family Affairs decided on the applicant's application of 26 August 2015 (see paragraph 25 above). The application was dismissed. The temporary Surrogacy Act of 2013 (see paragraph 97 below) did not apply in the applicant's case, since the time-limit for filing applications had lapsed. Nor did the provisions of the Adoption Act apply. A stepparent-adoption under section 5b of the Adoption Act could in any event not be carried out as child already had two parents, namely E.B., the biological father, and the woman who had given birth to X (see paragraph 95 below). The applicant had not applied for a normal adoption under Article 7 of the Adoption Act, which would entail that E.B. would lose his parenthood.

27. In a decision of 27 November 2015, on an appeal by the applicant, the Directorate for Children, Youth and Family Affairs (*Barne-, ungdoms- og familiedirektoratet*) found that the applicant's application submitted to the Offices for Children, Youth and Family Affairs on 26 August 2015 (see paragraph 25 above) could not be approved and thus upheld the decision. It stated, among other things, that pursuant to section 7 of the Adoption Act (see paragraph 95 below), it was a condition for adoption that the persons with parental responsibilities in respect of the child in question consented to the adoption, and in the instant case, E.B. had not consented. In response to submissions filed by the applicant, the Directorate also stated that it did not find that the requirement of parental consent for adoption was in contravention of fundamental human rights or that the decision entailed unfair discrimination against the applicant.

III. REQUEST FOR INTERIM MEASURE AGAINST E.B.

28. On 26 August 2015, the applicant had also applied to the Asker and Bærum District Court (*tingrett*) for an interim decision granting her rights to contact with X.

29. On 22 September 2015 the Asker and Bærum District Court dismissed the applicant's application for an interim decision granting her contact rights in respect of X. The applicant appealed against that decision but her appeal was dismissed by the Borgarting High Court (*lagmannsrett*) on 14 December 2015. A further appeal by the applicant to the Supreme Court (*Høyesterett*) was dismissed on 7 March 2016.

IV. THE DOMESTIC PROCEEDINGS

A. The proceedings before the City Court

30. On 25 April 2016 the applicant applied to the Oslo City Court (*tingrett*) for a judgment declaring that E.B. and the Norwegian government were obliged to recognise her as X's mother. In so far as the application was directed at the Government, she also argued that the decision given by the Directorate for Children, Youth and Family Affairs on 27 November 2015 (see paragraph 27 above) was invalid. In so far as the application was directed at E.B., she argued in the alternative that she had a right to contact with X.

31. In a judgment of 8 November 2016, delivered after a hearing over three days at which seven witnesses, in addition to the applicant and E.B., gave evidence, the Oslo City Court stated at the outset that surrogacy was an arrangement whereby a woman gave birth to a child for another person or persons. In the case before it, a surrogate mother in the United States had become pregnant after sperm donated by E.B. had been used to fertilise an egg from an anonymous egg donor by means of *in vitro* fertilisation, and the embryo had then been implanted in the surrogate mother's uterus. In such cases, the party that had no genetic or biological connection to the child was often referred to as the intended or social parent.

32. The Oslo City Court further stated that the type of surrogacy at issue in the case before it was illegal in Norway. It was nonetheless a fact that some Norwegian nationals travelled to other countries to have a child through surrogacy, as E.B. and the applicant had done. The fact that surrogacy was not legal in Norway did not according to the City Court deny the child and the social parent the possibility of achieving a safe legal framework for their relationship. However, it was clear that complicated legal and practical issues could arise in some cases, for example concerning the establishment and transfer of parentage, parental responsibility, citizenship, issuing of passports and immigration. The fact that at least two countries' legal systems were involved could give rise to conflict between the legal rules of different countries, which further complicated the matter. If a conflict arose between the biological parent and the intended parent before the intended parent's legal relationship with the child had been established, the conflict became even more complex.

33. The Oslo City Court went on to note that, in the case before it, E.B. and the applicant had completed a surrogacy process in the United States despite the fact that their relationship had ended by the time the embryo was implanted in the surrogate mother. The relationship between them had been strained throughout the pregnancy, and when X was born, they had failed to agree on how they were to resolve the fact that they did not live together and were no longer a couple. After X was born, they had not managed to agree on

where his permanent home should be, or on the scope of the access arrangement.

34. The principal issue in the case before the Oslo City Court was whether the applicant had a legal right to be recognised by the Norwegian State and E.B. as X's legal mother, in the same way as if she had been his biological mother. The outcome of this assessment would be of great importance to X. Reference was made to the second and third paragraphs of Article 104 of the Constitution (see paragraph 93 below), which was said to be in accordance with Norway's international obligations under the United Nations Convention on the Rights of the Child and the Convention. The City Court thus stated it had taken that provision into account as an overriding consideration in all aspects of its case processing, and that it followed from the City Court's concluding remarks how it had taken the child's best interests into consideration in its concrete assessment of the key disputed issues in the particular case before it.

35. The Oslo City Court also noted that the case concerned matters of legal parentage status, and that public considerations applied. It had therefore based its decision on the fact that the dispute concerned a case where public considerations limited the parties' rights of disposition pursuant to the Dispute Act. That meant that the City Court had a special responsibility for elucidating the case and that it was only bound by the parties' procedural actions insofar as they were compatible with public considerations. The City Court also remarked that the applicant's claim in the case raised both procedural and substantive questions, which it would discuss both in relation to the State and in relation to E.B.

1. Whether the applicant was entitled to be recognised as X's mother

36. Starting with the questions that arose in relation to the Children Act and the Adoption Act, the Oslo City Court stated that E.B. was X's biological and legal father and had the sole parental responsibility for him. This was not disputed.

37. Section 2 of the Children Act (see paragraph 94 below) stated that, under Norwegian law, the woman who had given birth to a child was regarded as that child's mother. This was the American surrogate mother K.J. The applicant had no genetic or biological relationship with X and in principle no legal relationship with him under Norwegian law.

38. There was no legal authority in the Children Act for a social mother in a surrogacy relationship to have legal maternity transferred from the biological mother to herself. The applicant's desire to become X's parent could, in principle and under prevailing law only be achieved through adoption, which was probably the most common procedure in cases where the biological parent and the social parent lived together and wished to raise the child together. Where no such agreement existed, permission for adoption

could not be granted. The Oslo City Court referred at this point to section 7 of the Adoption Act (see paragraph 95 below).

39. Given that E.B. did not consent to adoption, the applicant could not adopt X, and, in the Oslo City Court's view, the general provision on consent set out in section 7 of the Adoption Act was not in contravention of overriding rules concerning the best interests of the child. It stated that, normally, it was seldom in the child's best interests to let a person adopt the child against the will of the person with parental responsibility. This had also been discussed in a report on a proposed new act relating to adoption, where it was stated that the requirement of consent would be maintained, along with other conditions for adoption, including that the parties have a shared wish to raise the child together. It was also a fundamental condition for all adoptions that the adoption would serve the best interests of the child. The City Court considered that the rules that applied at the time and that were also proposed in the said report, were normally in the best interests of the child and not in violation of the Constitution or any international conventions by which Norway was bound. The requirement of consent for adoption could also be found in the legislation of most European countries. In conclusion thus far, the City Court could not see that the outcome under prevailing law or the proposals set out in the said report were in contravention of the best interests of the child in the specific dispute before it.

40. Turning to the temporary Surrogacy Act (see paragraphs 97-97 below), the applicant had argued before the City Court that that act, or the considerations on which it had been based, had vested her with a legal right to have the maternity in respect of X transferred to her. The Government and E.B. had contested that argument.

41. Initially on that point, the City Court referred to how the temporary Surrogacy Act, for a limited period, had allowed social parents the possibility of, on certain terms, establishing legal parentage on a par with the biological parent, so that the child no longer had any legal relationship with the surrogate mother.

42. What had occasioned the temporary Surrogacy Act had partly been that some couples who had had a child with the help of a surrogate abroad had received incorrect or incomplete information from Norwegian authorities, and partly that some couples had not familiarised themselves properly with the applicable legislation. With the help of the temporary Surrogacy Act, children born into an unclear legal position had received legal recognition and regulation of the relationship between the social parent and the child.

43. The Oslo City Court went on to state that the temporary Surrogacy Act had not provided for a legal right to be recognised as a legal parent. The transfer of parentage had been conditional on an assessment of whether the conditions of the temporary Surrogacy Act were met. It had followed from

the first paragraph of section 2 of that Act that the social parent had been entitled to apply for parenthood (see paragraph 97 below).

44. Furthermore, it had been expressly regulated in the temporary Surrogacy Act and clearly stated in its preparatory works that it was temporary. Section 5 had set out that it had entered into force immediately and was repealed on 31 December 2015. It also followed from section 4 that applications had had to be submitted by 1 January 2014 (see paragraph 97 below).

45. Regarding the temporary Surrogacy Act's relevance to the decision to be taken in the case before the Oslo City Court, that court considered it, in principle, sufficient to refer to the fact that the applicant had not submitted an application within the deadline. The City Court nonetheless added that it seemed unlikely that a claim from the applicant would have succeeded under the temporary Surrogacy Act. Its section 2 had required that applicants had to document that the child's father and they had had a shared wish to raise the child together (see paragraph 97 below). At the time that the egg had been fertilised and the embryo implanted in the case before the City Court, the parties had no longer been in a relationship, and the applicant had known that E.B. had started or was in the process of starting a relationship with H. It was not obvious to the City Court that this had been a situation in which the conditions of the temporary Surrogacy Act would have been met. In the City Court's view, it was more accurate to say that the parties had had a shared wish of becoming parents through surrogacy, but that they had not had a clear idea about how and under which circumstances the child would be raised, in a situation where their relationship had ended and E.B. was in a new relationship. According to the City Court, one could just as easily claim that the parties had had a shared wish of raising the child separately, not together. Section 1 of the temporary Surrogacy Act had stated that the main objective was the best interests of the child, and it was not a given that the public administration would see the transferring of parentage to the applicant under the circumstances in her case as a realisation of this objective.

46. In conclusion under this point, the City Court mentioned that there was no basis for claiming that the uncertainty regarding prevailing law that had occasioned the temporary Surrogacy Act applied to the case before it. The applicant and E.B. were both lawyers, and the City Court assumed that they both knew that the Act would not be applicable to them.

47. The applicant's main claim lodged with the City Court was that the decision of 27 November 2015 by the Directorate for Children, Youth and Family Affairs (see paragraph 27 above) had been based on an incorrect application of the law. It followed from what the City Court had already stated it considered that the application of the law in the decision had been correct, and it referred to its preceding discussions.

2. The City Court's assessment of the question of discrimination

48. Furthermore, the applicant had had argued that the decision constituted unfair discrimination. The Oslo City Court found that that argument clearly could not succeed either. As far as the City Court could see, the application had been treated in the same way as other applications for adoption. The fact that the outcome of the applicant's case differed from cases considered under the temporary Surrogacy Act was in the City Court's assessment obviously based on reasonable considerations. It was not unreasonable of the public administration to apply prevailing law. The City Court could not see any other reasons to deem the decision invalid, and referred in that context to the discussion below about the best interests of the child.

49. The Oslo City Court went on to state that in the introduction to its judgment, it had referred to the general significance of taking the best interests of the child into consideration when making decisions that concern children. In its concluding part, the City Court would comment on the significance of taking the child's best interests into consideration in the particular case before it.

50. In the Oslo City Court's view, the rules that governed the application of the law in the case before it, which were primarily section 2 of the Children Act (see paragraph 94 below), the provisions of the Adoption Act (see paragraph 95 below) and the Dispute Act (see paragraph 100 below), were not in themselves inconsistent with provisions with higher rank concerning the best interests of the child. The question was then whether the outcome that followed from prevailing law had to yield because the best interests of the child in the case before it indicated a different result. In the City Court's view, this was not the situation at hand.

51. In that connection the Oslo City Court first stated that the best interests of the child was not an objective entity, and frequently not unambiguous. It was often based on more or less uncertain ideas about future development based on a past that was a matter of dispute. The parties typically had quite diverging views of what would serve the best interests of the child in a specific case, and there could be good child welfare arguments for different results. This was often the case in parental disputes concerning living and access arrangements, and it was then up to the courts to balance conflicting considerations against each other. In cases of such nature, the outcome was often the result of a specific assessment. It could not be ruled out that the best interests of the child was a decisive argument in cases that had a bearing on the relationship between parents and children. When, for example, a child had a long-standing attachment to the social parent, the child's right to a family life, and the best interests of the child, could be the decisive factor. This had been the issue in the Court's cases of *Mennesson v. France* (no. 65192/11, ECHR 2014 (extracts)) and *Labassee v. France* (no. 65941/11, 26 June 2014). In other respects, the judgments adopted in those cases were not relevant to

the case before the City Court because they differed on significant points. The Oslo City Court also stated that a previous judgment from a Norwegian court (a judgment from the Gulating High Court given on 2 March 2009 in an unrelated case) differed from the case now before it on significant points, and was also not suited to provide guidance of importance to the application of the law in the case before it. The Court observes that the Borgarting High Court on appeal later gave a more detailed explanation as to why also that court considered that that previous judgment from the Gulating High Court could not provide guidance to the applicant's case, including that it had been a matter of a couple married and living together when the child was born; the judgment had not been followed up in later cases, and legislation had since been enacted (see paragraph 71 below).

52. The Oslo City Court went on to state that X was too young to form an informed opinion about what constituted his best interests. In the case before it, the City Court had been guided by the view that the outcome should contribute to reducing the risk that the choices E.B. and the applicant had already made on X's behalf would cause him harm in the future. The City Court's point of departure in that assessment was X's situation at the time of its judgment.

53. In that connection, it noted that the situation from shortly after X was born and up until August 2015 had entailed daily moves between E.B.'s and the applicant's home. The level of conflict had been constant, and rising during the period, which did not make for a good care situation. The Oslo City Court endorsed the child welfare service's assessments on this point.

54. Furthermore, the Oslo City Court stated that, regardless of what the applicant and others could think about E.B.'s choice to cut off contact between the applicant and X in August 2015, it seemed as though X had been living in a safe, adequate environment since then, with E.B. as his father, H. as his stepmother, and with his half-sibling and other family members.

55. It seemed clear to the Oslo City Court that the applicant, considered in isolation, had everything necessary to offer X a good and safe relationship, and it was also clear to it that it could be difficult for X to find out that the applicant was his intended mother. In the City Court's view, those were not sufficient grounds for taking the risk of going back to a situation characterised by conflict between E.B. and the applicant. There was good reason to assume that such an outcome would lead to a higher risk of role confusion and a conflict of loyalty for X as he would grow up.

56. Following an overall assessment, the Oslo City Court could not see that considerations of X's best interests indicated a different result than what followed from prevailing law.

3. The applicant's claim for contact rights

57. As to the applicant's alternative claim that she be given contact rights even in the event that she was not recognised as X's mother, the Oslo City

Court noted that granting such rights would require a formal legal basis, as a decision to that effect would interfere with the rights belonging to X as well as X's father. There were no provisions in domestic law that gave a legal basis to grant contact rights to a person in the applicant's position. While one could imagine situations where such a right could be established because it would be necessary to protect a child's best interests, for example where a break-up happened after such a long time that the child's attachment indicated that continued contact was necessary, the instant case was not of that type.

B. The proceedings before the High Court

58. The applicant appealed against the City Court's judgment. It reads in the appeal that the applicant agreed with the City Court that were she acknowledged as X's mother, which was her principal claim, she would also thereby gain a right to contact. In addition, she lodged a separate claim that the courts declare that she held contact rights. Furthermore, she upheld the claim that she would have a right to contact regardless of the question of recognition as mother.

59. The Borgarting High Court held a hearing over three days, at which six witnesses, in addition to the applicant and E.B., gave evidence. In its judgment of 12 October 2017, the High Court dismissed the appeal.

1. Whether the applicant was entitled to be recognised as X's mother

60. The Borgarting High Court stated at the outset that the case concerned the question of whether the applicant was entitled to be recognised as the mother of a child who was the result of an embryo created using sperm from E.B. and an egg donated by an unknown woman, which had then been implanted in the surrogate mother K.J. in accordance with a surrogacy agreement between K.J. and her husband J.J., and the applicant and E.B.

61. Furthermore, the Borgarting High Court remarked that egg donation and the use of a surrogate mother was illegal in Norway. This was evident from the first paragraph of section 2-15 of the Biotechnology Act (see paragraph 96 below). The second paragraph of section 2 of the Children Act (see paragraph 94 below) clarified and supplemented the prohibition in the Biotechnology Act. This meant that domestic surrogacy agreements were invalid. In the case before the High Court, the child had been born to a surrogate mother in the United States based on a surrogacy agreement that the applicant and E.B. had entered into there.

62. The Borgarting High Court noted that it followed directly from the first paragraph of section 2 of the Children Act (see paragraph 94 below) who the mother of a child was. That provision was based on a purely biological principle and gave decisive weight to the fact that the woman had given birth to the child. Reference was on this point made to a doctrinal work in which it was stated that the first paragraph of section 2 applied to all cases where the

question of maternity was determined pursuant to Norwegian law. As regarded cases where the child was a result of assisted reproduction abroad using eggs from another woman, it had been stated in the said work that it was still the woman who had given birth to the child who was the child's legal mother. The High Court further stated that the second paragraph of section 2 maintained the provision set out in the first paragraph concerning who was the child's legal mother and in the doctrinal work it had been stated that that paragraph entailed that the other woman (i.e. the donor) could not make a claim for the child pursuant to the agreement. As to the case before it, the Borgarting High Court stated that it had been surrogate mother K.J. who had given birth to X and she was therefore registered as the child's mother pursuant to the first paragraph of section 2 of the Children Act.

63. The Borgarting High Court went on to note that, pursuant to section 3 of the Children Act (see paragraph 94 below), the man to whom the mother was married at the time of the child's birth was to be regarded as the father of the child. According to the applicable law it was therefore K.J.'s husband, J.J., who was X's father. However, section 7 of the Children Act contained provisions on the possibility of contesting paternity if another man declared paternity to the child. In the case before it, E.B.'s declaration of paternity had been approved by K.J. and J.J., and following a DNA analysis the Norwegian authorities had recognised E.B. as X's father with sole parental responsibility.

64. Under Norwegian law, maternity could also be established by granting an official permission for adoption (an adoption order). Adoption required in accordance with section 7 of the Adoption Act (see paragraph 95 below) the consent of the parent who had parental responsibility for the child. Section 5b of the Adoption Act, which concerned stepparent-adoption, also set out the condition that the person with parental responsibility for the child had to consent to adoption.

65. Furthermore, pursuant to the third paragraph of section 5b of the Adoption Act, a stepparent could, subject to the consent of his or her former spouse or cohabitant, adopt former stepchildren following a divorce or breakdown of the relationship with the child's parent (see paragraph 95 below). That provision only applied when parentage had been established for one of the parents only, which meant that it was applicable in cases where the child had been conceived using sperm from an unknown donor. The provision did not apply in cases where the child had been born to a surrogate mother abroad and lived with his or her legal father. In such cases, parentage had already been established for both of the child's parents – the legal father and the surrogate mother.

66. The Borgarting High Court noted that in a Norwegian Official Report ((NOU) 2014: 9) on a proposed new act relating to adoption, a committee (the Adoption Act Committee) had proposed to expand the right to adopt stepchildren following the breakdown of a relationship to include cases where two parents had established parentage of the child. In the committee's

opinion, the arguments in favour of expanding the right to stepparent-adoption were also relevant in cases concerning adoption after surrogacy. The committee had therefore proposed to give the intended parent the same possibility as a stepparent to adopt a child following a breakdown of the relationship with the child's biological parent. It had been proposed to include a separate provision on stepchild adoption in order to regulate the conditions for adoption in these cases.

67. The committee's proposal had been rejected, however. In that context, the Borgarting High Court referred to statements by the Ministry of Children and Equality to the effect that the proposal had raised conflicting considerations that had to be weighed against each other. The Ministry had taken note that, through its proposal, the Adoption Act Committee had waned to highlight the distinction from normal stepparent-adoption and set more narrow conditions for the use of stepparent-adoption following assisted reproduction. The Ministry considered that a separate provision on adoption could lead to greater predictability in such cases. Important considerations spoke against introducing such a provision, however. The use of surrogacy raised difficult questions, both ethical and legal ones. Enshrining such a provision in law could according to the Ministry send unfortunate signals and be perceived as legitimising surrogacy and forms of assisted reproduction that were prohibited in Norway. The Ministry had also noted that the Hague Conference on Private International Law was preparing rules for private international law and the legal status of children with connections to more than one state, including children born through international surrogacy. Norway was a member of the Hague Conference, and introducing legislation in the field before this work had been concluded would therefore in the Ministry's assessment be unfortunate. In an evaluation of the Biotechnology Act of May 2015, the Norwegian Biotechnology Advisory Board had recommended a prohibition against commercial surrogacy. Moreover, the Ministry of Health and Care Services was working on a white paper evaluating the Biotechnology Act. For those reasons the Ministry of Children and Equality had decided not to pursue the Adoption Act Committee's proposal for a separate provision on stepchild adoption in connection with surrogacy.

68. Upon the above, the Borgarting High Court remarked that the legislature had thus considered whether the right to stepparent-adoption should be expanded to include cases of surrogacy, but had concluded that no such provision should be enshrined in Norwegian law. On that basis, the High Court concluded that, under Norwegian law, maternity could only be established by the woman giving birth to the child herself or by permission being granted for adoption. As to the case before it, the applicant had not given birth to X, nor had she been granted permission for adoption.

69. The Borgarting High Court added that the temporary Surrogacy Act of 8 March 2013 – which had by the time of its judgment been repealed –

could not form a basis for recognising the applicant as the mother. It stated that, during a brief period, the temporary Surrogacy Act had provided for the possibility of transferring parentage on certain terms. Among other things, the applicants for such transfer had had to document in accordance with section 2 of the Act that the child's father and the applicant had a shared wish to raise the child together (see paragraph 97 below). The High Court remarked that, in the case before it, the situation had not been that the applicant and E.B. were to raise the child together. The surrogacy agreement had been entered into after their relationship had ended, and the plan, even before the child was born, had been to live apart. Moreover, pursuant to section 4 of the temporary Surrogacy Act, an application for parentage had had to be submitted by 1 January 2014. X was born after that date. The High Court also endorsed the Oslo City Court's assessment on this point, and could not see that the temporary Surrogacy Act could be given any weight in the present case.

70. The Borgarting High Court went on to note that the applicant had been designated as "the legal parent" in an order issued by a district court in Texas. She had argued that a provision of the Dispute Act had provided a legal basis for recognising her status as mother from the United States. The Borgarting High Court found that the argument could not succeed, as the conditions in the Dispute Act for making a foreign court decision legally enforceable in Norway were not met in the case. Notably, according to section 11-4 there were limitations as to which procedural agreements could validly be entered into in cases concerning the legal status of children and in the instant case, though it had been stated in the surrogacy agreement that the parties submitted to the jurisdiction of the courts of the State of Texas, E.B. had in any event been barred from entering into a valid agreement that would limit the jurisdiction of the Norwegian courts.

71. The Borgarting High Court also found that the judgment by the Gulating High Court of 2 March 2009 (see paragraph 51 above), which had been relied on by the applicant, could not lead to any other result. It had concerned a different factual situation and could not be compared to the case before the Borgarting High Court. In particular, the Borgarting High Court referred to the fact that the parties that had appeared before the Gulating High Court had been married and living together when the child in that case was born. Both had been parties to proceedings in the United States, which had led to the adoption of a judgment there. Moreover, the judgment by the Gulating High Court had not been followed up in later cases. Parliament had also made new decisions about the matters subsequent to that judgment and new legislation had since been enacted.

72. Before the Borgarting High Court the applicant had invoked in particular that her status as mother in the United States had to be recognised in Norway under provisions with higher rank than the Dispute Act, the Children Act and the Adoption Act. Refusing recognition of the United States

court decision would according to the applicant be in contravention of the United Nations Convention on the Rights of the Child, the Convention and the Constitution. In her opinion, those sources of law had to be given independent significance in the application of Norwegian national law. She had argued that neither the Dispute Act, the Children Act nor the Adoption Act could be interpreted to mean that Norwegian legal provisions prevented recognition of the United States court decision. Moreover, she had maintained that the best interests of the child were the fundamental point of departure under the Convention on the Rights of the Child, the Constitution and the Children Act.

73. The Borgarting High Court found in response that none of the international conventions to which the applicant had referred provided an independent basis for her claim for maternity. In the High Court's view, the application of the law in the case before it – which was based on the provisions of the Children Act and the Adoption Act – was not in contravention of the Constitution, the Convention or the Convention on the Rights of the Child. The High Court agreed with the Government that the said conventions could not be a factor in the interpretation when applying the provisions of Norwegian law. As had been argued by the Government, the Norwegian rules were unequivocal and not in contravention of conventions by which Norway was bound.

74. In the case before the Borgarting High Court, the question was whether the applicant should be recognised as a parent, and she had specified herself that this was a question concerning the best interests of the child at a general level. In the High Court's view, the country's legislative authority was competent to adopt rules for this.

75. The Borgarting High Court stated in that connection that the Children Act was based on the best interests of the child and pointed to its section 48 (see paragraph 94 below). Referring to a doctrinal work, the High Court noted, *inter alia*, that section 48 was the manifestation of a value that would have a bearing on the application of the law over and above Chapter 7 of the Children Act. The High Court further noted that the Adoption Act was also based on the best interests of the child and referred to its section 2 (see paragraph 95 below), which, as had been pointed out in doctrine, had to be understood on the basis of Article 21 of the United Nations Convention on the Rights of the Child.

76. In the Borgarting High Court's view, the fundamental consideration relating to the best interests of the child was adequately safeguarded through the relevant provisions of Norwegian law. The applicant had argued that it was also in the child's best interests to have two parents from birth on, and that having the intended mother as X's legal and actual mother was the best thing for him. She had maintained that it was a fundamental part of a child's identity to know who the intended mother was in surrogacy cases and made

reference to Article 8 of the United Nations Convention on the Rights of the Child.

77. In response, the Borgarting High Court remarked that, in surrogacy cases the child had two biological parents from birth on, namely the surrogate mother and the legal father. The child's biological parents were known, and the child's right to know its biological origin and identity was therefore safeguarded. As the High Court had already explained earlier in its judgment, the legislature had considered and explicitly decided against parentage for the intended parent in surrogacy cases. In the High Court's view, this was not in contravention of the child's best interests.

78. Nor did the Borgarting High Court find that the right to respect for private and family life pursuant to Article 8 of the Convention and Article 102 of the Constitution had been violated. The Convention did not give intended parents an independent basis for establishing parentage or family life. The Court's judgments pronounced on 26 June 2014 in the cases of *Mennesson* and *Labassee*, both cited above, had concerned a different situation than that which was before the High Court. In the case of *Mennesson*, the Court had concluded that there had been no violation of the right to family life or the intended parents' right to private life. The only right violated had been the child's right to respect for private life. The intended parents in that case had been married when the surrogacy agreement was entered into and when the US court decision that recognised them as parents was pronounced. They were still married when the Court pronounced judgment in the case – 14 years later. The facts of that case were thus in the High Court's view in any event different from those in the situation before it.

79. The Borgarting High Court stated, furthermore, that under any circumstances, there could not be any doubt that any interference with the applicant's right to private and family life pursued a legitimate aim. Legal authority for the interference was provided by section 2 of the Children Act and section 13 of the Adoption Act (see paragraphs 94 and 95 below) and the measure was proportionate.

80. Moreover, the Borgarting High Court agreed with the State that the applicant could not invoke X's rights under the Convention. X had a biological and legal father who safeguarded his rights through his paternity and parental responsibility. It was thus E.B. who was in a position to invoke X's rights under the Convention. Reference was made to section 16 of the Guardianship Act, the Dispute Act and the Convention.

81. In the Borgarting High Court's view, a decision from the German Supreme Court, to which the applicant had made reference, could not be given weight in the case before it. It was a matter of a decision from another country and which concerned a case in which the parties had still lived together when the surrogacy agreement had been entered into.

82. Based on the above, the Borgarting High Court concluded that neither the State nor E.B. was obliged to recognise the applicant as X's mother.

83. The Borgarting High Court went on to note that the applicant's application for adoption and transfer of maternity had received a final rejection with the Directorate for Children, Youth and Family Affairs's decision of 27 November 2015 (see paragraph 27 above). The applicant had submitted a claim for a judgment stating that that decision was invalid, as she had argued that it had been based on an incorrect understanding of the law. The High Court disagreed with her. It found that the decision had been based on a correct application of the law. It referred to its understanding of the law previously stated in the judgement and to section 7 of the Adoption Act (see paragraph 95 below). The High Court stated that that provision with regard to adoption set out an unconditional requirement for consent from the person with parental responsibility for the child. In the High Court's view, that requirement for parental consent could not be deemed to be in contravention of the child's best interests. It was stated in that contest that Article 21 of the United Nations Convention on the Rights of the Child also contained rules concerning consent in connection with adoption. In the case before it, E.B. had the parental responsibility, and he had not consented to adoption.

84. On the basis of the above, the Borgarting High Court concluded that the Directorate for Children, Youth and Family Affairs's decision of 27 November 2015 (see paragraph 27 above) was valid.

2. The High Court's assessment of the question of discrimination

85. Nor could the Borgarting High Court see any grounds for the applicant's claim that she had been the victim of unfair discrimination by the public administration. The decision showed that the public administration had relied on prevailing law. As regarded the temporary Surrogacy Act of 2013 (see paragraphs 97-97 below), the Offices for Children, Youth and Family Affairs had not had any authority to consider applications submitted after the statutory deadline. As had been pointed out by the Government before the High Court, the applicant's situation could not under any circumstances be compared with the special situation that had formed the basis for Parliament, through the temporary Surrogacy Act, providing for the possibility of considering applications for transfer of parentage for a small group of children in Norway who had been born to a surrogate mother abroad.

3. The applicant's claim for contact rights

86. The applicant had lodged an alternative claim that she – regardless of whether she was recognised as X's mother in Norway – had a right to contact with the child as a consequence of her American motherhood and the mother-child relationship between them. She had referred to the United Nations Convention on the Rights of the Child, particularly its Articles 3 and 8, Article 8 of the Convention, Articles 102 and 104 of the Constitution and the principle in section 45 of the Children Act (see paragraphs 93 and 94 below).

87. The Borgarting High Court did not find basis for applying the principle reflected in section 45 of the Children Act to the case before it. On the contrary, it agreed with the Government that the applicant's claim for contact was in contradiction to that provision. Section 45 concerned contact rights for others than the child's parents. As had been noted in doctrine, the Children Act was reluctant to opening for such rights; it was only possible in two situations, where a parent had either died or been refused contact rights. In such situations, grandparents could be granted contact rights instead. The legislature had on several occasions considered whether the group of persons who could be granted contact rights should be expanded, but had not found grounds for doing so.

88. In the Borgarting High Court's view, neither the United Nations Convention on the Rights of the Child nor Articles 102 and 104 of the Constitution could lead to another result (see paragraph 93 below). In the High Court's assessment, general considerations about the child's best interests could not establish contact arrangements where it did not have any basis in the law. As had been pointed out by the Government before the High Court, a claim for contact for other persons than those mentioned in section 45 of the Children Act had to be voluntary or based on agreement with the persons having the parental responsibility for the child.

89. The Borgarting High Court stated that it was not aware of any judgments of the Court that granted contact rights in respect of children born via surrogacy. The Court's judgment in *Paradiso and Campanelli*, cited above, indicated, as the Government had argued, that the Court had been reluctant to give intended parents rights to children born via surrogacy.

90. The applicant's alternative claim concerning contact could therefore not succeed, either.

C. The proceedings before the Supreme Court

91. On 10 November 2017 the applicant lodged an appeal against the Borgarting High Court's judgment. In the appeal the applicant claimed that the State and E.B. be obliged to recognise her as X's mother in Norway and that the Directorate for Children, Youth and Family Affairs' decision of 27 November 2015 (see paragraph 27 above) was invalid. The question of the applicant's right to contact with X was not brought before the Supreme Court and was accordingly finally settled with the Borgarting High Court's judgment.

92. On 21 December 2017 the Supreme Court, in a summary decision, refused the applicant leave to appeal against the Borgarting High Court's judgment.

RELEVANT LEGAL FRAMEWORK

93. Articles 102 and 104 of the Norwegian Constitution of 17 May 1814 (*Grunnloven*), as revised in May 2014, reads as follows:

Article 102

"Everyone has the right to respect for their privacy and family life, their home and their communication. Searches of private homes shall not be made except in criminal cases. The authorities of the State shall ensure the protection of personal integrity."

Article 104

"Children have the right to respect for their human dignity. They have the right to be heard in questions that concern them, and due weight shall be attached to their views in accordance with their age and development.

For actions and decisions that affect children, the best interests of the child shall be a fundamental consideration.

Children have the right to protection of their personal integrity. The authorities of the state shall create conditions that facilitate the child's development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family."

94. The Children Act of 8 April 1981 (*barneloven*) includes the following relevant provisions:

Section 2. Maternity

"The woman who has given birth to the child shall be regarded as the mother of the child.

An agreement to give birth to a child for another woman is not binding."

Section 3. Paternity or co-maternity following from marriage

"The man to whom the mother is married at the time of the child's birth shall be regarded as the father of the child.

The woman to whom the mother is married at the time of the child's birth, when the child was conceived by means of assisted fertilisation provided by an approved health service and with the woman's consent to the fertilisation, shall be regarded as the co-mother of the child. In assisted fertilisation provided by an approved health service outside Norway, the identity of the sperm donor must be known.

If the spouses were separated by licence or judgment at the time of the birth, the first and second paragraphs shall not apply.

If the mother is a widow, her late spouse shall be regarded as the father or co-mother if it is possible that the mother may have conceived prior to the death of the spouse."

Section 7. Contestation of paternity pursuant to sections 3 and 4 if another man declares paternity

"Paternity pursuant to section 3 or section 4 may be contested if another man declares paternity pursuant to section 4, provided that the declaration is accepted in writing by the mother and the person who has been regarded as the father. However, such a declaration is only valid if the Norwegian Labour and Welfare Administration finds that it is proven by a DNA analysis that the man declaring paternity is the father of the child. If a child has reached the age of 18, paternity may not be contested pursuant to this section without the consent of the child."

Section 45. Right of access for persons other than the parents

"When one or both of the parents are deceased, relatives of the child or other persons who are close to the child may request the court to determine whether they shall have right of access to the child, and the extent of such access.

In cases concerning right of access between the parents, a parent who has been denied access may request that the decision-making body (court) determine whether his or her parents shall have access to the child and the extent of such access. Access for grandparents may only be determined on condition that the person who is denied access is not allowed to be with the child.

The provisions of chapter 7 apply also to these cases. The parties are not required to have attended mediation before bringing the action."

Section 48. The best interests of the child

"Decisions on parental responsibility, international relocation, custody and access, and procedure in such matters, shall first and foremost have regard for the best interests of the child.

..."

95. Section 2, the third paragraph of section 5b, the first paragraph of section 7, and section 13 of the Adoption Act of 28 February 1986 (*adopsjonsloven*), as in force at the relevant time, read as follows:

Section 2

"An adoption order shall only be given when it may be assumed that adoption is in the child's best interests. It is, moreover, required that the person who applies for adoption either wishes to bring up the child or has brought up the child, or there are other particular grounds for the adoption."

Section 5b

"A divorced spouse or registered partner may, with the consent of the former spouse or registered partner, adopt the latter's child. This only applies where one parental relationship has been established with the child, and the parent concerned is divorced from the person who is applying for adoption. A corresponding right applies to cohabitants when the cohabitation relationship has been dissolved."

Section 7

"A child under 18 years of age may not be adopted without consent from the person or persons holding the parental responsibilities. If either of them has disappeared or suffers from mental disorders or mental impairment, consent from the appointed guardian is required."

Section 13

"On adoption, the adopted child and his or her heirs of the body shall have the same legal status as if the adopted child had been the adoptive parents' biological child, unless otherwise provided by section 14 or another statute. At the same time, the child's legal relationship to his or her original family shall cease, unless otherwise provided by special statute.

If a spouse or cohabitant has adopted a child of the other spouse or cohabitant, the said child shall have the same legal status in relation to both spouses or cohabitants as if he or she were their joint child. The same applies to children adopted pursuant to section 5 b, second, third and fourth paragraphs."

96. The first paragraph of section 2-15 of the Biotechnology Act of 15 December 2003 (*bioteknologiloven*) read at the time of the facts of the instant case as follows:

§ 2-15. Use and implantation of embryos

"Embryos may only be used for implantation into the woman from whom the oocytes originate. ..."

97. On 30 March 2002 the Ministry of Children and Equality instituted a public consultation on a proposal to adopt a temporary act relating to surrogacy arrangements that had been carried out abroad. In the subsequent preparatory work on what became the temporary Surrogacy Act (Bill no. 47 (2012-2013)) it was stated, among other things, that during assessments of how to deal with the fact that some Norwegians effectuated surrogacy agreements abroad, it had been discovered that registrations of parenthood had been erroneously made in the National Population Register. It was also emphasised that a broader assessment of the questions that surrogacy abroad gave rise to was underway and that the temporary solutions proposed should not make create a precedent with regard to that work.

98. A temporary Surrogacy Act on the transfer of parenthood for children in Norway born to a surrogate mother abroad (*surrogatiloven*) was then passed on 8 March 2013 with effect until 31 December 2015. Pursuant to the Act, current and former partners of the legal father who had entered into a surrogacy agreement with the surrogate mother together with the father could apply for parenthood. It was stated in the Act that the applicant had to provide documentary evidence that the child's father and the applicant had a shared wish to bring up the child together and the applications had to be lodged by 1 January 2014 at the latest.

99. The Norwegian legislature has since debated whether to legalise surrogacy, but has not done so. In a report to Parliament of 16 June 2017 (*Meld. St.* no. 39 (2016-2017)) the Government stated that, while surrogacy should remain prohibited, criminal liability should also remain reserved to those facilitating surrogacy services, and not the persons who had availed themselves of such, *inter alia*, as punishing the parents could have an impact on the child in question. Jurisdictional issues with regard to the fact that surrogacy agreements would be effectuated abroad were also taken note of. The Parliamentary Committee in the *Stortinget* stated, *inter alia*, the following in its subsequent recommandation to Parliament (*Innst.* no. 273 (2017-2018)):

> "The Committee agrees with the government and with the majority of the Biotechnology Advisory Board that surrogacy should still be prohibited in Norway. The Committee, like the government, believes that it is not ethically acceptable that pregnancy and childbirth can be considered an act that can be performed in return for payment. A pregnancy cannot be compared to work, and the female body is not a tool that should be accessible to others. The Committee would point out that 'non-commercial' surrogacy can also be problematic because the limits of volunteerism can be stretched by [not only] economic, but also emotional and social necessity. The Committee points out that both pregnancy and childbirth involve mental, emotional and physical stress. Biological factors make the emotional and physiological link between the woman who becomes pregnant and delivers the child, and the child. The Committee believes that the ethical, existential, emotional and legal challenges, as well as costs, of surrogacy are too great for surrogacy to be allowed in Norway."

100. Sections 4-6, 11-4 and 19-16 of the Dispute Act of 17 June 2005 (*tvisteloven*) read as follows:

> **Section 4-6. Agreed venue**
>
> "(1) An action may be filed with the court agreed upon by the parties. Such an agreement may either exclude or supplement the venues stipulated in Sections 4-3 to 4-5.
>
> (2) An agreement that broadens or limits the international jurisdiction of the Norwegian courts must be in writing. ..."

> **Section 11-4. Exceptions when the right of disposition of the parties is limited.**
>
> "In cases relating to matters of personal status and legal capacity, the legal status of children pursuant to the Children Act, administrative decisions on coercive measures pursuant to Chapter 36 and other cases where public considerations limit the parties' rights of disposition in the action, the court is only bound by the parties' procedural actions to the extent that these are compatible with public considerations. However, the court may only rule on the claims that are made in the case."

> **Section 19-16. The legal force of foreign rulings**
>
> "(1) Civil claims that have been decided in a foreign state by way of a final and enforceable ruling passed by that state's courts or administrative authorities or by way of arbitration or in-court settlement, shall also be legally enforceable in Norway to the extent provided by statute or agreement with the said state. The Lugano Convention

2007 applies as law, cf. Section 4-8. Judgments that do not need to be recognised or enforced pursuant to Article 61 of the Lugano Convention 2007 do not have legal effect and executory force in the Kingdom.

(2) Final and enforceable rulings on civil claims rendered by a foreign court shall be final and enforceable in Norway if jurisdiction has been agreed pursuant to Section 4-6 for a specific action or for actions that arise out of a particular legal circumstance.

(3) Rulings referred to in subsections (1) and (2) shall not be recognised if such recognition would be contrary to mandatory laws or be offensive to the legal order."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

101. The applicant complained that the domestic authorities' not having granted her contact rights in respect of X or recognised her as X's mother either by acknowledging the birth certificate issued in the United States or by approving her requests for parenthood had amounted to a violation of her right to respect for her private and family life as provided in Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Non-exhaustion

102. The Government in their observations submitted that the applicant had not exhausted domestic remedies with regard to her request to be given a right to contact with X, an issue which she had raised before the City Court and the High Court but had not included in her appeal to the Supreme Court.

103. The applicant responded that she had not specifically pursued her request to be given a right to contact with X as it had only formed part of her application to be recognised as X's mother.

104. The Court notes that the question of the applicant's right to contact with X was the object of a separate application before the two first levels of domestic court (see paragraphs 30, 57, 58 and 86-90 above). As no claim relating to contact was included in the applicant's appeal to the Supreme Court (see paragraph 91 above), her complaint lodged with the Court under Article 8 of the Convention must be declared inadmissible for non-exhaustion in so far as it must be construed as a complaint that the authorities did not

enable her to have continued contact with X regardless of the issue of her recognition as X's mother.

105. It follows that the complaint under Article 8 of the Convention in so far as it concerns the above must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

2. Applicability ratione materiae

(a) The parties' submissions

106. The Government submitted that there had not been any *de facto* family life between the applicant and X. They pointed out that the applicant and X had spent approximately eight months together, similar to the applicants in *Paradiso and Campanelli v. Italy* ([GC], no. 25358/12, §§ 142-58, 24 January 2017), where the Court had concluded that no family life had been at issue. Moreover, unlike the applicants in *Paradiso and Campanelli*, the applicant in the present case had not thought that she was X's biological mother; she had not lived with X's biological father; she had not developed any "parental project" *vis-à-vis* X; and there had been no uncertainty about her legal ties to X – the applicant had chosen to engage in conduct contrary to Norwegian law and to settle in Norway. In so far as there were no biological ties and in the light of the fact that the applicant, X and E.B. had never lived together, nor had the applicant and E.B. had any intention to live together or raise X together, the Government also asserted that no private life had been at issue.

107. The applicant maintained that Article 8 of the Convention was applicable in her case.

(b) The Court's assessment

108. The Court observes that both during the weeks in the United States following X's birth on 19 March 2014 and in the time following their return to Norway, X stayed with the applicant while E.B. visited daily (see paragraph 12 above). From mid-May 2014 X stayed half of the time with the applicant and half of the time with E.B. (see paragraphs 15 and 18 above), until E.B. cut off contact between the applicant and X on 14 August 2015 (see paragraph 24 above). To the Court it is apparent that the applicant acted as a mother for X during this time, with the intention that she would continue to do so in the future. The Court also presumes that the applicant and X must have forged close emotional bonds during the time they spent together until E.B. stopped their contact, at which time X was 17 months old.

109. At the same time the Court notes that the surrogacy project was legally precarious with regard to what would be the applicant's formal position vis-à-vis X in Norway. What is to be examined by the Court in the instant case is the respondent State's lack of a recognition of the applicant's parenthood, including that the applicant could not adopt X since his father,

E.B., did not consent: the Court is not called to examine the fact that contact was cut off between the applicant and X, which was a decision that had been made by E.B., or the fact that the authorities did not, at the applicant's request, re-establish contact following E.B.'s decision, a matter which the applicant did not pursue before the Supreme Court (see paragraph 104 above). That is so even though the applicant's claim relating to legal recognition of her status as X's mother was lodged in that context and would, had it been successful, enabled her to claim contact, as the applicant had also stated in her appeal to the Borgarting High Court (see paragraph 58 above).

110. It is accordingly the lack of legal recognition of the applicant as X's mother as such which is principally at issue before the Court. In this respect, the Court notes that in its case-law relating to gestational surrogacy, it has generally approached the rights under Article 8 of the Convention of children born out of surrogacy arrangements from the perspective of the "private life" limb of that article (see, for example, *D v. France*, no. 11288/18, § 41, 16 July 2020) as well as finding that the legal position of the intended parents will, depending on the facts of a given case, principally concern matters relating to "private life" (see, *mutatis mutandis*, *Paradiso and Campanelli*, cited above, § 163). Moreover, the Court bears in mind that it has held 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 (see *Paradiso and Campanelli,* cited above, § 161). Proceeding on the basis that the case concerns "private" rather than "family" life thus does not entail that the Court will not take into account the actual bonds that had been created between the applicant and X.

111. On the basis of the above, the Court concludes that Article 8 of the Convention is applicable *ratione materiae* on the grounds that the matters complained of related to the applicant's "private life". There is no need to examine whether the "family life"-limb could also be engaged.

3. The Court's conclusion on admissibility

112. The Court has found above that the complaint under Article 8 of the Convention in so far as it concerns the applicant not having been given any right to contact with X is inadmissible due to non-exhaustion (see paragraphs 102-105). Moreover, it has found that the facts fall within the material scope of Article 8 of the Convention on the grounds that the applicant's private life was at issue. Furthermore, the Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other remaining ground listed in Article 35 of the Convention. In so far as it concerns the fact that the applicant was not recognised as X's mother by the domestic authorities, it must therefore be declared admissible.

B. Merits

1. The parties' and third party's submissions

113. The applicant submitted that it appeared from various documents in the present case that both E.B. and the woman who had given birth to X had recognised the applicant as the mother of X. The applicant maintained that at the time when E.B. had decided that X was no longer to meet her, the relationship between her and X as parent and child had become a practical reality, yet she had not been provided with any effective mechanism enabling that relationship to be recognised.

114. Furthermore, the applicant pointed to the fact that a different Norwegian High Court, in another case in 2009, had held that an intended mother was entitled to the full recognition of her legal US parenthood (see paragraph 51 above).

115. The Government submitted, as to proportionality, that the Court had thus far never held that any rights belonging to intended parents had been violated in cases relating to gestational surrogacy. Moreover, the instant case was not one in which the respondent State had directly interfered in any relationship between the applicant and X. It had been the biological and legal father's decision to stop any interaction between the applicant and X and the applicant was effectively arguing that the respondent State had been obliged to interfere in the family life of E.B., and potentially that of E.B.'s partner, to facilitate the creation of a legal bond between her and X, which she had participated in making by way of a contract, in violation of domestic law. The applicant had been fully aware of the legal circumstances.

116. Furthermore, the Government argued that the domestic decisions had been based on a concrete assessment of X's best interests. They had not left X without biological or legal parents, nor had they deprived him of the knowledge of his identity. Significant public interests had also weighed against the applicant's application for adoption since surrogacy remained illegal under the domestic law.

117. The Government submitted that the judgment given by the Gulating High Court in 2009 (see paragraph 51 above) had concerned different circumstances. Among other things, that case had concerned a dispute between the parties to an agreement that they had all applied to have acknowledged in the United States, whereas in the present case, an "order" from a court was at issue in a case where only the applicant was listed as a party. Moreover, the State had not been party to the case before the Gulating High Court in 2009 and the relevant provision in domestic law with regard to the recognition of judgments from foreign jurisdictions had not been addressed in that case.

118. The AIRE Centre, third-party intervener, submitted that, in reaching a conclusion about the recognition of legal parentage in surrogacy cases, the best interests of the child always had to be accorded the primacy required by

the UNCRC, and in particular by Article 3 of that instrument as elucidated in General Comment no. 14 (2013). The Court had to take this approach under Article 53 of the Convention. They further submitted that, if it was accepted that the recognition of the legal parentage of the intended parents in surrogacy cases was analogous to cases of adoption, then the appropriate UNCRC standard (Article 21) was paramountcy.

2. The Court's assessment

(a) Interference

119. The Court observes at the outset that the complaint under Article 8 of the Convention is formally limited to the allegation that there has been an interference with the applicant's rights – as opposed to X's own rights under the same provision (see, in contrast, for example *Mennesson*, cited above).

120. Furthermore, the Court reiterates that it has in its case-law generally considered that not enabling a legal recognition of parenthood for intended parents to surrogacy agreements amounts to "interference" with the intended parent's right to respect for his or her private life and that cases such as the present are accordingly to be examined from the perspective of a negative rather than a positive obligation (see, similarly, *Mennesson*, cited above, §§ 48-49). It proceeds on the same basis in the instant case and reiterates that the applicable principles regarding justification under Article 8 § 2 of the Convention are in any case broadly similar for both analytical approaches (see, for example, *S.H. and Others v. Austria* [GC], no. 57813/00, §§ 87-88, ECHR 2011).

121. The Court emphasises that the foregoing does not mean that it does not form a relevant point to it that the authorities did not act to remove X from the applicant, but had effectively been called upon to take decisions that in the circumstances of the case were linked to a dispute between the applicant and E.B. following E.B.'s decision to keep X and stop his contact with the applicant. The Court considers however that those aspects form part of the proportionality assessment.

(b) Lawfulness and legitimate aim

122. An interference with an applicant's right to respect for his or her private life will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of that provision 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.

123. The Court does not find that it can be called into question that the domestic proceedings, ending with the Supreme Court's decision to refuse the applicant leave to appeal against the Borgarting High Court's judgment (see paragraph 92 above), and the substantive decisions taken therein had a

basis in the Children Act, the Adoption Act and the Dispute Act (see paragraphs 94, 95 and 100 above) and were in accordance with the law. It takes note that the parties are in agreement on that point.

124. Furthermore, the Court finds that the proceedings pursued the legitimate aims of protecting "the rights of others", in particular X, and preventing "disorder or crime" in accordance with the second paragraph of Article 8 of the Convention. The Court observes that the lack of recognition of parenthood on the basis of the surrogacy agreement was linked to the prohibition against surrogacy in Norway to which there was also criminal liability attached, though not for the persons availing themselves of surrogacy services (see paragraph 99 above). The Court also notes in this respect that it has previously held that it regards as legitimate under Article 8 § 2 the domestic authorities' wish to reaffirm the State's exclusive competence to recognise a legal parent-child relationship with a view to protecting children (see *Paradiso and Campanelli*, cited above, § 177). It notes that neither party has argued otherwise on this point, either.

125. The remaining question is whether the proceedings and the decisions adopted therein were "necessary in a democratic society" under the second paragraph of Article 8 of the Convention.

(c) Necessary in a democratic society

126. The Court refers to the general considerations stated in *Mennesson* (cited above, §§ 75-86) and *Labassee* (cited above, §§ 55-65). It also refers to the principles set out in *Paradiso and Campanelli* (cited above, §§ 179-84) and in its *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* ([GC], request no. P16-2018-001, French Court of Cassation, 10 April 2019), though it emphasises that the latter did not deal with the issue of intended parents' rights (see § 30 of the opinion).

127. As to the facts, the Court first reiterates that, in contrast to what was the topic of the advisory opinion cited in the preceding paragraph, the application in the instant case does not relate to any rights of the child, X, under Article 8 of the Convention: the Court is called upon to examine solely the complaints raised by the applicant on her own behalf (see, similarly, *Paradiso and Campanelli*, cited above, § 135, and in contrast also *Mennesson*, cited above, §§ 96-102, and *Labassee*, cited above, §§ 75-81).

128. Moreover, the Court reiterates, as it considers it important for its assessment of the proportionality, that the question of contact rights for the applicant in respect of X is not to be examined on the merits (see paragraphs 102-105 above). It is accordingly only the questions relating to the legal recognition of parenthood, including that the applicant could not adopt X without E.B.'s consent, that are to be considered, not the fact that no measures

were at the applicant's request taken by the authorities in order to assure continued contact between her and X (see, also, paragraph 109 above).

129. As to the rules on parenthood and adoption, the Court notes that at the time when the applicant entered into the surrogacy agreement in 2012, when X was born in 2014, and when E.B. cut off the contact between the applicant and X in 2015 and the applicant first applied for parenthood to the administrative authorities and later instituted the proceedings brought before the Court in 2016 (see paragraphs 6, 11, 24, 25 and 30 above), the domestic legislation did not open for any recognition of the applicant's parenthood in respect of X in any other manner than by way of a transfer through adoption, which would, *inter alia*, require consent from the person holding the parental responsibilities in respect of him, which E.B. did not give. While the Court does not call into question that the applicant could not reasonably have foreseen that E.B., who had been a party to the surrogacy agreement with her, would cut off contact between her and X, the applicant did not argue that the domestic rules as such had been unclear or unknown to her. It does not consider that the introduction of the temporary Surrogacy Act in 2013 (see paragraphs 97-97 above) alters that point, in so far as it was expressly adopted as a temporary solution to existing issues relating to the fact that surrogacy arrangements had been carried out by Norwegians abroad.

130. The Court thus accepts that reasons relating to the observance and enforcement of the domestic legislation in the instant case spoke in favour of the Borgarting High Court's not granting the applicant's request to be recognised as X's legal mother contrary to what followed from the domestic law. As is apparent from the later parliamentary debate on whether surrogacy should be legalised, that illegality was due to a choice on ethical grounds and was upheld for the protection of women against exploitation (see paragraph 99 above).

131. In that connection, the Court reiterates that it has acknowledged that the issue of surrogacy raises sensitive ethical questions on which no consensus exists among the Contracting States (see *Paradiso and Campanelli*, cited above, § 203) and has afforded a margin of appreciation to the domestic authorities with regard to this issue (see, for example, *Mennesson*, cited above, § 79). With that as its starting point, the Court cannot find that the rules applied in the instant case would generally pose problems under Article 8 of the Convention or that the respondent State would be in breach of that provision for not having recognised the applicant's parenthood because the surrogacy arrangement had been carried out in the United States and she had been registered as X's parent there (see, *mutatis mutandis*, for example, *D v. France*, cited above, § 71).

132. The Court also cannot consider there to be any issue with the fact that an adoption of a child would as a general rule in domestic law require consent from those that have the parental responsibilities in respect of the child, which in domestic law was a requirement for adoption under section 7

of the Adoption Act as well as for stepparent-adoption under section 5b (see paragraph 95 above).

133. The fact remains that the actual situation for the applicant in the instant case was particularly harsh since E.B. had prevented her from maintaining her relationship with X and essentially put an end to the applicant's parental project in respect of the child after first having been a party to the surrogacy agreement forming the basis for that project together with her; the Court finds it however difficult to attribute this consequence to the authorities. It was not an intervention by the respondent State that had brought to an end the applicant's relationship with X (see, *mutatis mutandis, Valdís Fjölnisdóttir and Others v. Iceland*, no. 71552/17, §§ 71 and 76, 18 May 2021) and the Court observes that the Borgarting High Court carried out a closer examination of whether any rights belonging to the applicant under the Convention required that the domestic legislation not be applied to the particular circumstances of the applicant's case. In that context it examined relevant case-law from the Court (see paragraph 78 above) and whether the child's best interests indicated a different solution from what would follow from applying the Children Act and the Adoption Act on their terms. It concluded that X's best interests did not require that the applicant's claims should be granted (see, *inter alia*, paragraphs 77 and 83 above) and the Court has as such no basis for setting that assessment aside.

134. In addition, the Court takes note that the case, while it was clearly the applicant that had been put in a difficult situation, nonetheless required an examination of the interests of all the parties involved, and to some degree also a balancing of conflicting interests. That balancing exercise was, in the Court's assessment, also meticulously carried out by the Borgarting High Court and the Court finds that the outcome must be considered to fall within the margin of appreciation afforded to domestic authorities in cases such as the present (see paragraph 131 above).

135. On the basis of the above, the Court finds that there has been no violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

136. The applicant complained that the domestic authorities' not having recognised her as X's mother had entailed discrimination contrary to Article 14 of the Convention taken in conjunction with Article 8. Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Admissibility

137. The Government submitted that the case fell outside the ambit of Article 14 of the Convention in so far as they considered that neither private nor family life were at issue.

138. The applicant submitted that Article 14 of the Convention was applicable.

139. The Court has concluded above that there was an interference with the applicant's right to respect for her private life as guaranteed by Article 8 of the Convention (see paragraphs 108-111 and 119-121 above), and it follows that her complaint lodged under Article 14 does not fall outside the ambit of that provision either. Furthermore, the Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' and third party's submissions

140. The applicant relied on two arguments to support her allegation of discrimination. Firstly, she pointed to the temporary Surrogacy Act of 2013, which the Government, in her submission, had misinterpreted. She submitted that the temporary Surrogacy Act would also have applied to persons in her situation because, even though they had not intended to live together, the applicant and E.B. had to be considered to have had an intention to bring up X together. Secondly, she submitted that she had been discriminated against since the person involved in the case before the Gulating High Court in 2009 (see paragraphs 51 and 71 above) had been given parental rights.

141. The Government submitted that the applicant had in any event not been treated differently on account of her status. The temporary Surrogacy Act no longer applied at that time of the relevant facts of her case. Moreover, even assuming the counterfactual situation that it had applied, the applicant would not have been treated differently from any others in a similar situation in so far as the substantive conditions in that Act would not have been met in her case. The Government also maintained that, should one consider there to have been any difference on the grounds of the temporary Surrogacy Act, it would in any event have pursued a legitimate aim and been reasonable, as the temporary Act had been an interim solution to a specific problem that had arisen in connection with children living in Norway whose parentage had been incorrectly registered in the National Population Register. The Government also argued that the case that had been adjudicated by the Gulating High Court in 2009 had not been comparable to that of the applicant. They emphasised that in the judgment from the Gulating High Court, that court had decided to recognise, on the basis of section 19-16 of the Dispute

Act, a judgment from the United States on the basis that the parties before the Gulating High Court had had an agreement that the matter was to be decided by the US court in accordance with section 4-6 of the Dispute Act, as the Gulating High Court had considered that the US judgment did not run counter to the *ordre public.* However, the Gulating High Court had not taken into account that the case had concerned the legal status of a child under the Children Act, and that the parties' had only had limited possibilities to take procedural decisions binding on the courts, as set out in section 11-4 of the Dispute Act. The State had not been a party to that case, unlike what had been the situation in the proceedings in the applicant's case, where that matter had been examined and it had been concluded that a valid agreement to have the matter decided by the court in Texas could not have been entered into.

142. The AIRE Centre, third-party intervener, drew attention to Article 3 of the UNCRC, and submitted that discrimination against the child on the grounds of legal/social parentage fell under the "other status" category in that provision.

2. The Court's assessment

143. The general principles relevant to the Court's assessment of the applicant's complaint under Article 14 of the Convention in conjunction with Article 8 are set out in, among other authorities, *Biao v. Denmark* ([GC], no. 38590/10, §§ 88-90, 24 May 2016).

144. The Court notes that the applicant's principal argument relates to the domestic legislation. However, her argument is not that the rules provided therein made discriminatory distinctions, but that she was in the same position as those who had benefited from the temporary Surrogacy Act at the time when it had applied (see paragraph 97-97 above).

145. In that context, the Court observes that, regardless of whether persons who had benefited from the temporary Surrogacy Act could in principle be appropriate comparators in the light of the fact that the deadline for lodging an application under that Act had lapsed by the time X was born, the Borgarting High Court examined the counterfactual situation that the applicant's case had fallen within the temporal scope of the temporary Act and concluded that she would not, in any event, have met the substantive criteria set therein (see paragraph 69 above). The Court has no basis for calling that conclusion, which relies on an interpretation of the domestic law, into question. The Court notes that the applicant has not argued that the substantive criteria in the temporary Act were in themselves discriminatory.

146. As to the second ground relied on by the applicant with regard to her allegation of discrimination, that is, the Gulating High Court case of 2009, the Court finds it sufficient in the circumstances to note that the domestic authorities in the course of the proceedings complained of pointed out how the facts of that case had concretely been different from those of the applicant's case (see paragraphs 51 and 71 above). The Court does not see

that it can be called into question that the domestic courts provided relevant reasons for distinguishing between the cases and accordingly that the differences in outcome were not due to discrimination. Furthermore, the Court notes that the case before the Gulating High Court had been adjudicated on the basis that the parties before that court had entered into a choice-of-forum agreement designating a court in the United States, whereas the Borgarting High Court in the applicant's case found that, since the case concerned the legal status of a child, an agreement to that effect could not be validly entered into with the consequence that the US court's decision could be recognised as binding on the Norwegian judiciary (see paragraph 70 above).

147. The foregoing considerations are sufficient to enable the Court to conclude that the applicant was not the victim of discrimination. There has accordingly been no violation of Article 14 of the Convention taken in conjunction with Article 8.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaint under Article 8 of the Convention, in so far as it concerns the lack of recognition of the applicant as X's mother, and the complaint under Article 14 taken in conjunction with Article 8, admissible, and the remainder of the application inadmissible;

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

3. *Holds*, by six votes to one, that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

Done in English, and notified in writing on 24 March 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Síofra O'Leary 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 O'Leary;
(b) Dissenting opinion of Judge Jelić.

S.O.L.
V.S.

CONCURRING OPINION OF JUDGE O'LEARY

1. It is not without a degree of concern that I agreed with the Chamber that there has been no violation of Article 8 of the Convention, taken alone and in conjunction with Article 14.

2. The applicant's complaints essentially relate to the refusal by the respondent State to recognise her as the mother of X., a child who is now almost eight, born of a gestational surrogacy arrangement between the applicant, her former partner and a U.S. surrogate mother.

1. Background

3. The facts of the case are outlined in the majority judgment and I will not revisit them in detail. The applicant and her former partner, E.B., had tried unsuccessfully to have a child during their ten-year relationship. Their first attempt, when still a couple in 2010, to have a child via surrogacy failed. They continued their efforts even after the relationship had ended and E.B. had embarked on a new relationship with another woman with whom he would later father a child naturally.

4. X., who was born in the U.S. on 19th March 2014, spent the first months of his life in the care of the applicant and E.B. They then agreed to share the responsibility of caring for and raising him, albeit in their now separate homes. The couple were unable to reach further agreement on the terms of the shared parental arrangement, X. was effectively shuttled from one household to the other on a daily basis and the levels of conflict between the former couple rose to an extent that child welfare services became involved, at the request of the paternal grandmother. In August 2015, E.B., now the father of a second child born that same month to his new partner, unilaterally cut off contact between X. and the applicant.

5. By that time, aged only 17 months, X. had had:

- one biological father (E.B.), whose name featured on the U.S. birth certificate and who was recognised as his father under Texan law; whose name also featured in the Norwegian Population Register; whose paternity had been acknowledged, following a DNA test, pursuant to section 7 of the Children Act and who enjoyed sole parental responsibility under Norwegian law for X.;
- one genetic mother (the anonymous donor of the egg);
- one gestational surrogate mother (K.J.), registered as X.'s mother in the Norwegian Population Register on the basis of section 2 of the Children Act on the grounds that she had given birth to the child;
- a first "social" mother (the applicant), based on the fact that she cared for and raised X. since birth, albeit on the basis of the arrangements outlined above, but who also featured as X.'s legal mother under Texan law and in his

U.S. birth certificate following a successful application by E.B. and the applicant to the District Court in Texas;

- one "legal" father (J.J.), the husband of the surrogate mother K.J., who, by virtue of section 3 of the Children Act, as the man to whom the mother of the child (within the meaning of section 2) was married at the time of the child's birth, was X.'s legal father (until at least the recognition of the paternity of the biological father, E.B.);

- a second "social" mother (H.), who, as E.B.'s partner and the biological mother of his second child, born in August 2015, had presumably also cared for X. when the latter was staying with his biological father and who presumably assumed the role of his maternal carer when contact was cut off between X. and the applicant that same month.

6. Setting out the legal and social consequences for X. of the world into which he was born and raised in the first two years of his life puts into context the challenges facing the applicant. She sought to assert what she considered to be her rights albeit the legal ties between the applicant and X. were uncertain from the outset. This outline also highlights the difficulties facing the Norwegian courts and competent authorities, for which X.'s best interests had to remain of paramount importance.

2. Non-exhaustion and the contact rights complaint

7. Before the domestic courts the applicant sought i) legal recognition of her maternity, ii) adoption of X. in the absence of the consent of his biological father and iii) contact rights with X.

8. It is essential, in my view, to explain why the applicant did not succeed in relation to this third complaint regarding contact rights. Immediately after E.B. terminated contact, the applicant sought an interim decision granting her rights to contact with X. By March 2016 this request had been expeditiously examined but refused by the District, High and Supreme Courts in Norway. The purpose of an interim request of this type is to preserve the status quo if and to the extent possible pending the resolution of a dispute on the merits. It is not indicated on what basis the interim request regarding contact rights was refused. What is clear is that the passage of time can have irremediable consequences for relations between the child and the parent or care-giver with whom it does not live.

9. The applicant did not pursue her contact rights complaint before this Court immediately in 2016 but instead embarked on legal proceedings before the domestic courts in relation to legal recognition of maternity and adoption. In those proceedings the applicant asserted contact rights as part of her request for legal recognition of maternity and/or adoption, but also in addition to and regardless of those separate requests (see § 58 of the Chamber judgment). However, having raised the question of contact rights in her substantive proceedings before the City and High Courts, the applicant did

not pursue this issue before the Supreme Court. As a result, the Chamber judgment rejected unanimously, for non-exhaustion, her claim in relation to contact rights (see §§ 102 – 105 of the Chamber judgment).

10. The Chamber had no other choice in this regard. Had the applicant pursued the contact rights issue, the Chamber would have had to engage with what is probably one of the most difficult aspects of a case such as this case from the perspective of the respondent State, namely the possible legal response when a biological parent unilaterally cuts off all access between a child and a person with whom he sought to "co-parent" the child and who cared for and raised the child since birth (see further below).

3. Legal recognition of maternity and non-consensual adoption by the intended parent

11. As regards the applicant's complaints in relation to the refusal of her requests for recognition of maternity and adoption in the absence of paternal consent, the majority judgment reflects the existing case-law of the Court applied to the quite particular circumstances of the applicant's case.

12. It should first be recalled that the Court has consistently recognised that surrogacy arrangements raise sensitive ethical issues. They may also come into conflict with States' legitimate concerns regarding the protection of children from the risks of abuse which surrogacy arrangements may entail, human trafficking and compliance with the rules on international adoptions. The Court has described these as "very weighty public interests" (see *Paradiso and Campanelli v. Italy* [GC], nº 25358/12, §§ 197 and 204, 24 January 2017 and Advisory Opinion No. P16-2018-001, § 41, 10 April 2019). As indicated in § 124 of the Chamber judgment, "the lack of recognition of parenthood on the basis of the surrogacy agreement was linked to the prohibition against surrogacy in Norway to which there was also criminal liability attached" (albeit no such liability attached to persons like the applicant and E.B. who had recourse to surrogacy). It is entirely legitimate, under the Convention, for a State to seek to deter its nationals from having recourse to methods of assisted reproduction outside the national territory which are prohibited under its own territory (see *Mennesson v. France*, nº 65192/11, § 62, ECHR 2014 (extracts)) The Chamber judgment opted, in accordance with existing case-law, to approach the applicants' complaints via the private life limb of Article 8 and from the perspective of negative obligations. It follows implicitly from the present judgment (§ 111) and explicitly from the judgment in *Valdís Fjölnisdóttir v. Iceland* (nº 71552/17, §§ 56-62, 18 May 2021) that the family life limb of Article 8 might also be engaged in certain circumstances. In cases where what was at issue are the rights of a child born of a surrogacy arrangement, the Court has made clear that the wide margin of appreciation enjoyed by States in relation to the regulation of surrogacy and the recognition of child-parent

relationships, narrows when it comes to assessing alleged interferences with a child's Article 8 rights caused by the lack of formal recognition of his or her family ties (*Mennesson v. France*, cited above; *Labassee v. France*, n° 65941/11, 26 June 2014; *Foulon and Bouvet v. France*, n° 9063/14 and n° 10410/14, 21 July 2016; Advisory Opinion No. P16-2018-001, cited above). In the present case the margin remained wide as it was the former category and interference with the intended mother's rights which was at issue. The rights of X. were not directly before the Court.

13. As more children born of surrogacy arrangements and intended parents have had recourse to domestic courts and this Court the case-law has had to develop. Following, in particular, the aforementioned Advisory Opinion, itself directly related to execution by the French Court of Cassation of the 2014 judgment in *Mennesson*, it has been established that where a child is born through a gestational surrogacy arrangement abroad (as in the present case), and the intended mother is designated in a birth certificate legally established abroad as the "legal mother", the child's right to respect for his or her private life also requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother (Advisory Opinion No. P16-2018-001, cited above, § 46). The choice of means by which to achieve recognition of the legal relationship between the child and the intended mother falls within the State's margin of appreciation. However, once the relationship between the child and the intended mother has become a "practical reality" the procedure laid down to establish recognition of the relationship in domestic law must be capable of being "implemented promptly and efficiently" (Advisory Opinion No. P16-2018-001, cited above, §§ 52, 54-55). It is considered that expecting an intended mother to initiate adoption proceedings in order to be recognised as the legal mother would not impose an excessive burden on children born through a gestational surrogacy (*C. and E. v. France (déc.)*, n° 1462/18 and n° 17348/18, § 43, 19 October 2019; see, however, *D. v. France*, n° 11288/18, 16 July 2020, which involved a genetic mother and therefore one who, like the father, possessed a biological link to the child).

14. So why did this evolving case-law not benefit the applicant? A number of factual and legal characteristics distinguish the case from those just referenced.

15. Firstly, X.'s right to formal recognition of his or her family ties was not before the Court. As his biological father enjoyed sole parental responsibility under Norwegian law the applicant had no legal basis to represent the child's interests before the domestic courts and, consequently, before this Court (see §§ 119 and 127 of the Chamber judgment). The Court's case-law in this field has sought from the outset to place the legal and social interests of the children concerned centre stage and it is clear from the existing case-law that the "living instrument" responds better and more progressively to cases in which the rights of children are involved rather than simply the

rights of legally unrecognised parents, whether intended, non-biological parents or even genetic mothers (see *D. v. France*, cited above). The price the defeated parent pays is very heavy. Few would question, however, the need to maintain the rights of children centre stage; a need about which there is clear national, European and international consensus (see, among other authorities, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, ECHR 2010). That being said, as the child-parent relationship is a two-way street, refusal of recognition of the intended parent clearly has consequences for the rights, interests and social reality of the child as Judge Jelić explains in her dissenting opinion.

16. Secondly, in the cases just cited the "family" or parental units involved remained stable units, such that the intended parent seeking legal recognition of the child-parent relationship was supported by the legally recognised biological parent and could be accommodated somehow within the possibilities for legal recognition provided in existing domestic legal frameworks, not least adoption procedures. However, the applicant asserted her right to adopt X. despite the absence of consent by the other, biological parent. For the Court to endorse the existence of such a unilateral right to adopt under Article 8 would fly in the face of well-established case-law protecting parents and children from non-consensual or unilateral adoption procedures which break *de facto* and *de jure* child-parent bonds (see, for example, on the need for consent in adoption proceedings, *Keegan v. Ireland*, nº 16969/90, 26 May 2004).

17. The development sought by the applicant would also entirely ignore two basic principles which inform all Strasbourg cases involving children:

- the broad consensus, already mentioned above, which in all decisions concerning children their best interests are of paramount importance, and
- the fact that national authorities have the benefit of direct contact with all the persons concerned and that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the care of children and the rights of parents, whether biological or intended.

18. The Court's task is thus to review under the Convention the decisions taken by those authorities in the exercise of their power of appreciation. The Chamber reproduced the domestic decisions in detail for the purpose of the latter review and ultimately concluded that given the particular facts and the legal assessment of the domestic courts, Convention standards had been observed.

4. Legal problems highlighted by the applicant's case

19. The applicant has spent seven years seeking legal recognition of and contact with X. The extent of her struggle is a testament to her commitment to him. It will hopefully be of some solace that, in the view of the Oslo City

Court, considered in isolation, "she had everything necessary to offer X. a good and safe relationship" (see § 55 of the Chamber judgment). There is no doubt about the legal precarity of the surrogacy project at the origins of her case, but the applicant might also derive some solace from the fact that her legal struggle does serve to highlight certain problems in domestic law and gaps in the existing case-law of this Court.

20. Firstly, the existence or non-existence of "family life" is essentially a question of fact. It depends upon the existence of close personal ties. The notion of "family" in Article 8 concerns marriage-based relationships but also other *de facto* "family ties", including between same-sex couples, where the parties are living together outside marriage or where other factors demonstrate that a relationship has sufficient constancy (see *Paradiso and Campanelli v. Italy*, cited above, § 140; *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 130, 21 July 2015, and *C.E. and others v. France*, nº 29775/18 and nº 29693/19, § 49, delivered on the same day as the present judgment). The Court has consistently held that States must provide themselves with an "adequate and sufficient legal arsenal" to ensure respect for the positive obligations to which they are subject under Article 8 (*Soares de Melo v. Portugal*, no. 72850/14, § 92, 16 February 2016). However, it does not appear from the material before the Court that Norwegian law provided a basis for the protection of the *de facto* relationship between the non-biological parent and the child in circumstances where the biological parent had decided to exercise a veto despite previously embarking on a common parenthood project. According to the City Court, there was no legal basis in Norwegian law to grant rights to a person in the applicant's position. It did envisage scenarios in which such a right would have to be established to protect the child's best interests if, for example, a break-up occurred after such a long time that the attachment between the child and the non-biological parent was such that contact could not be terminated (§ 57 of the Chamber judgment). However, firstly, at least on the basis of the elements of national law before the Court, it is difficult to see from whence such a legal basis might come (compare the provisions of the French Civil Code at issue in *Honner* v. France, nº 19511/16, §§ 50-51 and *C. and E. and others v. France*, cited above, §§ 93 and 105, both of which concerned post-separation legal arrangements between a child and a non-biological "social" parent). Secondly, the reasoning of the domestic courts just outlined emphasises that the probability of legal protection of the relationship with a child for the non-biological parent will to a large extent be determined by the moment when the biological parent seeks to end that relationship. The difficulties for the State in handling "private" disputes of this nature are clear; however, so too is the existence of positive obligations. In both *Mennesson* and the Advisory Opinion which followed it, the Court expressed concern that the absence of legal protection for the relationship between a child and the intended mother rendered fragile the maintenance of the child's

relationship with the latter in cases where the parents separated or the biological parent (in that case the father) died (see the Advisory opinion, cited above, § 40). This is precisely what we see here, although the factual constellation is unusual. Thus, the inadmissibility for reasons of non-exhaustion of the applicant's contact rights complaint should not blind us to the possible existence of a legal lacuna in the respondent State which may merit further attention.

21. Secondly, in relation to both the possible absence of a legal basis for contact rights (see the preceding paragraph) and the absence of a possibility to recognise some form of legal relationship between the child and an intended, non-biological parent, separated from the biological parent of the child, a case such as this could also be assessed from the perspective of the positive obligations of the State. It is clear from the terms of the Temporary Surrogacy Act and from the travaux préparatoires leading to its adoption (see §§ 97-98 of the Chamber judgment) that the Norwegian legislature was concerned about the social and legal consequences for children born as a result of surrogacy arrangements entered into abroad and about "erroneous" registrations in the National Population Register as parenthood projects such as the applicant's advanced against the background of a regulatory grey zone at domestic level. This problem is far from unique to Norway. Had the applicant and her former partner been successful at their first surrogacy attempt in 2010 they would have fallen *ratione temporis* within the scope of that Act. As regards the substantive condition for a successful application thereunder – "a shared wish to bring the child up together" – the interpretation by the domestic courts in the applicant's case could point to a possible disconnect between the law and social reality in a modern European state in the 21st century in which "families" come in all shapes and sizes (see §§ 45 and 69 of the Chamber judgment) and raises questions regarding the State's margin of appreciation.

22. Finally, surrogacy cases such as the present also raise issues under Article 8, combined with Article 14 (see *C. and E. v. France*, cited above, and *D. v. France*, cited above, §§ 85-89 and the separate opinion attached). The applicant's complaint pursuant to the latter provision was quite simply underdeveloped and unsubstantiated (see §§ 145-146 of the Chamber judgment) and for this reason it was rejected. The Court has not yet properly tackled the legal difficulties raised by surrogacy cases from the perspective of these provisions of the Convention combined.

23. By entering a surrogacy arrangement abroad which practice is not lawful in their own State, an intended parent embarks on a legally precarious journey. States cannot necessarily be held accountable for what may subsequently unfold and too often the cases before the Court reveal the risk that children become the victims of well-intentioned but desperate and at times conflictual parental projects. However, it is hard not to conclude, from the existing case-law of the Court, that the journey is particularly precarious

for non-biological parents and even genetic (not gestational) mothers, in relation to whom the law has not kept apace either of social reality or of science.

DISSENTING OPINION OF JUDGE JELIĆ

24. I respectfully disagreed with the majority holding that there has been a violation neither of Article 8 of the Convention nor of Article 14 taken in conjunction with Article 8. I believe this judgment points to flaws in Norwegian legislation and in the Court's process-based approach in assessing the applicant's capacity for becoming a legal mother while being biologically incapable herself of procreating.

1. Legal shortcomings

25. The Court reiterates its findings in *Mennesson v France* that the respondent State has a margin of appreciation as regards the legal recognition of the parent-child relationship in cases of surrogacy owing to the lack of consensus on this matter amongst the member States of the Council of Europe (see paragraph 131). In its subsequent Advisory Opinion, however, the Court explained that "where a particularly important facet of an individual's identity was at stake, such as when the legal parent-child relationship was concerned, the margin allowed to the State was normally restricted. It inferred from this that the margin of appreciation afforded to the respondent State needed to be reduced" (Advisory Opinion P16-2018-001, paragraph 44). I would thus submit that, where the best interests of a child are involved in the assessment of the domestic courts, the margin of appreciation afforded to the authorities must be reduced in order to allow for the primordial protection of the child's interests.

26. With regard to the present case, the respondent State was afforded a broad margin of appreciation (see paragraph 131). However, given the Court's findings in its Advisory Opinion, a narrow or restricted margin of appreciation should be applicable, requiring the respondent State to strike a balance between the competing interests, whilst emphasising the primordial importance of X's best interests. Furthermore, I believe that there are other criteria playing an essential role in this assessment, such as the joint intent of the (prospective) parents in having and raising the child, the inability of the intended mother to procreate by natural means, and the circumstances leading up to the pregnancy and birth of the child.

27. The Norwegian authorities failed to take these aspects into consideration. Instead they applied a rigid law automatically designating the birth mother as the legal mother of the child. The application of such an inflexible legislation is not practicable in sensitive areas subject to diverging circumstances. Rather, the authorities should be able to apply an individualised approach and adapt the determination of motherhood to the applicant's individual situation, so as to take account of the diverging interests in each case.

28. Whereas neither the judgment nor my opinion may qualify the Norwegian ban on surrogacy as appropriate or not, it is also important to reiterate that its purpose is to protect women from exploitation and eradicating child trafficking. No doubt these are valid interests which are protected by the respondent State, but nonetheless the authorities should have regard to the absence of any indication of misuse of surrogacy involving exploitation in the present case. It is thus questionable whether the general ban on surrogacy may serve as a legitimate ground to refuse the applicant recognition as the legal mother of the child.

29. Consequently, the review-based process as undertaken by the Court correctly found that the Norwegian authorities had acted within the boundaries of law applicable at the time. However, those overly restrictive laws had ruled out any favourable outcome for the applicant to benefit from a, as the authorities could not consider crucial aspects affecting her situation, such as the fact that the applicant was biologically unable to procreate, that E.B. and she had tried to initiate a pregnancy on multiple occasions, that they had been in a long-term relationship before their separation, that they were both the intended parents of the child, and that they had agreed to raise the child together (as further elaborated below).

2. Categorisation of the applicant's claim under the family life aspect

30. Whereas the applicant's claim is adequately qualified under Article 8 of the Convention, I do not agree with the Court's approach to only assessing the private life aspect of the Article. Instead, I proposed a complementary assessment of the case under the family life aspect as this case also concerns the applicant's interest in developing family relationships (see *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31). Recognition of family life does not depend on the existence of legal links, but on the "real existence in practice of close personal ties" (see *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 140, 24 January 2017). Where there is no legal recognition between a child and his or her parents, the Court observes the existence of *de facto* family ties (see *Johnston and Others v. Ireland*, 18 December 1986, § 56, Series A no. 112).

31. In the present case the existence of family life between X and the applicant is undeniable. The applicant has taken care of the child from the moment of birth until E.B. restricted her access to X in August 2015. The applicant's involvement in the first 17 months of X's life means that she played a crucial role in shaping his development as a young child. The existence of close ties between the applicant and X was recognised by the Court in paragraph 108, stating that "it is apparent that the applicant acted as a mother for X" and that "the applicant and X must have forged close emotional bonds".

32. Having determined the applicability of family life in the present case, the Court should have assessed whether the interference by the Government had been proportionate to the right of the applicant to seek the further development of her family ties. In that regard, the Court should have taken notice of the applicant's inability to have a child of her own and the need to find alternative channels if she wanted to become a mother. Moreover, the importance to a child of becoming familiar and having a relationship with an intended parent from the very beginning of the pregnancy should be regarded as crucial. As further detailed below, the strengthening of this bond, which had already been forged between X and the applicant, was not given sufficient weight, thus disregarding the importance placed by the Government on the best interests of the child.

3. The Court's failure to consider factual aspects

a) Recognition of the birth certificate

33. I see a further issue in the failure of the Norwegian authorities to recognise X's birth certificate as registered by the American authorities in line with the ruling of the District Court of Bexar County, Texas which had recognised the applicant as the child's mother (see paragraphs 10-11). In line with section 19-16 (3) of the 2005 Dispute Act, the Borgarting High Court ruled that "it had been surrogate mother K.J. who had given birth to X and she was therefore registered as the child's mother" (see paragraph 62).

34. The formalism shown in Norwegian legislation is excessive, as the complete rejection of a valid foreign birth certificate leads on to excessive rigidity. Contrary to traditional understandings of family life, there are ever more different constellations of motherhood in the 21st century, ranging from genetic mothers (providing the fertilised ova), birth/gestational mothers, adoptive mothers and intended mothers. In that regard it seems overly simplistic to limit Norwegian law to recognising only the birth mother as the legal mother of a child at the time of birth. A more lenient law which is able to assess individual situations of mothers and which determines the legal status of a mother on a case-by-case basis would thus be more in line with current developments in reproductive rights.

b) The best interests of the child

35. The Court has reiterated the primary importance that should be attributed to the best interests of the child. According to the Norwegian authorities, those interests are protected by refusing to recognise the applicant as the legal mother and not granting her visiting rights, and instead strengthening the bond between the child, his father E.B. and their newly created family. In reaching that conclusion, the domestic authorities did in fact highlight the importance of maintaining the contact between the applicant

and X, yet ultimately held that it was less important than the ongoing conflict between the applicant and E.B. as endured by the child (paragraph 55).

36. I disagree with this interpretation by the domestic authorities. Every child has the right to know his identity, which includes "discover[ing] the truth concerning important aspects of one's personal identity, such as the identity of one's parents" (see *Odièvre v. France* [GC], no. 42326/98, § 29, ECHR 2003-III). Such a right must not be confined to the biological parents but should be broadened to include intended parents who were supposed to be the mother or father of the child right from the beginning of the surrogacy proceedings. Moreover, the courts failed to award sufficient weight to the ensuing consequences should the child, at a later stage, find out that he had an intended mother who raised him for the first year and five months of his life, and whom he was unable to get to know. Such revelations could not only deeply impact his relationship with his father and stepmother, but may also cause severe emotional damage. Accordingly, I cannot agree with the courts' reasoning that prohibiting the applicant from having any relationship with X was in the latter's best interests.

37. Furthermore, the domestic courts failed to note the lack of any ties between X and his recognised biological mother, that is to say the American surrogate mother. She has always lived in the United States and was only involved in the child's life in so far as she was pregnant and gave birth to him. After birth the child was handed over to his intended family, the applicant and E.B., and there is no evidence of any contact between X and the birth mother since his day of birth. In that regard, I cannot see the benefits, *inter alia* in terms of protecting the best interests of the child, of recognising the non-existent relationship between the surrogate mother and X, rather than the relationship between the latter and the applicant.

38. Finally, it is clear that the passage of time in this case does not play in the applicant's favour. Even though it is clear to me that it was in her and the child's best interests to recognise her as the legal mother, she has had no contact with him since August 2015 (6½ years). At the time of writing, the child, who is almost 8 years old, is unlikely to remember the applicant and perceives only his stepmother as his mother. It is thus in his best interests at the present time to strengthen that bond, rather than introducing the applicant as his mother and thereby confusing the still young child and causing possible emotional distress. Such a situation is particularly unfair to the applicant and should not count as a reason for finding no violation of Article 8 of the Convention.

c) Raising the child together

39. I cannot support the majority's acceptance of the domestic interpretation of "raising a child together". This issue is twofold, as the courts, on the one hand, adopted an erroneous definition of the concept and, on the

other hand, failed to take into account the agreement between the applicant and E.B. on sharing parental responsibility for the child.

40. The Borgarting High Court, in its assessment, took an incorrect stance as concerns the interpretation of "raising a child together" by arguing that the Temporary Surrogacy Act was not applicable in the present situation (see paragraph 69). The notion of "raising a child together" in the authorities' understanding is remote from the reality of family life and family constellations in the 21st century. A multitude of couples raise their children together while not living together, ranging from separated or divorced couples to families whose parents commute or simply decide to live apart while maintaining their romantic relationship. Under such circumstances, and provided both parents are involved, they are still regarded as raising their children together. There is thus no evidence that the concept of raising a child together implies the existence of a shared family home. Disregarding the temporal limitation of the temporary Surrogacy Act, the court wrongly assumed that the act was not applicable to the applicant given her living arrangements with E.B.

41. The Court further failed to take account of the agreement on shared parental responsibilities between the applicant and E.B. The domestic authorities merely assessed whether the couple was still together and held that, because they were not, they "had a shared wish of raising the child separately, not together" (see paragraph 45). I cannot reach the same conclusion on this point. The fact that the couple was separated by the time the child was conceived should imply that they meant to raise the child together rather than ruling it out. This was acknowledged by both E.B. and the applicant, who had agreed to share responsibility for X, and they spent an equal amount of time with the child (see paragraphs 14-15). This "raising the child together" notion was particularly noticeable because X was handed over to the other parent every day so as to comply with the 50/50 arrangement between them.

42. I therefore conclude on this point that the courts failed to infer relevant facts from the practice between the parents and their explicit agreement. This resulted in turning a blind eye to the *de facto* family situation and the wrongful application of an overly simplistic and outdated definition to the fact of a couple raising their child together.

4. Discriminatory conduct

43. There are several instances of unfair and discriminatory treatment of the applicant in the present case.

44. First, the failure to award the applicant with legal recognition of motherhood has resulted in the father, E.B., retaining sole authority to refuse the applicant any right to visit or stay in contact with X. Such a restriction leads to a justice issue of "one person's will", whereby E.B. has exclusive

power to decide over the applicant becoming the mother of a child who was intended to be hers, when she had been unable to procreate biologically. In addition to denying the applicant motherhood, E.B. has the further authority to designate his current partner as the adoptive mother of X.

45. Such an imbalance of power not only leads to one person being able to make life-changing decisions over another person, it can also create a situation where this power can be misused in order to abuse an intended parent. In a situation of conflict, as in the present case, the recognised parent is given the sole ability to retaliate against a rebelling intended parent, stripping her of any rights of contact with their child.

46. Awarding such large powers to one person is not only discriminatory against the parent who was biologically unable to procreate, it also acts contrary to the intended purpose of surrogacy and the interest of the child. As described above, any child born out of surrogacy should have the ability to get to know his intended parent(s) – the failure of the Norwegian legal system to recognise the importance of this aspect leads to a situation unfairly penalising individuals biologically unable to procreate.

47. Secondly, the Court failed to recognise that the refusal by the domestic authorities to apply the 2009 case-law of the Gulating High Court had been tainted by discrimination between the applicant and E.B., based on differing marital status. The authorities held that the 2009 case was not applicable in the present instance, notably because the applicant and E.B. had not been married and living together when the child was born. The cases were therefore not comparable (see paragraph 71).

48. However, the Court has found on several occasions that the difference of treatment on the grounds of birth within or out of wedlock could only be made if very weighty reasons existed (see *Sahin v. Germany* [GC], no. 30943/96, ECHR 2003-VIII; *Mazurek v. France*, no. 34406/97, ECHR 2000-II; and *Camp and Bourimi v. the Netherlands*, no. 28369/95, ECHR 2000-X). Such reasons were not adduced in the present case, as the existence of wedlock between the applicant and E.B. is not indicative of their ability to raise the child together. In that regard, the courts unfairly discriminated against the applicant by refusing to apply older case-law on the grounds that she was not married to the father of X.

49. Finally, it is important to note that the Court is gradually recognising the rights of the LGBTQ community. In that regard, the Court has found violations of Article 14 in conjunction with Article 8 of the Convention where a partner in an unmarried same-sex couple was not allowed to adopt the child of her girlfriend without severing their legal ties (*X and Others v. Austria* [GC], no. 19010/07, ECHR 2013), where a homosexual man was prevented from having parental authority over his daughter on account of his sexual orientation (*Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, ECHR 1999-IX) or where a lesbian woman was prevented from adopting a child (*E.B. v. France* [GC], no. 43546/02, 22 January 2008). These cases

demonstrate that the Court is awarding increased rights to non-conventional family constellations and people with differing sexual orientations or identities, which I support.

50. Despite the major case-law developments in this area, which is undoubtedly commendable, I cannot accept that the Court on the one hand recognises the increased parental rights of the LGBTQ community, and on the other fails to award any protection to intended parents deprived of their right to have a relationship with their intended child. It is the role of the Court to afford equal protection to all the citizens of its Contracting Parties and to adapt, in line with the "living instrument" doctrine, to new emerging social concepts. Internalising this principle requires the Court to look beyond the process-based assessment followed by the domestic authorities, and instead to conduct a case-by-case analysis of the circumstances of a given case – and even more so where such crucial aspects as parenthood are in issue.

Conclusion

51. It is for the above reasons that I cannot agree with the view of the majority in finding no violation of Article 8 of the Convention or of Article 14 read in conjunction with Article 8. In my opinion, both, the domestic authorities and the Court, in their assessment, failed to take relevant practical factors into consideration, in a manner that would have tipped the balance of interests in the applicant's favour. I therefore conclude that the failure to recognise the applicant as X's lawful mother (also restricting her visiting rights) was not proportionate under the circumstances of the case, and that the consequent sole authority of E.B. resulted in unfair and discriminatory treatment of the applicant.