What makes a parent in surrogacy cases? Reflections on the Fjölnisdóttir et al. v. Iceland decision of the European Court of Human Rights

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Abstract
The present commentary analyses and discusses the Fjölnisdóttir et al. v. Iceland decision of the European Court of Human Rights (ECtHR) of 18 May 2021. The case concerned an Icelandic couple who had been recognised as the legal parents of a child born by a surrogate mother in California. In contrast to most other surrogacy cases decided by the ECtHR, however, the child had no biological link to either of the intended parents. The ECtHR thus found that a ruling of the Supreme Court of Iceland which had rejected the recognition of the legal parenthood of the intended parents under Icelandic law had not violated Art. 8 of the European Convention on Human Rights, despite the fact that joint adoption by the intended parents was not possible in this case. The present commentary argues that this decision exaggerates the importance of the biological link, creating injustices at the expense of the child concerned. In conclusion, the commentary calls for a more consistent and holistic framework to protect the best interests of the child and to prevent abuses of transnational commercial surrogacy.

Keywords
Surrogacy, European Court of Human Rights, biological link, right to respect for family life, Iceland

Accepted 16 August 2021

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Introduction

Less than 1 year after its last transnational surrogacy case, the European Court of Human Rights (ECtHR) has again had an opportunity to pronounce itself on this issue in the Fjölnisdóttir et al. v. Iceland case in May 2021. Even after a series of nine Chamber judgements, one Grand Chamber judgement, and one advisory opinion in less than 7 years, the issue of transnational surrogacy remains pressing before the ECtHR, with three new communicated cases currently pending.

The Fjölnisdóttir case is, however, different from the other surrogacy cases which were so far decided by the ECtHR or which are pending before the ECtHR. In contrast to the other cases (except the Paradiso and Campanelli v. Italy case), the Fjölnisdóttir case concerned a child born by a surrogate mother who had no genetic link to either of the intended parents.

The present commentary will discuss the Fjölnisdóttir case in four steps: Based on a summary of the facts and of the ECtHR decision (‘The Fjölnisdóttir decision of the ECtHR’ section), the case will be mapped in the context of the jurisprudence of the ECtHR on transnational surrogacy (‘The place of the Fjölnisdóttir decision in the jurisprudence of the ECtHR on transnational commercial surrogacy’ section). Thereinafter, the commentary will critically discuss the distinction between non-genetic and genetic intended parents.

1. Fjölnisdóttir et al. v. Iceland, no. 71552/17, 18 May 2021.
2. Aside the Fjölnisdóttir case, Chambers of the European Court of Human Rights (ECtHR) have ruled on issues related to transnational commercial surrogacy in the following cases: Mennesson v. France, no. 65192/11, 26 June 2014; Labassee v. France, no. 65941/11, 26 June 2014; D et al. v. Belgium, no. 29176/13, 8 July 2014; Paradiso and Campanelli v. Italy, no. 25358/12, 27 January 2015; Foulon and Bouvet v. France, no. 9063/14 and no. 10410/14, 21 July 2016; Laborie v. France, no. 44024/13, 19 January 2017; C and E v. France, no. 1462/18 and no. 17348/18, 12 December 2019; D v. France, no. 11288/18, 16 July 2020.
3. Paradiso and Campanelli v. Italy, Grand Chamber, no. 25358/12, 24 January 2017 (which reversed the Chamber judgment of 27 January 2015).
4. Advisory Opinion of the Grand Chamber to the Cour de Cassation, P16-2018-001, 10 April 2019.
5. As of 31 July 2021, the following cases relating to transnational commercial surrogacy are pending before the ECtHR: Schlitter-Hay et al. v. Poland, no. 56846/15 and no. 56849/15 (communicated on 26 February 2019); S.C. et al. v. Switzerland, no. 26848/18 (communicated on 15 June 2020); D.B. et al. v. Switzerland, no. 58817/15 and no. 58252/15 (communicated on 15 June 2020).
6. See below, ‘Differences between of Fj case and Paradiso Fjölnisdóttir case to the Paradiso and Campanelli case’ section.
7. More detailed overviews over the jurisprudence of the ECtHR on transnational surrogacy before the Fjölnisdóttir case are provided by J.W. März, ‘Challenges Posed by Transnational Commercial Surrogacy: The Jurisprudence of the European Court of Human Rights’, European Journal of Health Law 28(3) (2021), pp. 263–280; L. Bracken, Same-Sex Parenting and the Best Interests Principle (Cambridge: Cambridge University Press, 2020), pp. 204–210; P. Beaumont and K. Trimmings, ‘European Court of Human Rights’, in Claire Fenton-Glynn, Jens M. Scherpe and Terry Kaan, eds., Eastern and Western Perspectives on Surrogacy (Cambridge: Intersentia, 2019), pp. 331–357.
operated by the ECtHR in its jurisprudence on transnational surrogacy (‘A critical assessment of the Fjölnisdóttir et al. v. Iceland decision: when the requirement of the biological link hurts the best interests of the child principle’ section), and it will argue that this distinction should be abandoned in favour of a more comprehensive and consistent legal framework to prevent abuses of transnational surrogacy (‘Conclusion’ section).

The Fjölnisdóttir decision of the ECtHR

Facts of the case

A married couple from Iceland, Ms. Fjölnisdóttir and Ms. Agnarsdóttir, had entered into a surrogacy agreement with a woman in California. The gametes used were provided by neither of the intended mothers, meaning that the couple had no biological link to the child who was born in California in February 2013 and who was subsequently registered as the child of Ms. Fjölnisdóttir and Ms. Agnarsdóttir under Californian law. By virtue of his birth in the United States, the child acquired US citizenship, and thus had the possibility to enter Iceland together with his intended mothers on the basis of his US passport.

Upon return to Iceland, the intended mothers applied for the transcription of the Californian birth certificate of the child into the Icelandic civil registries, which was refused on the ground that the surrogate mother was considered as the child’s legal mother under Icelandic law. Since the child was considered an unaccompanied minor under Icelandic law, the Icelandic authorities appointed an independent legal guardian for the child, but placed the child in the foster care of Ms. Fjölnisdóttir and Ms. Agnarsdóttir. Subsequently, the child was granted Icelandic citizenship in 2015, but the Icelandic authorities continued to refuse the recognition of the legal parenthood of Ms. Fjölnisdóttir and Ms. Agnarsdóttir, despite the fact that it had been lawfully established under Californian law.

Ms. Fjölnisdóttir and Ms. Agnarsdóttir thus filed court proceedings against the refusal of the Icelandic authorities to recognise their legal parenthood. Their lawsuit was finally dismissed by the Supreme Court of Iceland in 2017, which held that the recognition of the legal parenthood of Ms. Fjölnisdóttir and Ms. Agnarsdóttir was incompatible with fundamental principles of Icelandic law (ordre public), notably the (domestic) ban on surrogacy and the principle of *mater omnis certa est*, which means that only the woman who gives birth to a child can be recognised as his or her legal parent upon birth.

In principle, Ms. Fjölnisdóttir and Ms. Agnarsdóttir would have been able to establish their legal parenthood of the child under Icelandic law through adoption. Due to their divorce in 2015, they were, however, barred from joint adoption, meaning that only one of them could adopt the child under Icelandic law (which was not wished by either intended parent). As a consequence, neither Ms. Fjölnisdóttir nor Ms. Agnarsdóttir was recognised as a legal parent of the child under Icelandic law at the time of the decision of the ECtHR, but the child had been placed under the permanent foster care of Ms. Fjölnisdóttir (and her new spouse) and enjoyed equal access to Ms. Agnarsdóttir.

Since Ms. Fjölnisdóttir and Ms. Agnarsdóttir still sought their joint recognition as legal parents of the child under Icelandic law, they filed a complaint to the ECtHR on their own behalf and on behalf of the child, arguing, in particular, that the refusal of recognition of their legal parenthood by the Icelandic authorities had violated their and the
child’s right to respect for family life of Art. 8 of the European Convention on Human Rights (ECHR).

**The decision of the ECtHR**

In a first step, the ECtHR considered that the refusal to recognise the legal parenthood of Ms. Fjölnisdóttir and Ms. Agnarsdóttir by the Icelandic authorities interfered with their and the child’s right to respect for family life. In particular, the ECtHR held that family life in the sense of Art. 8 ECHR presupposed the ‘existence of close personal ties’, which it observed in this case since the child had been cared for by Ms. Fjölnisdóttir and Ms. Agnarsdóttir uninterruptedly since his birth (in 2013).

In a second step, the ECtHR argued that this interference with the right to respect for family life of the child and of Ms. Fjölnisdóttir and Ms. Agnarsdóttir was justified. It agreed with the Icelandic government that the refusal of recognition pursued a legitimate aim since ‘the ban on surrogacy served to protect the interests of women who might be pressured into surrogacy, as well as the rights of children to know their natural parents’. It argued that the interference with the right to respect for family life was proportionate to this aim since the Icelandic authorities had taken steps to safeguard the family life of the child and of Ms. Fjölnisdóttir and Ms. Agnarsdóttir, in particular by granting Icelandic nationality to the child and by making a permanent foster care arrangement which allowed the child to live with Ms. Fjölnisdóttir and to enjoy equal access to Ms. Agnarsdóttir. The ECtHR considered that these safeguards were sufficient to ‘compensate’ the fact that Ms. Fjölnisdóttir and Ms. Agnarsdóttir could not obtain joint legal parenthood of the child under Icelandic law due to the non-recognition of the child’s Californian birth certificate by the Icelandic authorities, given the fact that joint adoption was barred to them after their divorce.

In an obiter dictum, Judge Paul Lemmens voiced concern that the refusal of recognition of the legal parenthood of the intended mothers might be incompatible with the child’s right to respect for his private life since the child could only obtain the legal recognition of his parent–child relationship with one of the intended mothers, but not with both. He recalled that the ECtHR had already recognised that the right to respect for private life encompassed a right of the child to have his or her parent–child relationship with the intended parents recognised if at least one of the intended parents is a genetic parent of the child. He argued that this jurisprudence should also apply to cases where

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8. *Fjölnisdóttir et al. v. Iceland*, para. 56.
9. *Fjölnisdóttir et al. v. Iceland*, para. 65. This is in line with the landmark *Mennesson* and *Labassee* decisions, in which the ECtHR held that preventive measures against transnational commercial surrogacy can potentially be justified by the legitimate aim to protect surrogate mothers and children (*Mennesson v. France*, para. 62; *Labassee v. France*, para. 54).
10. *Mennesson v. France*, paras. 96–101; *Labassee v. France*, paras. 75–80; Advisory Opinion of 10 April 2019, paras. 35 and 46; see below, ‘The paramountcy of the best interests of the children born from transnational commercial surrogacy in the jurisprudence of the ECtHR’ and ‘The importance of the biological link in the jurisprudence of the ECtHR on transnational commercial surrogacy’ sections, for a detailed summary of the *Mennesson* and *Labassee* jurisprudence and of the Advisory Opinion of 10 April 2019 of the ECtHR.
the child does not have a biological link to the intended parents since ‘adoption is not always a solution’ (as the Fjölnisdóttir case illustrates) and

for the children the impact is the same, whether or not one or both of their intended parents has a biological link with them. In both situations, I wonder whether the legal limbo in which a child finds itself can be justified on the basis of the conduct of its intended parents or with reference to the moral views prevailing in society.11

However, Judge Lemmens nevertheless concurred to the unanimous decision since the complaint filed on behalf of the child did not discuss violations of his right to respect for private life, but only of his right to respect for family life. In this regard, he recalled that the right to respect for family life and the right to respect for private life had different scopes. Judge Lemmens agreed with the other judges that the enjoyment of family life with his two intended mothers by the child, which is protected by the right to family life, was adequately safeguarded by the Icelandic State. However, he considered it doubtful whether the same holds true for the child’s right to have his parent–child relationships legally endorsed, which is protected by the right to respect for private life.

The place of the Fjölnisdóttir decision in the jurisprudence of the ECtHR on transnational commercial surrogacy

The tension between prevention of transnational commercial surrogacy and the best interests of children born from surrogacy

Commercial surrogacy raises serious concerns of a commodification of children and an exploitation of surrogate mothers.12 These concerns have motivated a large majority of European countries to outlaw commercial surrogacy at the domestic level.13 In Germany, France, and the United

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11. Fjölnisdóttir et al. v. Iceland, no. 71552/17, 18 May 2021 – Concurring opinion of Judge Lemmens, para. 4.

12. The claim that commercial surrogacy per se constitutes a commodification of children and an exploitation of surrogate mothers is disputed; see, in detail, on the debate whether commercial surrogacy per se constitutes an exploitation of women, for example, S. Wilkinson, ‘The Exploitation Argument against Commercial Surrogacy’, Bioethics 17(2) (2003), pp. 169–187; S. Wilkinson, ‘Exploitation in International Paid Surrogacy Arrangements’, Journal of Applied Philosophy 33(2) (2016), pp. 125–145; J. Tobin, ‘To Prohibit or Permit: What Is the (Human) Rights Response to the Practice of International Commercial Surrogacy?’, International and Comparative Law Quarterly 63(2) (2014), pp. 317–352, at pp. 344–348, and on the debate whether commercial surrogacy per se commodifies children, for example, Tobin, ‘To Prohibit or Permit’, pp. 335–344; S. Allan, ‘The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations’, in Paula Gerber and Katie O’Byrne, eds., Surrogacy, Law and Human Rights (London and New York: Routledge, 2016), pp. 113–144; J.K. Hanna, ‘Revisiting Child-Based Objections to Commercial Surrogacy’, Bioethics 24(7) (2010), pp. 341–347.

13. As of July 2021, the main jurisdictions which expressly allow commercial surrogacy are several US States (e.g. California, Florida, Nevada, Texas) and most post-Soviet States (e.g. Russia, Ukraine, Belarus, Georgia, Armenia, and Kazakhstan). Commercial surrogacy is unregulated
Kingdom, for instance, surrogacy contracts are void or unenforceable. These private law provisions are complemented by criminal law provisions which sanction intermediaries (e.g. surrogacy agencies) who are facilitating (commercial) surrogacy. These criminal law provisions, which complicate the matching between potential surrogate mothers and potential intended parents, are likely relatively effective at preventing surrogacy at the domestic scale, despite the fact that surrogate mothers and intended parents do not incur criminal law sanctions even if they engage in a domestic surrogacy arrangement.

Fears of a marketisation of children and an exploitation of surrogate mothers are, of course, no less pertinent in the case of transnational commercial surrogacy than in the case of domestic surrogacy. Only very few jurisdictions worldwide (and no European jurisdiction) have adopted legislation which imposes criminal law sanctions on intended parents who participate in transnational commercial surrogacy arrangements. Given the absence of criminal law sanctions, transnational commercial surrogacy is relatively easily accessible for most residents of European States (if they dispose of sufficient financial resources).
The courts of the home States of the intended parents are thus, in general, confronted with a fait accompli in cases of transnational surrogacy. They will, in general, only be aware of the transnational surrogacy arrangement once the child is born and the intended parents, who have acquired\(^\text{19}\) legal parenthood under the law of the place of birth of the child (where the surrogacy contract was ‘performed’), request the recognition or the establishment of their legal parenthood under domestic law.

In this situation, the domestic courts are confronted with a serious dilemma. On one hand, the recognition of the legal parenthood of the intended parents is, in general, necessary to avoid a state of (de facto) parentlessness of the child (as seen in the Fjölnisdóttir case). On the other hand, the recognition of the legal parenthood of the intended parents in one case risks to be interpreted as an acceptance of surrogacy tourism by other potential intended parents, which might encourage the use of transnational commercial surrogacy.\(^\text{20}\)

Therefore, the key question the domestic courts have to answer in cases of transnational commercial surrogacy is the following: Should they privilege the prevention of surrogacy tourism or the best interests of children born from surrogacy?

**The paramountcy of the best interests of the children born from transnational commercial surrogacy in the jurisprudence of the ECtHR**

The ECtHR has given a straight answer to this question in the Mennesson v. France\(^{21}\) and Labassee v. France\(^{22}\) decisions (which are its two leading cases on transnational

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\(^{19}\) The legal modalities of acquisition of legal parenthood by the intended parents vary between different jurisdictions. Under Ukrainian and Georgian law, for instance, the intended parents are automatically considered as legal parents of the child. In contrast, legal parenthood must be transferred to the intended parents by court order in the US jurisdictions which allow surrogacy, which is possible before the child’s birth in some States (e.g. California), but not in others (e.g. Minnesota); see in detail: N. Nord and D. Porcheron, ‘Gestation pour autrui, panorama de droit comparé’, *AJ Famille* (2018), pp. 586–592.

\(^{20}\) This dilemma between the prevention of transnational commercial surrogacy and the best interests of children born from surrogacy is discussed in detail by C. Fenton-Glynn, ‘Outsourcing Ethical Dilemmas’, pp. 63–64; C. Fenton-Glynn, ‘The Regulation and Recognition of Surrogacy under English Law: An Overview of the Case Law’, *Child and Family Law Quarterly* 27(1) (2015), pp. 83–95, at p. 92; C. Fenton-Glynn, ‘The Difficulty of Enforcing Surrogacy Regulations’, *The Cambridge Law Journal* 74(1) (2015), pp. 34–37; and (regarding the dilemma between the enforcement of the UK ban on commercial surrogacy and the best interests of the child) A. Alghrani and D. Griffiths, ‘The Regulation of Surrogacy in the United Kingdom: The Case for Reform’, *Child and Family Law Quarterly* 29(2) (2017), pp. 165–186, at pp. 179–180.

\(^{21}\) *Mennesson v. France*, no. 65192/11, 26 June 2014.

\(^{22}\) *Labassee v. France*, no. 65941/11, 26 June 2014. A comprehensive list of commentaries on the Mennesson and Labassee cases is provided by J.W. März, ‘Transnational Surrogacy’, p. 266; see also N. Bala, ‘The Hidden Costs of the European Court of Human Rights’ Surrogacy Decision’, *The Yale Journal of International Law Online* 40(3) (2014), pp. 11–19; C. Fenton-Glynn, ‘International Surrogacy before the European Court of Human Rights’, *Journal of Private International Law* 13(3) (2017), pp. 546–567.
surrogacy): ‘[W]henever the situation of a child is in issue, the best interests of that child are paramount’.23

These cases concerned two French couples who had been declared the legal parents of children born from surrogacy by Californian and Minnesotan court orders, respectively. The sperm was provided by the respective intended father, meaning that one of the intended parents had a biological link to the children (in contrast to the Fjölnisdóttir case, where none of the intended mothers had a biological link to the child). After a long litigation, the French Cour de cassation, however, decided in 2008 and 2011 that the legal parenthood of both intended parents (including the genetic father) could not be transcribed into the French civil registries (and thus recognised under French family law) since this would be incompatible with the French ban on surrogacy, which is part of the French ordre public.24

The ECtHR found that a State pursues a legitimate aim (within the sense of Art. 8 ECHR) when refusing the recognition of the legal parenthood of the intended parents under domestic law in order to protect the rights of (potential) surrogate mothers and children born from surrogacy. The restriction of the intended parents’ rights to respect for their private and family life (Art. 8 ECHR) through a policy of non-recognition of their legal parenthood is, in general, proportionate to this aim. However, with regard to the children’s Art. 8 ECHR rights, the ECtHR considers a policy of non-recognition of the legal parenthood of the intended parents as disproportionate to this aim if

- the children are barred from obtaining the nationality of their genetic father;
- the children have no possibility at all to have their parent–child relationship with the intended parents, especially with the genetic father, legally endorsed under domestic law;
- the children do not have the possibility to be considered as children of the intended parents for the purposes of inheritance law.

Since the French jurisprudence complicated the obtention of nationality and did not allow for the recognition of the legal parenthood of the intended parents at all, the ECtHR condemned France for a violation of the children’s Art. 8 ECHR rights in the Mennesson and Labassee cases.25

The importance of the biological link in the jurisprudence of the ECtHR on transnational commercial surrogacy

The fact that one of the intended parents was a genetic parent of the children played a major role in the decisions of the ECtHR in the Mennesson and Labassee cases.25

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23. Mennesson v. France, para. 81; Labassee v. France, para. 60.
24. Cass. 1re civ., 6 April 2011, no. 10-19.053 and no. 09-17.130.
25. The Mennesson and Labassee jurisprudence was confirmed by the ECtHR in Foulon and Bouvet v. France, no. 9063/14 and no. 10410/14, 21 July 2016 and Laborie v. France, no. 44024/13, 19 January 2017.
In its subsequent Advisory Opinion of 10 April 2019,26 which clarified the Mennesson and Labassee decisions, the ECtHR underlined the importance of the ‘biological link’ of at least one of the intended parents to the child in its jurisprudence on legal parenthood in transnational surrogacy cases.27 It repeated that the legal recognition of the parent–child relationship with a genetic intended father under domestic law is of particular importance to a child’s Art. 8 ECHR rights, and must thus be possible without undue delay in order to avoid a state of parentlessness of the child. Furthermore, if the child has a biological link to at least one of the intended parents, the legal recognition of the parent–child relationship with a non-genetic second intended parent under domestic law must be possible once the link of the child to this non-genetic intended parent has become a ‘practical reality’. In the view of the court, a viable implementation of these requirements of the child’s Art. 8 ECHR rights is the automatic recognition of the legal parenthood of the genetic intended father as it was established under foreign law and the referral of the non-genetic intended parent to adoption proceedings.28

In line with the Mennesson and Labassee decisions and the 2019 Advisory Opinion, the Fjölnisdóttir case stresses that the requirement of a biological link of the intended parents to the child lies at the heart of the ECtHR’s jurisprudence on transnational surrogacy. For the intended parents in the Fjölnisdóttir case, who had no biological link to the child, this meant that they could not profit of the Mennesson and Labassee jurisprudence which only privileged genetically linked families built through surrogacy. They are, however, not only worse off in comparison to a genetic intended father29 who enjoys the privilege of the automatic recognition of his legal parenthood under domestic law. They are also worse off in comparison to a non-genetic intended parent whose spouse or partner is the genetic father of the child since the child has a right to have his or her relationship with this non-genetic intended parent legally endorsed once their link has become a ‘practical reality’ (e.g. through adoption proceedings at infant age). In contrast, the ECtHR did not recognise a similar right of the child in the Fjölnisdóttir case, leaving the child with no possibility to

26. Advisory Opinion of the Grand Chamber to the Cour de Cassation, P16-2018-001, 10 April 2019; for commentaries, see, for example, L. Bracken, ‘The ECtHR’s First Advisory Opinion: Implications for Cross-Border Surrogacy Involving Male Intended Parents’, Medical Law International 21(1) (2021), pp. 3–18; A. Margaria, ‘Parenthood and Cross-Border Surrogacy: What Is “New”? The ECtHR’s First Advisory Opinion’, Medical Law Review 28(2) (2020), pp. 412–425.
27. The ECtHR has, however, reserved the possibility to lessen the importance of the biological link in its future jurisprudence (Advisory Opinion of 10 April 2019, para. 36).
28. See Advisory Opinion of 10 April 2019, paras. 52–55.
29. The ECtHR has not yet had an opportunity to pronounce on the question whether the privileges of a genetic father also apply to a genetic mother, meaning that her parenthood should also be automatically recognised under domestic law. However, Judge Síofra O’Leary pointed out in an obiter dictum to the D v. France (no. 11288/18, 17 July 2020) case that a distinction between genetic fathers and genetic mothers in transnational surrogacy cases is likely incompatible with the European Convention on Human Rights (ECHR), meaning that national authorities are well advised to automatically recognise the legal parenthood of a genetic mother in the same way as they treat a genetic father.
have his relationship with both intended parents legally recognised under domestic law, despite the fact that it was lawfully established under Californian law.

**Differences between the Fj case and Paradiso and Campanelli case**

In its *Fjölnisdóttir* decision, the ECtHR has repeatedly cited and distinguished the *Paradiso and Campanelli* case, which was the only other transnational surrogacy case decided by the ECtHR so far which concerned a child who had no biological link to the intended parents.30

The *Paradiso and Campanelli* case concerned an Italian couple who had entered into a surrogacy agreement with a Russian company. The child was conceived using anonymously donated gametes (which is neither expressly prohibited nor expressly authorised under Russian law), and Mr. Paradiso and Mrs. Campanelli, who were the intended parents of the child, were listed as the parents on the child’s birth certificate. The couple used this certificate to obtain travel documents for the child from the Italian Consulate in Moscow and returned to Italy with the child. The Italian authorities, however, refused the transcription of the birth certificate of the child into the Italian civil registries and later ordered the placement of the child in care in a children’s home since the couple had no biological link to the child and had allegedly broken the Italian international adoption laws. The couple filed complaints to the ECtHR on their own behalf and on the child’s behalf, but the latter was inadmissible due to a lack of standing of the couple on behalf of the child (who, at the time the complaint was filed, had not lived with the couple for 6 months).

Nevertheless, the Second Section of the ECtHR31 condemned Italy for a violation of the couple’s right to respect for private and family life. The Chamber considered that the decision to refuse recognition of the legal parenthood of the couple on the ground of a lack of biological link was proportionate to the Italian authorities’ aim to tackle the (presumably) illegal conduct of the couple. It held, however, that the decision of placement of the child in care violated the couple’s right to respect for private and family life since it failed to adequately take into account the best interests of the child for whom the couple had cared well.

This judgement was subsequently reversed by the Grand Chamber. The Grand Chamber32 concluded that the restriction of the couple’s right to respect for private and family life by the placement of the child in care was proportionate to the Italian authorities’

30. Strikingly, however, a case which was practically identical to the *Fjölnisdóttir* case has been decided by the Swiss Federal Court (Bundesgericht) (which reached the same conclusions as the ECtHR in the *Fjölnisdóttir* case) in 2015 (BGE 141 III 328).
31. *Paradiso and Campanelli v. Italy*, no. 25358/12, 27 January 2015.
32. *Paradiso and Campanelli v. Italy*, Grand Chamber, no. 25358/12, 24 January 2017. For a comprehensive account of case comments on the *Paradiso and Campanelli* case, see März, ‘Transnational Surrogacy’, p. 273; see also L. Bracken, ‘Assessing the Best Interests of the Child in Cases of Cross-Border Surrogacy: Inconsistency in the Strasbourg Approach?’, *Journal of Social Welfare and Family Law* 39(3) (2017), pp. 368–379; C. Fenton-Glynn, ‘International Surrogacy before the European Court of Human Rights’, *Journal of Private International Law* 13(3) (2017), pp. 546–567; M. Iliadou, ‘Surrogacy and the ECtHR: Reflections on Paradiso and Campanelli v. Italy’, *Medical Law Review* 27(1) (2018), pp. 144–154.
aim to tackle the (presumably) illegal conduct of the couple, and that the best interests of the child had been adequately weighed by the Italian authorities.

In its Fjölnisdóttir decision, the ECtHR demonstrated the exceptionality of the Paradiso and Campanelli case. In contrast to the Paradiso/Campanelli couple, the Fjölnisdóttir/Agnarsdóttir couple had been indisputably established as the child’s legal parents under Californian law, and the child had entered Iceland lawfully on the basis of his US passport. Most importantly, however, the child was a party to the Fjölnisdóttir case (in contrast to the Paradiso and Campanelli case).

These factual differences heavily influenced the ruling of the ECtHR in the Fjölnisdóttir case. In fact, the ECtHR reasoned that the refusal of the recognition of the legal parenthood of the non-genetic intended parents by the Icelandic authorities is only compatible with the child’s Art. 8 ECHR rights since the Icelandic authorities have taken measures to safeguard the family life that the child had with Ms. Fjölnisdóttir and Ms. Agnarsdóttir. In particular, the ECtHR referred to the permanent foster care arrangement with Ms. Fjölnisdóttir (which gave the child equal access to Ms. Agnarsdóttir) and the granting of the Icelandic nationality to the child. Furthermore, the ECtHR noted that the child has the possibility to have his link to at least one of the intended parents legally recognised through adoption.

A critical assessment of the Fjölnisdóttir et al. v. Iceland decision: when the requirement of the biological link hurts the best interests of the child principle

The Fjölnisdóttir case has reinforced the importance of the biological link in the jurisprudence of the ECtHR on transnational surrogacy. Only if at least one of the intended parents is a genetic parent of the child, can they both avail themselves of the Mennesson and Labassee jurisprudence which guarantees them the legal recognition of their relationship with the child.

At first look, this privileged treatment of intended parents who have a biological link to the child vis-à-vis intended parents who lack this biological link appears intuitively sensible. First, a significant majority of States which allow surrogacy require a biological link between the intended parents and the child. Second, surrogacy cases without a biological link arguably resemble adoption, whose tight regulation under the domestic

33. See above, ‘The importance of the biological link in the jurisprudence of the ECtHR on transnational commercial surrogacy’ section.
34. However, while the recognition of the legal parenthood of a genetic intended parent must be possible immediately after the birth of the child, State authorities can refuse the recognition of the parenthood of a non-genetic second intended parent until his or her link to the child has become a ‘practical reality’ (at which point in time adoption must be possible), see above, ‘The paramountcy of the best interests of the children born from transnational commercial surrogacy in the jurisprudence of the ECtHR’ section.
35. Among the jurisdictions which allow commercial or at least non-commercial surrogacy, for example, the United Kingdom, Israel, South Africa, and Ukraine require a biological link. A biological link is not mandatory, for example, in California, Russia, and Greece; see also
laws of most signatory States of the ECHR would be open to circumvention if the privileging *Mennesson* and *Labassee* jurisprudence would equally apply to surrogacy cases without a biological link. Third, surrogacy without a biological link raises even more ethical concerns than surrogacy with a biological link, with fears of commodification of children appearing more pertinent in the context of surrogacy without a biological link.

Taking a step back, however, the inconsistencies of the requirement of the biological link with the general purpose of the ECtHR jurisprudence on transnational commercial surrogacy become apparent. In fact, the ECtHR jurisprudence does not require signatory States to legalise domestic surrogacy (which signatory States remain free to ban at their discretion), nor does it bar them from taking measures to tackle the use of transnational commercial surrogacy by their nationals or residents. Rather, the ECtHR jurisprudence aims to find a solution in cases where children have already been born from transnational surrogacy. As the ECtHR held in its *Mennesson* and *Labassee* decisions, ‘whenever the situation of a child is in issue, the best interests of that child are paramount’.37

In the case of transnational surrogacy, the best interests principle has two opposite implications. On one hand, it imposes on State authorities a duty to take measures to prevent abuses of transnational commercial surrogacy, which threaten the rights of children and surrogate mothers. In principle, the non-recognition of the legal parenthood of the intended parents in order to fight transnational surrogacy is legitimate, as the ECtHR underlined in its *Mennesson* and *Labassee* decisions. On the other hand, however, the best interests principle also asks States to give special consideration to the particular situation and the particular (legal) problems of children born from surrogacy.39

First, children born from transnational surrogacy are at risk of statelessness. Under the laws of the State of nationality of the surrogate mother, which regularly is the place of birth of the child, the surrogate mother is, in general, not considered as a legal parent
of the child. With the exception of the United States (where the child can acquire nationality by virtue of the *ius soli*)\(^{41}\), the child will thus in general not acquire the nationality of the surrogate mother. If the State of nationality of the intended parents also refuses its nationality to the child, the child risks being stateless. Therefore, the ECtHR attaches great importance to the possibility of the child to acquire the nationality of at least one of the intended parents.\(^{42}\)

Second, children born from transnational surrogacy are at a high risk of being effectively parentless. Under the law of their place of birth, the surrogate mother is in general not recognised as a legal parent of the child, and she will thus in general not be willing to assume this role. If the intended parents do, however, not have the possibility to be recognised as the legal parents of the child under the law of their and the child’s place of residence, the child is at a risk of effectively being parentless. For this reason, the ECtHR’s jurisprudence on transnational surrogacy is marked by the concern that the child must have a legal possibility to have his or her relationship with the intended parents legally recognised under the law of his or her place of residence.

The risks of statelessness and parentlessness are, however, the same for children who have a biological link to the intended parents and for children who do not have this biological link. Genetics might be a feasible way to determine the concrete remedies to the issues of statelessness and parentlessness in cases where the child has a biological link to the intended parents: It is possible to solve the problem of statelessness through the acquisition of the nationality of a genetic intended parent and the problem of parentlessness through the automatic recognition of the legal parenthood of a genetic intended parent (as the ECtHR has suggested in its *Mennesson* and *Labassee* jurisprudence).

In cases where the child lacks a biological link to the intended parents, the risks of statelessness and parentlessness cannot be ‘solved’ by genetics. This does, however, not alleviate the national authorities from their responsibility to protect the child from the risks of statelessness and parentlessness. In these cases, the best interests of the child generally command a possibility to establish the legal parenthood of the intended parents under domestic law. If adoption is unavailable or inappropriate (like in the *Fjölnisdóttir* case), then the recognition of the legal parenthood of the intended parents as it was established under foreign surrogacy laws is the only way to adequately safeguard the best interests of the child.

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\(^{41}\) U.S. Const. amend. XIV, § 1.

\(^{42}\) *Mennesson v. France*, para. 97; *Labassee v. France*, para. 76; see also, on the right of children born from surrogacy to obtain a nationality, K. Wade, ‘The Regulation of Surrogacy: A Children’s Rights Perspective’, *Child and Family Law Quarterly* 29(2) (2017), pp. 113–131, at pp. 128–130.
By rejecting this conclusion, the ECtHR has imposed a heavy burden on the child in the *Fjölnisdóttir* case: Since adoption by only either of the intended parents is not an option, the child will indeterminately remain de facto parentless.43

**Conclusion**

The *Fjölnisdóttir* case has well illustrated the dilemma that courts are confronted with in cases of transnational surrogacy. On one hand, they are responsible for the protection of the best interests of the child born from surrogacy, which generally go strongly in favour of the recognition of the legal parenthood of the intended parents. On the other hand, the automatic recognition of the legal parenthood of the intended parents would be tantamount to a capitulation before global surrogacy tourism, which poses serious threats to women’s and children’s rights.

How should courts confronted with this dilemma decide? If they recognise the legal parenthood of the intended parents, they risk further encouraging global surrogacy tourism. If they refuse recognition, they risk harming the rights of the child born from surrogacy.

Solving this dilemma will require a comprehensive and consistent framework, which, on one hand, combines preventive measures against global surrogacy tourism and, on the other hand, sets rules which protect the best interests of children born from transnational surrogacy as much as possible. In this sense, the jurisprudence of the ECtHR on transnational surrogacy should be understood as a wake-up call for the legislators of the signatory States to elaborate holistic legal frameworks to address the issue of global surrogacy tourism.

**Declaration of conflicting interests**

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

**Funding**

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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43. This situation is of course not remedied by the fact that the surrogate mother is considered *de iure* as the legal mother of the child under Icelandic law since it is clear that she will not assume any parental duties, given the fact that she is not recognised as a legal parent of the child under the law of her place of residence (California).