The ECtHR’s first advisory opinion: Implications for cross-border surrogacy involving male intended parents

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Abstract
This article examines the content and scope of the European Court of Human Rights’s first advisory opinion as regards the practice of cross-border surrogacy in Europe. While the advisory opinion concerns the recognition of the legal parentage of an intended mother, this article considers whether the reasoning could be applied to male couples who avail of surrogacy. It is argued that the non-genetically related intended father in the male couple is in a directly comparable position to the non-genetically related intended mother in the opposite-sex couple for the purpose of legal parentage following surrogacy.

Keywords
Advisory opinion, ECtHR, male couple, cross-border surrogacy

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Introduction
In its first-ever advisory opinion issued under Article 1 of Protocol No. 16 to the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) found that the right to respect for private life of a child born abroad through gestational surrogacy demanded that a mechanism should exist to allow the child’s relationship with their intended mother to be recognised under domestic law where
certain conditions are met. At the time of the advisory opinion, only 19 of the 43 States surveyed provided a mechanism to allow for such recognition.¹

An analysis of ILGA Europe’s Rainbow Map 2020 reveals that even fewer countries provide mechanisms to allow for the type of legal recognition envisaged in the advisory opinion to occur where the intended parents are a same-sex couple.² While the advisory opinion concerns the recognition of the legal parentage³ of an intended mother, this article argues that the reasoning could be applied to male couples who avail of surrogacy. It is argued that the non-genetically related intended father in the male couple is in a directly comparable position to the non-genetically related intended mother in the opposite-sex couple for the purpose of legal parentage following surrogacy. Hence, failure by the State to provide a mechanism to recognise the non-genetically related intended father as a legal parent in circumstances where the non-genetically related intended mother can be recognised as a legal parent could be regarded as contrary to Article 14 ECHR, taken in conjunction with Article 8 ECHR.

The article begins by setting out the background to and context of the first advisory opinion issued under Protocol No. 16. It then examines the rationale of the answers provided by the Court and the jurisdiction of the advisory opinion to consider the implications of the opinion for other cases concerning cross-border surrogacy. The advisory opinion is concerned with the recognition of the non-genetically related intended mother as a consequence of her connection to the genetic intended father in cases of surrogacy. As such, the article first examines the implications of the reasoning for other non-genetically related intended mothers. It then examines whether and how this reasoning could be extended to encompass non-genetically related fathers in male couples who engage in cross-border surrogacy. The article does not examine the legal recognition of the intended mother in circumstances where she is the only intended parent with a genetic connection to the child. The ECtHR has not yet ruled on this latter scenario, and it is unclear whether the existing jurisprudence could be interpreted in a manner that would demand such recognition. This discussion gives rise to a number of discrete issues and is, unfortunately, outside of the scope of the present article.

**The advisory opinion**

The ECtHR’s advisory opinion mechanism is contained in Protocol No. 16 to the ECHR. The Preamble to Protocol No. 16 explains that the purpose of the mechanism is to

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¹. European Court of Human Rights, 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, Request no. P16-2018-001, 10 April 2019, para 23.

². Available at: https://www.rainbow-europe.org/ (accessed 22 November 2020).

³. In this article, the term ‘parentage’ is used to refer to the parent–child relationships created through surrogacy. See L. Bracken, ‘Surrogacy and the Genetic Link’, *Child and Family Law Quarterly* 32 (2020), pp. 303–320.
‘further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity’. The mechanism allows the highest courts of Member States to request opinions from the ECtHR on questions relating to the interpretation or application of the Convention. Protocol No. 16 entered into force in 2018 after 10 Member States had ratified it. France was the 10th country to ratify the Protocol and the first country to submit a request for an advisory opinion in 2019. To date (November 2020), the ECtHR has issued two advisory opinions under Protocol No. 16: the first on the request of France and the second on the request of Armenia.

The request for the first advisory opinion emerged in the context of a protracted legal battle involving the Mennesson family, which had progressed through the French courts to the ECtHR and back to the French courts for review over a 20-year period. The litigation commenced when Mr and Mrs Mennesson sought recognition in France of birth certificates issued by the Californian authorities that listed them as the legal parents of twins born by gestational surrogate in California. Initially, the particulars of the birth certificates had been recorded in the central register of births, marriages and deaths in Nantes by the French consulate in Los Angeles, but this was challenged by the Crétel public prosecutor in 2003 giving rise to a series of cases and appeals before the French courts. The case reached the French Court of Cassation in 2011, which found that the decision to annul the entries in the register of births, marriages and deaths had been correctly made.

Mr and Mrs Mennesson subsequently submitted a claim to the ECtHR that their inability to obtain recognition in France of the parent–child relationships legally established abroad was contrary to the children’s best interests and amounted to a violation of Article 8 ECHR (the right to respect for private and family life). The ECtHR held that there was no violation of the right to family life under Article 8 ECHR, but there was a violation of the children’s right to private life under the Article. The Court noted that the children were not recognised in French law and were thus deprived of French nationality. Although Article 8 does not guarantee a right to acquire a particular nationality, the Court noted that ‘the fact remains that nationality is an element of a person’s identity’. The Court observed that respect for private life ‘implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship’. This was found to be particularly important in the instant case due to the biological relationship between the children and the intended father, which the Court considered to be a significant ‘component of identity’. Ultimately, the Court found that:

4. Preamble to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.
5. Mennesson v. France, Application No. 65192/11, 26 June 2014.
6. Op. cit., para 97.
7. Op. cit., para 99.
8. Op. cit., para 100.
it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof.\textsuperscript{9}

The restrictions on the children’s right to identity caused by the failure to legally recognise their biological relationship with the intended father were found to exceed the permissible margin of appreciation and hence there was a violation of their right to private life under Article 8. Following the ECtHR judgment, it became possible in France to register the details of a birth certificate validly issued abroad following a surrogacy arrangement in so far as it designates the intended father as the child’s legal father in circumstances where he has a biological connection to the child. Thus, the ruling allowed Mr Mennesson to be recognised in France as the children’s legal father. However, the ruling did not address the status of the intended mother in cases of surrogacy. As such, the State was not required to recognise Mrs Mennesson as a legal parent under French Law, even though she was listed as a parent on the children’s birth certificates alongside the intended father.\textsuperscript{10}

In 2018, the French Civil Judgments Review Court granted a request from the Mennessons for re-examination of the earlier refusal to enter the particulars of the foreign birth certificates into the French register of births, marriages and deaths. The ECtHR’s advisory opinion arose in the context of this review as the Court of Cassation submitted two questions concerning the case to the ECtHR for clarification. The questions were worded as follows:

1. By refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the ‘intended mother’ as the ‘legal mother’, while accepting registration in so far as the certificate designates the ‘intended father’, who is the child’s biological father, is a State Party overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the ‘intended mother’?

2. In the event of an answer in the affirmative to either of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother–child relationship, ensure compliance with the requirements of Article 8 of the Convention?\textsuperscript{11}

In addressing the first question, the ECtHR noted that, as it had determined in \textit{Mennesson v. France},\textsuperscript{12} Article 8 ECHR requires that the domestic law of each Member State

\textsuperscript{9} Op. cit., para 100.
\textsuperscript{10} For a discussion of the significance of the ruling, see C. Fenton-Glynn, ‘International Surrogacy Before the European Court of Human Rights’, \textit{Journal of Private International Law} 13 (2017), pp. 546–567.
\textsuperscript{11} European Court of Human Rights, \textit{Advisory Opinion}, para 9.
\textsuperscript{12} \textit{Mennesson v. France}, Application No. 65192/11, 26 June 2014.
provides the possibility for recognition of the legal relationship between a child born through a surrogacy arrangement abroad and the intended father in cases where he is the biological father. Failure to provide such recognition amounts to a violation of the child’s right to respect for their private life under Article 8. Using the same reasoning, the ECtHR was satisfied that the lack of legal recognition of the relationship between the surrogate-born child and the intended mother in cases of surrogacy negatively impacted on ‘several aspects of that child’s right to respect for its private life’. The Court was of the view that the child’s best interests ‘entail the legal identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare, as well as the possibility for the child to live and develop in a stable environment’. These considerations led the Court to find that:

the general and absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is incompatible with the child’s best interests, which require at a minimum that each situation be examined in the light of the particular circumstances of the case.

These considerations led the Court to answer the first question posed in the advisory opinion request in the affirmative. It found that:

the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad through a gestational surrogacy arrangement requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the ‘legal mother’.

In addition, although the Court acknowledged that the domestic proceedings did not concern the situation of a surrogate-born child conceived using the eggs of the surrogate mother, it went on to comment that ‘the need to provide a possibility of recognition of the legal relationship between the child and the intended mother applies with even greater force in such a case’.

In relation to the form that the legal recognition of the mother–child relationship should take, the ECtHR was satisfied that there was no obligation on the State to register the details of the birth certificate legally established abroad. Rather, ‘the choice of means by which to permit recognition of the legal relationship between the child and the intended parents falls within the States’ margin of appreciation’. The Court found that Article 8 ECHR does not require States to recognise ab initio the legal relationship between the child and the intended mother. However, the State must provide a legal

13. European Court of Human Rights, Advisory Opinion, para 40.
14. Op. cit., para 42.
15. Op. cit., para 42.
16. Op. cit., para 46.
17. Op. cit., para 47.
18. Op. cit., para 51.
mechanism to recognise the relationship once ‘it has become a practical reality’. Various procedures, including adoption by the intended mother, could be used for this purpose provided that the chosen method ‘produces similar effects to registration of the foreign birth details’ in terms of recognising the relationship. In addition, the procedure must be ‘implemented promptly and effectively’ to ensure that the child is ‘not kept for a lengthy period in a position of legal uncertainty as regards the relationship’.

The answers provided by the ECtHR to the questions posed in the advisory opinion may have surprised some observers, given the absence of a European consensus on the recognition of legal parentage in surrogacy. In addition, the reasoning may appear to be at odds with the ECtHR’s decision in Paradiso and Campanelli v. Italy, discussed further below, which emphasised the importance of the genetic link in establishing legal parentage in surrogacy. At the same time, the conclusions in the advisory opinion cogently build on the reasoning of the Court in the first Mennesson case by acknowledging the children’s rights issues created by the absence of legal recognition for the mother–child relationship. In addition, it should be noted that the reasoning in the advisory opinion still leaves a large amount of discretion to States as regards the mode of legal recognition. This point is explored further in the third section of the article.

The advisory opinion was returned to the Court of Cassation and, on 4 October 2019, the French Court finally ordered that the Mennesson children’s foreign birth certificates be transcribed in their entirety into French law. Although this approach to recognition of the mother–child relationship would not be required in every case, the Court of Cassation was satisfied that the transcription of the birth certificates was more appropriate than adoption in the instant case due to the length of time involved in the Mennessons’ quest for family recognition.

Pursuant to Article 5 of Protocol No. 16, the advisory opinion was not binding on the Court of Cassation, but it has nonetheless established ‘a modus operandi’ for future cases before the Court and has thus had a huge impact on French law. It remains to be seen how other countries will respond to the advisory opinion, if at all, and whether it will have a broader impact on cross-border surrogacy in Europe. The following section will assess the jurisdictional limits of the advisory opinion to consider the possible implications for legal parentage in future cases.

19. Op. cit., para 52.
20. Op. cit., para 53.
21. Op. cit., para 55.
22. Op. cit., para 54.
23. Paradiso and Campanelli v. Italy, Application No. 25358/12, 24 January 2017.
24. Cour de Cassation, Assemblee pleniere, No. 648 of 4 October 2019.
25. A. Alouane, ‘A Never-ending Conflict: News From France on the Legal Parentage of Children Born Trough Surrogacy Arrangements’, Conflict of Laws (29 January 2020). Available at: https://conflictoflaws.net/2020/a-never-ending-conflict-news-from-france-on-the-legal-parentage-of-children-born-trough-surrogacy-arrangements/ (accessed 27 August 2020).
**Jurisdiction of the advisory opinion**

Protocol No. 16 to the ECHR makes provision for advisory opinions to be issued by the ECtHR. The procedure is intended to support the principle of subsidiarity by enhancing the interaction between the Court and national authorities. The principle of subsidiarity recognises that Member States have the primary responsibility to secure the rights and freedoms defined in the ECHR, while the ECtHR exercises a supervisory role. The principle is bolstered through the advisory opinion mechanism as this procedure provides guidance to assist State Parties to avoid future violations of the ECHR. It is an optional process, initiated by the national court, that is intended to assist them in resolving cases at national level without transferring the dispute to the ECtHR.

The scope of the advisory opinion is clearly defined in Protocol No. 16. Article 1 of Protocol No. 16 specifies that the requesting court may seek an advisory opinion ‘only in the context of a case pending before it’. This provision restricts the nature of the questions that can be sent to the ECtHR through the procedure and limits the wider application of the principles espoused in the advisory opinion as those principles will be developed in the context of a specific case.

In the French request, the ECtHR highlighted the parameters of the advisory opinion procedure throughout. The Court noted that its response had to be ‘confined to points that are directly connected to the proceedings pending at domestic level’. Hence, as the Mennessons’ case did not involve traditional surrogacy, the ECtHR noted that the opinion would not address such situations. Moreover, as the domestic proceedings concerned a father with a biological connection to the child, the Court emphasised that it would ‘limit its answer accordingly’.

However, the Court does stray from its commitment to confine the scope of the opinion. The Mennessons’ case concerned an intended mother who was not genetically related to the surrogate-born children. Yet, the Court specifically mentions the situation of an intended mother who is genetically related to the child, noting that ‘the need to provide a possibility of recognition of the legal relationship between the child and the intended mother applies with even greater force in such a case’. This statement constitutes guidance on a factual scenario that does not relate to the proceedings pending at domestic level and undermines the assertion that the opinion can only address matters...

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26. Preamble to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.
27. Article 1, Protocol No. 15 to the Convention for the Protection of Human Rights and Fundamental Freedoms.
28. Council of Europe, Explanatory Report to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS 214), para 2.
29. European Court of Human Rights, Advisory Opinion, para 26.
30. In traditional surrogacy, the surrogate contributes her own egg to enable the conception of the child. By contrast, in gestational surrogacy, the egg of the intended mother or an egg donor is used.
31. European Court of Human Rights, Advisory Opinion, para 36.
32. Op. cit., para 47.
arising in the pending case. It should, of course, be noted that the questions posed by the French Court of Cassation in its request for the advisory opinion specifically ask whether a distinction should be drawn ‘according to whether or not the child was conceived using the eggs of the “intended mother”’. As such the Court’s digression can be explained on the basis that it was answering the question posed. Still, one cannot ignore that, in doing so, the ECtHR goes beyond the facts of the domestic proceedings and ‘ends up partially ignoring its own disclaimer . . . by providing some guidance – even if through an obiter dictum – on a situation that is different from the one pending before the national court’. 33

It is also notable that, although the Court is careful to temper the scope of the advisory opinion, it acknowledges that the value of the opinion lies in ‘providing the national courts with guidance on questions of principle relating to the Convention applicable in similar cases’. 34 This statement proposes that the reasoning and analysis in the advisory opinion should extend beyond the pending domestic proceedings. This approach is also envisaged in the Explanatory Report on Protocol No. 16, which states that advisory opinions ‘form part of the case-law of the Court, alongside its judgments and decisions’ and further that ‘[t]he interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions’. 35 Thus, the advisory opinion is designed to provide guidance on the interpretation of the ECHR that extends beyond the facts of the pending case and is intended to set standards that reflect the thinking of the court that are applicable in future cases. The standards set in the French advisory opinion have already been applied by the ECtHR in a subsequent case, C and E v. France, 36 demonstrating that the opinion can be used in this interpretive manner.

C and E v. France concerned the French authorities’ refusal to enter in the French register of births, marriages and deaths the full details of the birth certificates of children born abroad through a gestational surrogacy arrangement and conceived using the gametes of the intended father and a third-party donor, in so far as the birth certificates designated the intended mother as the legal mother. The ECtHR noted that the situation of the children in this case was similar to that of the children at the centre of the advisory opinion. The Court noted that, in the advisory opinion, it found that once the relationship has become a practical reality, an effective mechanism must exist to recognise the legal relationship between mother and child. Applying this finding to the instant case, the Court noted that adoption was available to the mother under national law to establish a legal relationship with the children and that the waiting times for adoption in France were ‘4.1 months’ for full adoption and ‘4.7 months’ for simple adoption. 37 The existence of this mechanism was deemed to satisfy the criteria enunciated in the advisory opinion and so the French authorities’ refusal to enter the details of the children’s foreign

33. 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 at p. 419 (original emphasis).
34. European Court of Human Rights, Advisory Opinion, para 26 (emphasis added).
35. Council of Europe, Explanatory Report, para 27.
36. C and E v. France, Application Nos 1462/18 and 17348/18, 19 November 2019.
37. Op.cit., para 43.
birth certificates in the French register of births, marriages and deaths was found not to be disproportionate and the application was therefore ‘manifestly ill-founded’.

The reasoning in the advisory opinion represents something of a departure for the Court, which has traditionally placed great significance on the genetic connection in surrogacy. For example, in Paradiso and Campanelli v. Italy, the ECtHR held that the lack of any genetic link between the child and the intended parents meant that there was no violation of Article 8 ECHR in circumstances where the Italian authorities refused to recognise the parental relationship legally established in Russia between a child born through surrogacy and the intended parents. There is, however, a substantial difference between the scenario discussed in the advisory opinion and the facts of Paradiso: in the former, the intended father was genetically connected to the children; in the latter, neither intended parent was genetically related to the child. In this way, it is clear that the advisory opinion continues to place great weight on the genetic connection since the intended father’s recognition is premised on it. Moreover, the significance attached to the genetic connection is apparent when looking at the different approaches taken to recognition of the genetic father and the non-genetically related mother (who is married to the genetic father): the genetic intended father’s legal relationship with the child must be recognised ab initio, whereas States have a choice of how and when to recognise the relationship between the non-genetically related intended mother and the child.

The discussion above also gives rise to questions about the compliance of the advisory opinion with the principle of subsidiarity. On first reading, it would seem that the ECtHR has effectively usurped the role of Member States in respect of the regulation of cross-border surrogacy by requiring that States recognise certain intended parents as the legal parents to comply with Article 8 ECHR. Subsequent cases in countries including France, Spain and Germany have followed the reasoning of the ECtHR in the Mennesson case and have provided legal recognition of the father–child relationship notwithstanding restrictions on cross-border surrogacy in the domestic laws of the countries. In essence, the effect of Mennesson is to allow intended parents to circumvent prohibitive domestic laws on surrogacy by travelling abroad for the surrogacy arrangement, safe in the knowledge that their State of residence will have to recognise the legal relationship between the genetic intended father and the child ab initio. Where this occurs, the State of residence has no oversight of the surrogacy arrangement and there is no opportunity for an individualised assessment of the best interests of the child born through the surrogacy. The genetic connection, it seems, obviates the need for such an assessment.

However, the implications of the ECtHR’s reasoning in the advisory opinion are more nuanced as regards the recognition requirement for the non-genetically related intended mother. The requirements in the latter situation are, necessarily, tempered in accordance

38. Paradiso and Campanelli v. Italy, Application No. 25358/12, 24 January 2017.
39. Margaria, ‘Parenthood and Cross-border Surrogacy’, pp. 12–13.
40. Fenton-Glynn, ‘International Surrogacy’, pp. 562–564.
41. 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.
with the margin of appreciation and the best interests of the child. In particular, it is notable that the State is not required to recognise the legal parentage of the non-genetically related spouse \textit{ab initio}, but merely has to put in place a \textit{mechanism} to establish a legal relationship between the child and the intended mother. The choice of mechanism to facilitate recognition of the legal relationship between the child and the intended mother is a matter that remains within the State’s margin of appreciation, and the \textit{criteria} for recognition are also for the State to determine. This means that there is no guarantee that the intended mother will be recognised as the legal mother: in accordance with the margin of appreciation, the State could find that recognition is not appropriate in a particular case based on its consideration of the best interests of the child. As part of the recognition mechanism, the State will need to assess the child’s best interests, but the advisory opinion ‘does not explain how to determine when countervailing reasons to recognition may prevail’.\cite{Lavrysen} Thus, individual States are permitted to determine the nature of the best interests assessment and maintain the ultimate decision-making authority in respect of the legal recognition of the intended mother. This, in itself, may lead to concerns that the best interests of the child may act as a ‘smokescreen’ in the decision-making or that the child’s best interests will become weaponised in the process.\cite{Bracken} Full discussion of this point is outside of the scope of the present article, but it is apposite to note that any refusal of recognition based on consideration of the best interests of the child would need to be justified in light of the child’s rights under Article 8 ECHR, taken alone or in conjunction with Article 14 ECHR.

The next section will further tease out the requirements established in the advisory opinion for the legal recognition of the intended mother. It will also consider whether these requirements could apply in the case of a non-genetically related intended father in a male couple following a cross-border surrogacy arrangement and how ‘countervailing reasons to recognition’ may be addressed in such a case.

\textbf{Implications for future cases}

\textit{The non-genetically related intended mother}

The advisory opinion places a clear obligation on States Parties to put in place a mechanism to allow for the legal recognition of the parental status of an intended mother in surrogacy in circumstances where her husband, who is genetically related to the child, has been recognised as a legal parent under national law and both intended parents are listed on the child’s birth certificate. As discussed above, this finding has application beyond the Mennessons’ case and has relevance for all future cases of cross-border

\begin{itemize}
\item \cite{Lavrysen} L. Lavrysen, ‘The Mountain Gave Birth to a Mouse: The First Advisory Opinion under Protocol No. 16’, \textit{Strasbourg Observers} (14 April 2019). Available at: https://strasbourgobservers.com/2019/04/24/the-mountain-gave-birth-to-a-mouse-the-first-advisory-opinion-under-protocol-no-16/ (accessed 27 August 2020).
\item \cite{Bracken} L. Bracken and C. O’Mahony, ‘The Child’s Right to Family Life: Shifting Sands and Social Science’ in P. Czech, L. Heschl, K. Lukas, M. Nowak, G. Oberleitner (eds) \textit{European Yearbook on Human Rights} (Cambridge: Intersentia, 2020), pp. 79–96
\end{itemize}
surrogacy in all Member States, albeit subject to the restrictions discussed in the previous section. To comply with Article 8 ECHR, States must establish a mechanism to legally recognise the intended mother’s relationship with the child once that relationship ‘has become a practical reality’. The mechanism must be ‘implemented promptly and effectively’ to ensure that the child is ‘not kept for a lengthy period in a position of legal uncertainty as regards the relationship’. The advisory opinion does not specify the time frame required for a ‘prompt’ or ‘effective’ decision. In *C and E v. France*, waiting times of ‘4.1 months’ and ‘4.7 months’ for adoption were found to satisfy the criteria in the advisory opinion.

States can use a variety of means to recognise the relationship between the intended mother and the child, but the chosen method must have ‘similar effects to registration of the foreign birth details’. As such, it would seem that the extension of something like parental responsibility to the intended parent would not, in itself, satisfy the standards established in the opinion. Although the meaning of ‘parental responsibility’ will differ from jurisdiction to jurisdiction, it is not normally equivalent to the status of legal parentage that would be achieved through registration of the foreign birth certificate. In most countries, parental responsibility is a temporary status that comes to an end when the child reaches the age of majority. It does not typically create a legal relationship with the extended family in the way that legal parentage does, and it does not confer many important rights that are associated with legal parentage such as those pertaining to citizenship or succession. As such, it is argued that the extension of parental responsibility alone to the intended mother would not have sufficiently similar effects to birth registration needed to comply with the advisory opinion. Instead, a mechanism such as adoption would be needed to allow the intended mother to be recognised as a legal mother under national law.

**The non-genetically related intended father**

As noted above, the advisory opinion issued by the ECtHR is confined to the factual scenario on which it is based, that is the recognition of the mother–child relationship in the case of an opposite-sex couple who have engaged in surrogacy. The opinion does not consider whether the same principles could or should apply in the case of a male couple who have engaged in surrogacy. Therefore, it is not immediately clear from the opinion

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44. European Court of Human Rights, *Advisory Opinion*, para 52.
45. Op. cit., para 55.
46. Op. cit., para 54.
47. *C and E v. France*, Application Nos 1462/18 and 17348/18, 19 November 2019.
48. European Court of Human Rights, *Advisory Opinion*, para 53.
49. This is the case in England and Wales and in Ireland, for example.
50. L. Bracken, *Same-Sex Parenting and the Best Interests Principle* (Cambridge: Cambridge University Press, 2020), chapter 3; A. Bainham, ‘Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions’, in A. Bainham, S. Day Sclater and M. Richards, eds., *What is a Parent? A Socio-Legal Analysis* (Oxford: Hart Publishing, 1999), p. 25.
whether a Member State would also be required to recognise the legal relationship between the non-genetically related intended father and the child in circumstances where the genetic intended father has been recognised as a legal father. Although the advisory opinion is focused on the legal recognition of the intended mother, the ECtHR’s emphasis on the best interests of children who are born through surrogacy demonstrates an awareness of the need to recognise and protect a wide range of children’s family relationships where these are a practical reality. This focus suggests that the principles established in the advisory opinion can be applied to a variety of family forms, including male couples who engage in surrogacy.

According to the ECtHR, the child’s best interests ‘entail the legal identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare, as well as the possibility for the child to live and develop in a stable environment’.51 This statement has far-reaching consequences for all families and emphasises the need to recognise caring roles, rather than relying solely on genetics as the marker of legal parentage. Where male couples have a child through surrogacy, both fathers are likely to be actively involved in the upbringing and day-to-day care of the child. Thus, a mechanism should exist to legally recognise the parenting roles of both fathers. The possibility of this legal recognition is also required to ensure that there is an individualised approach to the assessment of the best interests of the children raised by them. In many European countries, the type of legal recognition envisaged by the advisory opinion is not possible where the intended parents are of the same-sex. For example, only 19 of the 49 European countries analysed as part of ILGA-Europe’s Rainbow Map 2020 allow for second-parent adoption by same-sex couples; only 17 countries allow for joint adoption by same-sex couples; and only 10 countries allow automatic co-parent recognition in the case of a same-sex couple.52

If the intended parents are unable to access adoption or a similar mechanism following surrogacy, there would be no individualised assessment of the best interests of the child as the application would be refused outright regardless of how suitable the intended parents are and irrespective of whether the child would benefit from the creation of legal ties with both of the parents. In line with Articles 3 and 21 of the United Nations Convention on the Rights of the Child (UNCRC), the ECtHR has established that ‘whenever the situation of a child is in issue, the best interests of that child are paramount’.53 The ECtHR also recognises that the assessment of the child’s best interests must take place on a case-by-case basis.54 As stated in the advisory opinion:

the general and absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is

51. European Court of Human Rights, Advisory Opinion, para 42.
52. ILGA Europe Rainbow Map. Available at: https://www.rainbow-europe.org/ (accessed 12 March 2021).
53. European Court of Human Rights, Advisory Opinion, para 38.
54. The individualised nature of the best interests assessment is endorsed by the Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para 1) CRC/C/GC/14.
incompatible with the child’s best interests, which require at a minimum that each situation be examined in the light of the particular circumstances of the case.\textsuperscript{55}

An individualised assessment of the child’s best interests cannot be achieved where certain applicants are prevented from accessing the adoption process because this exclusion means that there is no independent assessment of the best interests of the child who was born through surrogacy in the context of adoption.\textsuperscript{56}

The contention that recognition of the legal parental status of the non-genetic intended father is required in order for a Member State to comply with Article 8 ECHR is also supported by reference to prior ECtHR case law (although it is accepted that there is no rule of stare decisis at the ECtHR). In \textit{Foulon and Bouvet v. France},\textsuperscript{57} the ECtHR confirmed that the principles established in the \textit{Mennesson} case apply equally to same-sex couples such that the genetic intended father who is listed on the child’s foreign birth certificate following a surrogacy agreement must be recognised as a legal parent under domestic law. The applicants in this case were Mr Foulon and his daughter and Mr Bouvet and his twin sons. The children had been born in India through surrogacy agreements. Following the births of their respective children, Mr Foulon and Mr Bouvet had been issued with birth certificates in India as evidence of paternity. Each of the foreign birth certificates listed the surrogate mother as the legal mother. The French authorities subsequently refused to transcribe these birth certificates into French law, and this refusal ultimately formed the basis of the linked cases taken to the ECtHR. The ECtHR noted that there were similarities between the situation of Mr Foulon and Mr Bouvet and the applicants in the earlier case of \textit{Mennesson} and saw no reason to depart from the principles established in the earlier case. As such, it held that the refusal to transcribe the Indian birth certificates into the French civil status register amounted to a violation of the children’s right to respect for their private life under Article 8 ECHR.

\textit{Foulon and Bouvet} established that the legal parental status of the intended father must be recognised under domestic law in cases of surrogacy where he is the genetic father, regardless of his sexual orientation. It should be noted, however, that each of the birth certificates in this case listed the surrogate as the legal mother. Thus, the decision does not address the legal recognition of the non-genetically related intended father in circumstances where he is listed as a legal parent alongside the genetic father on the child’s birth certificate. Nonetheless, it is submitted that the legal recognition of the non-genetically related intended father represents a logical progression in the jurisprudence of the Court, taking into account the \textit{Foulon and Bouvet} judgment and the principles established in the advisory opinion. It is argued that the principles set in the advisory opinion should apply equally in the case of a male couple that has engaged in surrogacy on the basis that the male couple is in a ‘directly comparable’ position to the opposite-sex

\textsuperscript{55} European Court of Human Rights, \textit{Advisory Opinion}, para 42 (emphasis added).

\textsuperscript{56} U. Kilkelly, ‘In Re P: Adoption, Discrimination and the Best Interests of the Child’, \textit{Child and Family Law Quarterly} 22 (2010), pp. 115–130.

\textsuperscript{57} \textit{Foulon and Bouvet v. France}, Application Nos 9063/14 and 10410/14, 21 October 2016.
couple. Hence, any difference in treatment would amount to discrimination under Article 14 ECHR, taken in conjunction with Article 8 ECHR.

A ‘directly comparable’ position. According to the ECtHR, in order for an issue to arise under Article 14 ECHR, there must be a difference in the treatment of persons in relevantly similar situations and that difference in treatment will only amount to discrimination where it has no objective and reasonable justification.\(^{58}\) Differences based on sexual orientation require particularly serious reasons by way of justification.\(^{59}\) The question of whether or not the persons are in ‘relevantly similar situations’ will be based on consideration of the factual circumstances in each case.

In *Gas and Dubois v. France*,\(^{60}\) a female same-sex couple who had been denied access to second-parent adoption claimed that they had been subjected to an unjustified difference in treatment compared with opposite-sex couples. Notwithstanding that marriage was unavailable to the applicants at the time, the fact that they were unmarried meant that their situation was *not* comparable to that of a married opposite-sex couple since ‘marriage confers a special status on those who enter into it’.\(^{61}\) On the other hand, the ECtHR found that the applicants’ position was similar to that of an unmarried opposite-sex couple. However, as unmarried opposite-sex couples were also excluded from second-parent adoption, the Court found that there was no difference of treatment between them and hence no discrimination based on the applicants’ sexual orientation.

These findings were reiterated in the later case of *X and Others v. Austria*,\(^{62}\) such that the unmarried same-sex couple at the centre of this case were found not to be in a comparable situation to a married opposite-sex couple, but they were found to be in relevantly similar situation to an unmarried opposite-sex couple. In this case, Austrian law allowed unmarried opposite-sex couples to avail of second-parent adoption but excluded unmarried same-sex couples from the process. Since unmarried opposite-sex and unmarried same-sex couples were in relevantly similar situations, the Court found that there was a difference in treatment in the law that was based on the applicants’ sexual orientation and was therefore in violation of Article 14 ECHR taken in conjunction with Article 8 ECHR.

In light of the above, it is necessary to consider whether the non-genetic intended father in cases of surrogacy is in a relevantly similar situation to the non-genetic intended mother. In examining the similarities, it is useful to surmise the position of the intended mother who was at the centre of the advisory opinion. In essence, the possibility for this intended mother to acquire her legal parentage arises by virtue of her connection to the

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58. See, for example, *Mareckx v. Belgium*, Application No. 6833/74, 13 June 1979; *Schalk and Kopf v. Austria*, Application No. 30141/04, 24 June 2010; *Fabris v. France*, Application No. 16574/08, 7 February 2013.

59. *Schalk and Kopf v. Austria*, Application No. 30141/04, 24 June 2010.

60. *Gas and Dubois v. France*, Application No. 25951/07, 15 June 2012.

61. Op. cit., para 68.

62. *X and Others v. Austria*, Application No. 19010/07, 19 February 2013.
genetic father – the requirement to recognise her as a legal parent is not dependent on genetics, gestation or gender. This intended mother is:

1. listed as the legal mother of the surrogate-born child on the foreign birth certificate;
2. does not have a genetic connection to the child; and
3. is married to the genetic intended father who is listed as the father on the birth certificate.

Hence, the non-genetically related intended father will be in a ‘directly comparable’ position to the intended mother where he is:

1. listed as the second parent of the surrogate-born child on the foreign birth certificate;
2. does not have a genetic connection to the child; and
3. is married to the genetic intended father who is listed as the father on the birth certificate.

Where a non-genetically related intended father is in a directly comparable position to the non-genetically related intended mother, whatever mechanism is made available to recognise the parent–child relationship between the intended mother and her surrogate-born child must also be available to the intended father and his surrogate-born child. Otherwise, there would be an unjustified difference of treatment between the families.

It would be open to a Member State that fails to provide equal recognition of the parent–child relationships created through surrogacy to argue that the resulting difference in treatment is justified by reference to the need to protect ‘the family in the traditional sense’ or to protect the child’s best interests. However, such contentions would be heavily scrutinised by the ECtHR. In X and Others v. Austria, the ECtHR dismissed arguments to this effect made by the Austrian authorities in the case of a same-sex couple. In this case, the ECtHR noted that the burden of proof is on the Government to show that the protection of the family requires the difference in treatment, but no such evidence had been presented. On the contrary, the Government had conceded that same-sex couples could be ‘as suitable or unsuitable’ as opposite-sex couples when it came to adopting children. There is a growing body of scientific evidence that shows that children born through surrogacy to gay fathers have positive outcomes. The existence of this research would undermine efforts by a Member State to justify a difference of treatment between the intended mother and the intended father on the basis of the child’s best interests.

63. Op. cit.
64. Op. cit., para 142.
65. S. Golombek and others, ‘Parenting and the Adjustment of Children Born to Gay Fathers Through Surrogacy’, Child Development 89(4) (2018), pp. 1223–1233. See further, L. Bracken, Same-Sex Parenting and the Best Interests Principle (Cambridge: Cambridge University Press, 2020), chapter 3, pp. 199–202.
As argued in the previous section, Member States are obliged to make access to adoption or a similar mechanism available without delay for opposite-sex couples who have engaged in surrogacy to comply with the advisory opinion. Once a State does so, to avoid any difference in treatment, it is argued that it must extend this access to male couples who have engaged in surrogacy in order for the State to comply with Article 14 ECHR, taken in conjunction with Article 8 ECHR. In each case, the argument is that each parent should have the opportunity to apply for adoption or for the similar mechanism and to have that application considered in light of the best interests of the child. The ultimate decision on the application would rest with the Member State.

Conclusion

It is likely that the significance of the ECtHR’s first advisory opinion has yet to be fully considered by many Member States. Although the opinion is non-binding, it has far-reaching consequences for ECHR Member States as it signifies the mindset of the Court in relation to cross-border surrogacy that would likely be applied in future cases. As demonstrated in this article, the reasoning in the advisory opinion is applicable to both non-genetically related intended mothers and non-genetically related intended fathers in cross-border surrogacy who meet the specific conditions outlined in the opinion. There are, however, limits to the opinion and it has been shown that the reasoning is not quite as expansive as one might first assume. This is due to the fact that the opinion does not require States to recognise the legal parentage of the non-genetically related spouse *ab initio*, but merely to establish a mechanism to allow for recognition of the parent–child relationship once ‘it has become a practical reality’.66 As part of this mechanism, the State must assess the best interests of the child on a case-by-case basis. In this way, States maintain discretion as to the recognition of the parental status of the non-genetically related intended parent. However, in line with the procedural guarantees of Article 3 UNCRC, States must demonstrate how the interests of the child have been examined and assessed, and what weight has been ascribed to them in the decision,67 which reduces the risk that ‘smokescreen’ considerations will determine the outcome of the best interests assessment.

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66. European Court of Human Rights, *Advisory Opinion*, para 52.
67. Committee on the Rights of the Child, para 14.