SURROGACY AND THE ECtHR: REFLECTIONS ON *PARADISO AND CAMPANELLI v ITALY*

ABSTRACT

This case note analyses the recent judgment of the European Court of Human Rights in *Paradiso and Campanelli v Italy* and examines its implications for cross-border surrogacy in Europe. It is argued that this judgment is highly significant, because it sets new standards in terms of the concept of family life under Article 8 of the European Convention on Human Rights. This judgment, it is argued, only appears to bring a halt to the (seemingly) backdoor legitimacy of commercial surrogacy established by the findings of the Second Section and previous judgments of the Court. Finally, this case note critiques the Grand Chamber's findings and examines its likely impact on the problem of cross-border surrogacy.

KEYWORDS: Article 8, European Convention on Human Rights, European Court of Human Rights, *Paradiso and Campanelli v Italy*, surrogacy.

INTRODUCTION

Surrogacy has generated a significant amount of controversy in academic and policy circles but cross-border surrogacy, which is related to reproductive tourism, has brought the issue into the international arena. Over the last few years the European Court of Human Rights (hereinafter ECtHR or Court) has been called upon to interpret Article 8 of the European Convention on Human Rights (ECHR or Convention) on family and private life to provide

protection to children and their intended parents.[1] The latest case, the decision of the Grand Chamber in *Paradiso & Campanelli v Italy* (the *Paradiso* case) was issued in January 2017.[2]

This case note will analyse the *Paradiso* case and examine its likely implications for cross-border surrogacy in Europe. After summarising the facts and judgments, it will be argued that the Grand Chamber decision sets new standards for the interpretation of family life and surrogacy. Special focus will be given to another fundamental part of this judgment: the finding that there was no violation of the right to respect for private life caused by the removal of the child from the intended parents. This note will then indicate that the judgment appears to bring a halt to the (seemingly) backdoor legitimacy of commercial surrogacy established by the previous case law of the Court, but does not offer a solution to cross-border surrogacy.

PARADISO AND CAMPANELLI v ITALY: AN OVERVIEW

In 2010 Mrs Paradiso and Mr Campanelli entered into a surrogacy agreement with a Russian clinic given that surrogacy is not legal in Italy. Mrs Paradiso took a sample of her husband's semen to Russia so that it could be joined with a donor's egg and implanted into a surrogate's womb. The Russian clinic certified that Mr Campanelli's semen was used for the creation of the implanted embryos, which was however proved wrong by a later DNA test.

The child was born in Moscow in February 2011, and Mrs Paradiso submitted the necessary documents to the Italian Consulate in Russia and took the child to Italy that April. In May 2011 the Italian Consulate informed the relevant Italian authorities that the birth certificate contained false information. Consequently, the Italian Public Prosecutor started criminal proceedings against the couple for misrepresentation of civil status, use of falsified

[1] e.g. *Mennesson v France* [2014] ECHR 664 and *Labassee v France* [2014] ECHR 668.

[2] *Paradiso & Campanelli v Italy* [2017] ECHR 96.

documents and breach of the international adoption rules of Italy. At the same time, civil proceedings were instigated to suspend the couple's custody and place the child for adoption, as it was in a 'state of abandonment'.[3] Following the appointment of a guardian, the registration of the Russian birth certificate was refused. In proceedings before the civil courts in Italy, a team of social workers drafted a report on the family, indicating that the intended parents had a comfortable income, were respected by their fellow citizens and the child was in excellent health. However, in August 2011 a DNA test proved that the child bore no biological link to Mr Campanelli.

In October 2011 the child was removed from the intended parents and was placed in a children's home for fifteen months, before ending up in a new family. The separation was ordered by the Campobasso Minors Court while the proceedings were pending, and was contrary to the advice of a consulted psychologist who warned about the devastating effects of a possible separation on the child. The whole process was conducted under strict anonymity so the intended parents lost trace of the child.

The Chamber of the ECtHR held that, based on the time the applicants had parented the child during the important first stages of his young life, there was a *de facto* family life within the meaning of Article 8 of the ECHR. It did not matter that there was no formal legal relationship with the child. The right to respect for private life was also involved, given that it encompasses the right to establish relationships with others and here there was a direct link between the establishment of paternity and Mr Campanelli's private life. The Chamber held that the removal of the child without any specific assessment regarding his best interests was

[3] According to section 8 of (the Italian) Law no. 184/1983 ('the Adoption Act'), as amended by Law no. 149 of 2001, entitled 'The Child's Right to a Family', a child is encountered in a state of abandonment when it is being deprived of all emotional or material support from the parents or the members of his or her family responsible for providing such support other than in temporary cases of force majeure (n 2 [63]).

an extreme measure that should be used only as a last resort and, consequently, the national authorities had failed to strike a fair balance between the public interest and the private interests.[4]

The academic reaction to the judgment was mixed. Beaumont and Trimmings were among those who urged the Court to reconsider the notion of *de facto* family life, given that the child had resided with the intended parents for only eight months and bore no genetic link to the couple.[5] With its referral to the Grand Chamber, the case took an interesting turn, as the ECtHR based, among others, on the two factors mentioned by Beaumont and Trimmings did not consider that family life was engaged in the present case.

FAMILY LIFE

A quick glance at the case law of the ECtHR reveals that the concept of family life is rather wide. The Court has repeatedly stated that the application of the notion of family life is not conditional upon a merely legal and formal relationship, but upon the real existence of family ties, otherwise referred to as *de facto* family ties.[6] Nonetheless, the desire to found a family or adopt is not guaranteed by Article 8.[7]

The Grand Chamber rejected the application of the concept of family life in the *Paradiso* case on three grounds: the absence of biological ties, the short duration of their

[4] Chamber's *Paradiso and Campanelli v Italy*, [86].

[5] P Beaumont and K Trimmings, 'Recent Jurisprudence of the European Court of Human Rights in the Area of Cross-Border Surrogacy: Is There Still a Need for Global Regulation of Surrogacy?' (University of Aberdeen, Working Paper no. 2016/4), <https://www.abdn.ac.uk/law/documents/CPIL_2016-4.pdf> accessed 22 December 2017.

[6] e.g. *Johnston and Others v Ireland* (1987) 9 EHRR 203.

[7] *E.B. v France* [2007] ECHR 211.

cohabitation and the uncertainty of the ties from a legal perspective based on their own actions.

i) Absence of biological ties

The absence of biological ties alone does not preclude the notion of family life as the ECtHR itself acknowledges that family life exists as long as there are genuine personal ties. In fact, this is one of the reasons for the recognition of *de facto* family ties by the ECtHR: to provide protection for genuine personal ties in circumstances where there is no biological link between an adult and a child; the other reason being the absence of recognised legal ties.[8] Therefore, the Court acknowledges the fact that biological ties are not a *sine qua non* for the notion of family life and further accepts that the applicants had developed a parental project and had undertaken the role of parents towards the child. In this way, the intended parents created an emotional bond with the child from his early life, which was also recognised by the social workers report before the Italian Minors Court civil proceedings.[9] Despite the above findings, this criterion in combination with the duration of cohabitation leads to a different result.

ii) Duration of cohabitation

The Grand Chamber held that there should be no specification of a minimal duration of cohabitation between the parents and child to develop *de facto* family ties. Nonetheless, the time of cohabitation is a crucial element when acknowledging the reality of a family life. The Court considered that although there have been cases where the time of shared life lasted for only two months, in those cases there was a biological tie with at least one parent and the cohabitation was subsequently resumed.[10] Given that in the present case the parents had spent

[8] *Paradiso & Campanelli v Italy* (n 2) [141].

[9] ibid [151].

[10] *D. and Others v Belgium* ECtHR 8 July 2014, [49].

'only' eight months with the child and there was no biological link between them, the criterion of cohabitation was not fulfilled. In addition, the belief that the intended father was the biological parent could not compensate for the short period of the cohabitation.

iii) Uncertainty created by the applicants themselves

The Grand Chamber refused to accept the existence of *de facto* family life because the applicants put themselves in this situation of legal uncertainty by acting in a way that was illegal and inconsistent with their state's legal system. In Italy surrogacy is prohibited and the settlement of the intended parents with the child lacked any legal basis.

This judgment introduces new elements to the notion of family life. The duration of cohabitation is made a key element for *de facto* family ties, an element that has been used in previous judgments to support the existence of family life, although it has been held by the Court that it 'does not see cohabitation as a *sine qua non* of family life between parents and minor children'.[11] Nevertheless, its duration has never been a subject of scrutiny. According to this new judgment, a short time of cohabitation does not suffice for the notion of family ties when there is no biological link between the parents and the child, such as eight months for instance. This is not the case when there is a biological tie, as in such cases the duration of cohabitation may be as short as two months. It is however important to keep in mind the fact that there is no definition of the period that constitutes a short duration of cohabitation. This leads to the conclusion that the issue of cohabitation will be decided by the Court on a case-by-case basis. It is curious that, previously, in the absence of a biological link in *Moretti and Benedetti v Italy* 19 months were considered enough to establish *de facto* family ties between foster parents and the child.[12]

[11] *Berrehab v Netherlands* ECtHR 21 June 1988, [21].

[12] *Moretti and Benedetti v Italy* ECtHR 27 Apr 2010.

Additionally, the *Paradiso* case gives rise to the presumption that belief in the existence of a biological connection with the child does not counterbalance the short time of cohabitation. Accordingly, the belief of genetic parenthood does not automatically imply the existence of *de facto* family ties where there is a short duration of shared life. This is an important point to note as, previously, there was an affirmation regarding a different scenario: the belief of genetic parenthood supports a finding of *de facto* family ties where the duration of shared life is long.[13]

Finally, the legal uncertainty regarding the family ties between the applicants and the child based on their own previous acts constitutes a reason for rejecting family life. In situations like this the requirements for a *de facto* family life are not met. Again, this is contrary to the previous case law of the Court providing protection to family ties based on an illegal – in the home country – adoption. In *Wagner v Luxembourg*,[14] protection was granted to an adoption carried out under Peruvian law which was contradictory to the laws of Luxembourg, a comparison easily drawn with the present case involving a legal surrogacy in Russia that was illegal in the country of origin: Italy.

To summarise, the combination of these three factors played a catalytic role in the interpretation of family life by the ECtHR. It seems the Court would have reached a different conclusion in the absence of any of these circumstances. The three factors – namely, absence of biological ties, short duration of cohabitation and the legal uncertainty created by the applicants themselves – led to the Court's refusal to apply Article 8 in terms of family life. Nonetheless, the judgment serves as a landmark decision for surrogacy and introduces important changes to family life.

[13] *Nazarenko v Russia* [2015] ECHR 686, [58].

[14] *Wagner and J.M.W.L. v Luxembourg* ECtHR 28 June 2007.

LEGITIMATE INTERFERENCE

Nevertheless, the ECtHR accepted that the state's actions constituted an interference with private life based on the removal of the child and its placement under guardianship and adoption. The relationship between the adults and child, even in the absence of biological or legal ties, and the desire of the couple to become parents evoked the notion of private life; as did Mr Campanelli's intent to demonstrate a biological link with the child. Article 8, however, constitutes a qualified right which entails a balance between the rights of the individual and the broader interests of society. Accordingly, the next issue to address is whether there has been a legitimate interference with the applicants' private life. The Grand Chamber examined the issues discussed below when considering the legitimate interference of Italy in the private life of the applicants:

i) In accordance with the law

This condition goes beyond the impugned measures being based on national law, as it additionally requires that the national law in question be both accessible to the person concerned and have foreseeable effects. The Grand Chamber assumed that this was the case for the legal parent-child relationship, since the application of Italian law on the conflict of laws is justified as both biological parents are unknown donors. According to the (Italian) Private International Law Act, the establishment of parentage is governed by the national law regulating the child at the time of its birth, therefore the status of the child (as of unknown nationality) was equivalent to that of a foreign minor, making the application of Italian law and the child's 'state of abandonment' foreseeable. Regarding the birth certificate, The Hague

Convention only applies when confirming the authenticity of the signature, but does not apply when verifying the truthfulness of its content.[15]

ii) Legitimate aim

There must be a legitimate aim justifying state interference with the applicants' private life. The Grand Chamber accepted that the actions taken by the Italian authorities were measures aimed at preventing disorder and protecting the child's rights and freedoms, as the state wished to 'reaffirm its exclusive competence to recognise a legal parent-child relationship – and this solely in the case of a biological tie or lawful adoption – with a view to protecting children'.[16]

iii) Necessity in a democratic society

This condition has been shaped by the Court as a classic test concerning state interference in terms of Article 8 of the ECHR. It includes an estimation of whether the interference is in accordance with the margin of appreciation doctrine, whether the reasons for it are relevant and sufficient and whether the intervention respects the principle of proportionality.

A margin of appreciation is granted to states as it is presumed that, in principle, they are better suited to assessing their internal matters.[17] The scope of the deference shown to states depends on many factors. When a particularly important facet of one's identity is at stake, then the margin of appreciation should be restricted.[18] Conversely, when there is no consensus in Europe about an issue or if it raises issues concerning sensitive moral or ethical

[15] The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

[16] *Paradiso & Campanelli v Italy* (n 2) [177].

[17] *Schalk and Kopf v Austria* (2011) 53 EHRR 20, [62].

[18] *Evans v UK* (2008) 43 EHRR 21, [77].

dilemmas, the margin of appreciation will be broad.[19] In the *Paradiso* case the breadth of the deference was wide, because of the sensitive issues of a moral and ethical nature. Furthermore, the Court had previously identified a lack of European consensus on the matter of surrogacy among the Contracting States of the Convention.[20] The ECtHR drew a distinction between the *Paradiso* case and *Mennesson,* as in the case at hand the applicants did not represent the child and there is no biological link between them. Nevertheless, even when the margin of appreciation is broad there must be a fair balance struck between the competing interests.

The Court observed that the rationale for the measures taken by the Italian authorities was both relevant and sufficient. The justification for these measures rested on the fact that the illegality of the intended parents' behaviour and the urgency of acting to protect the child (who was deemed to be in a 'state of abandonment') were directly connected to the legitimate aim pursued: preventing disorder and protection of children in general by establishing parentage via adoption and prohibition of medically assisted reproduction.

Finally, when evaluating proportionality it is essential to examine whether the Italian authorities struck a fair balance between the interests of the individuals and the interests of society.[21] The interests put forward by the Italian courts are 'very weighty public interests',[22] as is putting an end to an illegal situation. In addition, the measures serve to protect women and children from the dangers that surrogacy can evoke, such as human trafficking. At the other end of the spectrum – ie the individual interests – the authorities attached significant

[19] *Mennesson v France* (n 1) [77].

[20] ibid [78].

[21] *Paradiso & Campanelli v Italy* (n 2) [200].

[22] ibid [204].

weight to the interests of the child and the need for adoption by suitable parents, given the absence of biological links. Furthermore, the Court estimated that the separation would not cause irreparable damage to the child. In relation to the applicants' interests, the national courts considered their interest to carry little weight, as the judges were not obliged to give priority to the preservation of the relationship between the applicants and child. The justification for the low weighting given to the applicants' interests was again the unlawful situation created by the applicants themselves. Consequently, the ECtHR held that a fair balance was struck between the interests of the individuals and those of society, while it rejected the arguments of the applicants about shortcomings regarding the failure to follow the expert's opinion and to find alternatives to the immediate and irreversible separation. The ECtHR rejected these arguments by referring to the expertise of the Italian Minors Court and the fact that the Italian authorities had to act rapidly given the risk of the passage of time determining the outcome of the case.

CRITICISM AND IMPACT OF THE JUDGMENT

This case note argues that the separation of the intended parents from the child, as ordered by the Italian courts, is an extremely regrettable situation. Surrogacy entails considerable risks and challenges. Nonetheless, the failure of the Grand Chamber to protect the individuals' respect for private and family life can be criticised on many grounds.

With reference to the interpretation of family life made by the ECtHR in this specific case, it should be observed that the Court seems to treat the Paradiso Campanelli family as an illegitimate family as it constantly emphasised that their uncertainty was self-inflicted. Using the uncertainty of parentage to deny the existence of *de facto* family life creates the impression that the Court makes a distinction between legitimate and illegitimate families and 'labels' this family illegitimate. Again, it should be kept in mind that surrogacy was legal in

Russia, it is not as if the intended parents kidnapped the child and brought it from Russia to Italy. This case bears a resemblance to the *Wagner* case discussed above in which the adoption was legally performed in Peru, but was illegal under Luxembourgian law. The fact that the Paradiso Campanelli family was portraited as an illegitimate family was similarly emphasised by the Joint Dissenting Opinion.[23]

This criticism is connected to the well-established jurisprudence of the Court that the notion of family life does not distinguish between legitimate and illegitimate families.[24] The extent of this disaccord with the previous case law is evidenced by the Joint Concurring Opinion of Judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov, which notes that 'a family is to be understood a natural and fundamental group unit of society, founded primarily by the marriage between a man and a woman'.[25] Although this notion of family was not adopted by the majority of the Court, it constitutes a very dangerous approach erasing all the progress the Court has made towards a more equal, diverse and less discriminatory society both in terms of married versus non-married couples and heterosexual versus homosexual couples.[26]

Although the ECtHR does not formally confer precedence to its own judgments, it does hold the principles of legal certainty, predictability and foreseeability in high regard and

[23] *Paradiso & Campanelli v Italy* (n 2) Joint Dissenting Opinion of Judges Lazarova, Trajkovska, Bianku, Laffranque, Lemmens and Grozev, [3]-[4].

[24] Among others, *Marckx v Belgium* (1979) 2 EHRR 330, *Kroon and Others v Netherlands* (1995) 19 EHRR 263.

[25] *Paradiso & Campanelli v Italy* (n 2) Joint Concurring Opinion of Judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov, [3].

[26] Among others, *Mata Estevez v Spain* [2001] ECHR 896, *S.H. and Others v Austria* ECtHR 3 Nov 2011, *Vallianatos and Others v Greece* [2013] ECHR 1110, *Oliari and Others v Italy* [2015] ECHR 716.

consequently only changes its jurisprudence when presented with compelling reasons.[27] In the *Paradiso* case, it is not apparent why the Court has taken what could be construed as a retrogressive step by distinguishing between legitimate and illegitimate families. If it does have compelling reasons, these should have been clearly articulated throughout its judgment, which was not the case.[28] It is important to remember that the concept examined is *de facto* family life, and that its involvement does not necessarily mean illegitimate interference with Article 8.

Furthermore, the Court's close and narrow interpretation of family life can be construed as limiting the protection of genuine family ties. This approach runs the risk of rendering the application of *de facto* family ties to some surrogacy situations obsolete. Using a strict definition of family life may discourage couples from engaging in cross-border surrogacy, but it also leaves unprotected people that undergo surrogacy with the belief that it was their genetic material used for the embryos implanted in the surrogate mother's uterus. This means that when the genetic material of one of the parents is used for the embryos implanted in the surrogate mother the protection will be granted to the intended parents, hence not discouraging them from engaging in surrogacy. On the other hand, if the intended parents believe it was their genetic material that was used for the creation of the embryos but due to an error in the clinic this did not occur, they are left unprotected. It is not difficult to see the arbitrariness of this approach, as it allows the claims of biological parents but denies those of non-biological parents where there is fraud or negligence on the clinic's part.

[27] *Cossey v UK* ECtHR 27 Sept 1990, [35]. See further, SD Pattinson, 'The Human Rights Act and the Doctrine of Precedent' (2015) 35 LS 142, 147-148.

[28] The ECtHR makes a reference to the danger of human trafficking through surrogacy at [202], however it does not build on that argument and does not make any moral or ethical assessment that would justify this change in its case law.

This strict and narrow interpretation of *de facto* family ties taken by the Court in *Paradiso* clashes with previous case law, which had focussed on the bond between the people involved. The ECtHR does not justify measuring cohabitation only in terms of duration.[29] Focusing on the emotional bond and that the parents behaved as such in every aspect towards the child could have led to recognition of *de facto* family ties for the Paradiso Campanelli family.

Objections can also be raised about the Court's evaluation of the legitimate interference with private life. The efficacy of the measures taken to achieve the legitimate aim of protecting the child can be called into question. The social workers' report showed that there was no danger for the child living with the intended parents; in contrast, the child was in a loving environment. In addition, the report of the psychologist about the irreparable damage of the separation to the child puts into doubt whether the measures taken pursued the best interests of the child, which is a primary consideration.[30] It is hard to see how the separation served the best interests of the child. It should be highlighted that in the *Paradiso* case, the child was not an applicant, however the argument that the separation served the best interests of the child was used to justify the state's interference. Nonetheless, in the light of the lack of consideration given to the best interests of the child the use of legitimate interference is flimsy. It is additionally contrary to the Court's case law, according to which

[29] For instance, *Nazarenko v Russia* (n 13) [56].

[30] UN Convention on the Rights of the Child, Article 3(1). The ECtHR included it in its 'Relevant International Law and Practice' section of the judgment, [76].

the interests of the child remain paramount even in cases of fraudulent or misleading evidence.[31]

Regarding proportionality, as the Chamber had correctly pointed out, the separation of the child from its parents should be an extreme measure to be used as a last resort to protect the child from an immediate danger.[32] Such danger was absent in this case. The Chamber justified this approach by relying on *Pontes v Portugal*, where it was held that family ties could be severed in very exceptional circumstances, where the family is particularly unfit.[33] Yet not only did the social workers' report show that the child was not in an immediate danger, but it additionally evidenced that the child was in a perfect environment and condition.

One might also wonder whether the measures taken by the national authorities were deployed to set an example for couples planning to engage in similar unlawful (in Italy) reproductive methods, because, as spotted by the Joint Dissenting Opinion, the Italian courts did not consider whether it was in the child's interest to remain with the family.[34]

Finally, when striking a fair balance between the competing interests, it seems that the Italian courts did not seriously consider the interests of the applicants. While the Court constantly referred to the applicants' unlawful conduct – conduct unlawful in Italy and not Russia, where the surrogacy took place – there is no mention of how this had an impact on the private life of the intended parents. It is hard to understand how the ECtHR found that a

[31] 'If subsequent evidence reveals that a final adoption order was based on fraudulent or misleading evidence, the interests of the child should remain paramount in establishing a process to deal with any damage caused to the adoptive parent as a result of the wrongful order' *Zaiet v Romania* [2015] ECHR 307, [49].

[32] Chamber's *Paradiso and Campanelli v Italy* (n 4) [80].

[33] *Pontes v Portugal* ECtHR 10 Apr 2012, [79].

[34] *Paradiso & Campanelli v Italy*, Joint Dissenting Opinion (n 23) [12].

fair balance was struck when there is no reference from the national authorities on the influence this judgment would have on the applicants.

In relation to the impact this judgment will have on cross-border surrogacy, it is imperative to allude to the scepticism towards the judgments of the ECtHR related to this matter. The Court has had to adjudicate on the denial of civil registration of surrogate-born children twice (*Mennesson, Labassee*).[35] These two cases have been severely criticised, because they 'forced' national authorities to register children born through surrogacy in another state, albeit prohibited at domestic level, based on the best interests of the child and the violation of the children's right to respect for private and family life. This was perceived as a backdoor acceptance of surrogacy and as depriving states of the opportunity to decide whether or not to allow surrogacy, while creating a double standard, as, within the same state, domestic surrogacy is illegal, whereas cross-border surrogacy will be recognised.[36]

Nonetheless, the *Paradiso* judgment will not change the previous rulings, which are indeed based on different circumstances. When it comes to intended parents with children biologically linked to them, born through surrogacy in another state, the national authorities should recognise this parentage and register the children in their home country, thus following *Mennesson* and *Labassee*. *Paradiso* only affects relations between non-biologically linked intended parents and children. Consequently, even where there is a prohibition of surrogacy at domestic level, the law can be circumvented through cross-border surrogacy and the parent-child relationship will have to be recognised by the domestic authorities, as long as there is a biological link between one of the intended parents and the child. This demonstrates that the strict approach taken by the Court might not have a great impact. The judgment might have served as a response to the criticism concerning the backdoor acceptance of

[35] *Mennesson v France, Labassee v France* (n 1).

[36] P Beaumont and K Trimmings (n 5), 12.

surrogacy, but in reality, its effect might be insignificant and it certainly does not offer a solution to the problem of cross-border surrogacy. Thus, even the criticism that the Court forces states prohibiting surrogacy to accept cross-border surrogacy will not be resolved by this case, showing the need for the ECtHR to make an in-depth assessment of surrogacy. The Court has not considered the underlining moral and ethical issues and did not even distinguish between commercial and altruistic surrogacy, however vital. These will inevitably have to be addressed by the Court in the future.

Conversely, a positive impact that this judgment might have is that it demonstrates the gravity of the cross-border surrogacy problem and its devastating implication for individuals' lives, as is the separation of the intended parents and the children. This may provide further impetus for the Expert Group to progress on the Surrogacy/Parental Project, established by The Hague Conference.[37] The aim of this project is to study surrogacy worldwide and provide guidance towards a binding multilateral instrument. This development in Private International Law will be extremely helpful, as surrogacy will be regulated at an international level and it will then be treated as such and not as a failed international adoption, like in the case at hand by the Italian Courts.

CONCLUDING REMARKS

Paradiso and Campanelli v Italy is a problematic judgment for surrogacy. It takes a restrictive approach to the notion of *de facto* family life, by denying its existence when there is a combination of three factors: absence of biological ties, short duration of cohabitation and legal uncertainty created by the applicants themselves. Acknowledging the involvement of private life, the Court examined the legitimate interference imposed by the Italian

[37] For further information, < https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

authorities. The ECtHR found no violation of Article 8, given that the interference was in accordance with Italian laws, the interference served the legitimate aim of ensuring the prevention of disorder and protecting the child's rights and freedoms and was necessary in a democratic society, due to the wide margin of appreciation given to Italy and its compliance with the requirement of a fair balance between the competing interests.

The differences among the judgments in the case displays a deep division on surrogacy within the ECtHR. The ECtHR has the unenviable task of deciding whether and how cross-border surrogacy operates in Europe. Fears concerning the adverse outcome of recognising commercial surrogacy in Europe are not, by themselves, enough to support denying that the forced separation violated respect for the intended parent's private and family life. The denial of the involvement of family life, even when there is cohabitation of eight months from the early life of the child, and the justification of the interference, when there is no trace of estimation of the applicants' interests with no indications that the separation serves the best interests of the child, generate doubts and objections. Reliance on what seems to be a distinction between legitimate and illegitimate families is alarming. The Court's task is exceptionally difficult when dealing with these aspects of private and family life, especially in an era of massive advances in reproductive technology. Nonetheless, a judgment holding there to be no violation of the right to respect for private and family life should be grounded on solid argumentation.