

European human rights law

Course material n°4

Chapter 2: The Right to Identity

The right to identity, which is not expressly contained in the Convention, has been enshrined by the European Court in general terms in the course of evolving case-law on the basis of Article 8 of the Convention. While most of the elements of identity fall within the court's view of the person's right to privacy, some are at least partially related to the right to respect for family life. On this question of the right to identity, the court uses the concept of "private and family life".

The right to identity appeared for the first time in the case-law of the European Court with the enshrinement of a right to a name, which does not appear in the Convention, in the *Burghartz v. Switzerland* judgment of 22 Feb. 1994. It was in the *Bensaid v. United Kingdom* judgment of 6 February 2001 concerning the expulsion of a schizophrenic alien that the Court expressly stated for the first time that "Article 8 protects a right to identity". By this affirmation, it enshrines a right to an autonomous identity, which was then taken up again in the *Odièvre judgment* in 2003 (in the same sense in *Godelli*) concerning access to origins, but also in the *Jäggi v. Switzerland* judgment of 13 Oct. 2006, referred to in the *Menesson judgment* (in the same sense *Pascaud v. France*, 16 June 2011).

Among the various aspects of the right to identity, particular attention will be paid to the right to sexual identity and family identity.

Section 1: Gender Identity

§1. The right to change sex on the civil registry

1. The obligation for States to admit sex reassignment

If, in *B v. France* of 25 March 1992, (Application No.13343/87) the French system for the identification of persons had been the subject of a private life condemnation by the European Court, the Court had not imposed the change of sex of the transgender person on the civil registry.

By the judgment *Goodwin* and the judgment *I. v. United Kingdom* of 11 July 2002, the European Court of Human Rights, in a remarkable reversal, took an essential step in the recognition of the rights of transsexuals by imposing on States the obligation to accept the change of sex of a transgender person on his or her birth certificate.

In various subsequent judgments, the European Court condemned the refusal to recognise the change of sex or to draw the consequences from it.

2. The conditions for sex change

After requiring States to agree to change the sex of the transgender person on his or her civil status, the Court will monitor the conditions of access to this sex change.

In the *Y.Y. v. Turkey* judgment of 10 March 2015 (*Dr. fam.*, 2015, no. 5, p. 42, obs. F. Marchadier), the European Court condemned the Turkish authorities who made a transsexual's access to a surgical gender reassignment subject to prior sterilisation. Anticipating the

condemnation of France in the judgment of April 6, 2017 in *A. P., Garçon and Nicot v. France*, the law of 18 May 2016 specified that "The fact of not having suffered [...] sterilization cannot justify the refusal to grant the request" (art. 61-6 C. civ.).

In *A. P. Garçon and Nicot*, however, the Court accepted that the transgender person is required to prove the reality of his or her sex change by an expert opinion.

§2. The effects of a person's sex change on their family life

The Goodwin judgment also condemned a violation of the right to marriage under Article 12 of Article 12 of the Convention.

The Court also accepted in the judgment *X, Y and Z v. United Kingdom* of 22 April 1997 (*JCP G*, 1998, I, 107, obs. F. Sudre), that the relationship between a transsexual, his partner, and the child born of artificial insemination with a third party donor, which they raised together, was part of a family life, even though it did not require the State to legally recognize it. The Court ensures that a parent who has undergone gender reassignment is not treated differently from other parents. *A.M. et al. v. Russia*, 6 July 1919. 2021 ; *P.V. v. Spain* 30 Nov. 2010).

To the question whether the transgender parent, having retained his or her reproductive faculties and having participated in the conception of a child, can claim to have his or her sex of conversion indicated on his child's birth certificate, the Court answered in the negative (for a man who has given birth, *O.H. and G.H. v. Germany*, Apr 4, 2023; for a woman who donated her male gametes, *A.H. et al. v. Germany*, 4 Apr. 2023).

Section 2: Family Identity

§1. Knowledge of origins

Every person must be able to establish the details of his identity as a human being and be aware of his history (*Gaskin v. the United Kingdom*, 7 July 1989 concerning the access of a young delinquent to his educational assistance file) and his origins (*Odièvre v. France* 16 Feb. 2003, *Godelli v. Italy*, 25 Sept. 2012; *Cherrier v. France*, relating to a child born in secret; *Gauvin-Fourni and Silliau v. France*, 7 Sept. 2023, *JCP G* 2023-38, act. 1072, obs. F. Sudre, for a child conceived by AMP, *Jäggi v. Switzerland*, 13 Oct. 2006 and *Pascaud v. France*, 16 June 2011 relating to access to genetic expertise; *Mikulic v. Croatia*, 4 Sept. 20002 relating to an action to establish paternity).

The Court affirms, in the judgments relating to access to the origins of a child whose mother has given birth in secret, that "the right to know one's ancestry falls within the scope of the concept of 'private life', which encompasses important aspects of the personal identity of which the identity of the parents is a part".

The Court has repeatedly affirmed that the right to know one's origins does not cease with age, quite the contrary.

In judgments relating to access to personal origins, in the broad sense of the term, the Court wonders whether the domestic authorities have taken the necessary measures to enable the person to have access to information relating to his or her identity, whether it is a question of consulting a file relating to his or her history (*Gaskin*) or having a genetic expert report ordered to ascertain his or her ancestry and possibly establish his or her parentage (*Gaskin*, *Mikulic*, *A.M.M.*, *Jäggi*, *Pascaud*, *Mifsud*). The choice of this analysis on the ground of positive

obligations in cases relating to childbirth in secret (*Odièvre, Godelli*) may have seemed debatable, since the "primary" infringement of the applicant's right to know her origins was based on the biological mother's decision to request secrecy. The European Court also changed its angle of analysis in the *Cherier* judgment to place itself on the ground of positive obligations.

The balance of interests in cases relating to knowledge of origins

§2 The first and last name

The European Court has recognised the person's need to identify a person in terms of name (*Burghatz; Stjerna v. Finland*, 25 Nov. 1994; *Ünal Tekeli v. Turkey*, 16 November 2004; *Luc De Ram v. France*, 27 August 2013; *Losonci Rose et Rose v. Switzerland*, 9 Nov. 2010) and first name (*Guillot v. France*, 24 Oct. 1996). In the *Kismoun v. France judgment* of 5 Dec. 2013, it underlined the identity aspect of the request for a change of name.

The Court considers that "the surname and first name concern the private and family life of the individual" (in particular, *Kismoun v. France*), and does not hesitate to qualify the name as the hard core of considerations relating to the right to respect for private and family life (*Losonci Rose and Rose*).

Judgments concerning the change of name are dealt with by the European Court from the point of view of positive obligations.

In judgments relating to the choice of the child's first name by his parents, the court also took a position on the ground of positive obligations (*Guillot, Johansson*), by accepting a wide margin of appreciation for the States.

In cases relating to the change of name, the Court, while acknowledging that there may be genuine reasons for an individual wishing to change his or her name, accepts that legal restrictions on such a possibility may be justified in the public interest, in order to ensure an accurate registration of the population, to safeguard the means of personal identification and to link the bearers of a given name (*Stjerna*) to a family.

The same reasoning applies to the parents' choice of their child's first name. The Court considers that in weighing up the various interests at stake, account must be taken, on the one hand, of the applicants' right to choose a first name for their child and, on the other hand, of the public interest in regulating the choice of first names (*Guillot, Johansson*), bearing in mind that on this question too States enjoy a wide margin of appreciation. It accepts that restrictions on the choice of first names may be justified in the interests of the child and society (*Salonen v. Finland*, 2 July 1997 (Dec.)).

In *Johansson*, the Court held that considerations of public interest could not outweigh the applicants' claim of interest in having their son entered in the official registers under the first name of their choice, since that name was not contrary to the child's interests and was borne by other persons in Finland. In the judgment in *Güzel Erdagoz*, the Court found that the refusal of the applicant by the national courts to change the spelling of her forename so that it conformed to the regional pronunciation of the word was mainly motivated by the fact that the first name she claimed did not appear in the dictionary of the Turkish language without taking into account the interests relating to her identity. The impossibility for a transsexual person to obtain a change of her first name on the grounds that her transition process was not completed is based on purely formal arguments that do not take into account the specific situation of the person

concerned, and the court sees no reason in the public interest that could have prevented the first name appearing on the applicant's official documents from being brought into line with reality for more than two and a half years of the social situation of the latter (*S.V. v. Italy*, 11 Oct. 2018).

The question of the attribution of the child's father's or mother's surname is dealt with by the Court from the point of view of equality between the parents. The attribution of the father's surname is no longer compatible with the principle of equality (*Cusan and Fazzo v. Italy*, 7 Jan. 2014), as is the attribution of the father's surname followed by the mother's surname to the child when it is impossible to derogate from paternal priority (*León Madrid v. Spain*, 26 Oct. 2021).

§2. Filiation

The Court held in the *Mikulic v. Croatia* judgment of 4 Sept. 20002 and also in the *A.M.M. v. Romania* judgment of 14 Feb. 2012 that "proceedings relating to paternity fall within the scope of Article 8" because "even if no family relationship has been established between the applicant and his alleged father, Article 8, for its part, protects not only 'family' life but also 'private' life, which encompasses aspects of an individual's physical and social identity."

In the context of an action to establish paternity, the *Mikulic* judgment condemned Croatia for having kept the applicant in a state of prolonged uncertainty as to her personal identity. This notion of uncertainty is taken up again in the *Menesson* judgment, with regard to the recognition of the child's filiation.

In the inadmissibility decision of 25 June 2015 in *Canonne v. France*, the Court affirmed that the recognition and annulment of a parent-child relationship directly affects the identity of the man or woman whose parentage is in question. In the *Mandet v. France* judgment of 14 Jan. 2016, which concerns the contestation of the filiation of a child vis-à-vis the husband of his mother who raised him, the Court considers that the annulment of the recognition is not only an infringement of the child's right to respect for family life but also an infringement of his right to respect for his private life.

Questions of establishing, recognising or contesting parent-child relationships generally fall within the scope of interference when it is the refusal of the authorities to bring the legal link into line with the biological link that is taken into account.

On the other hand, when it comes to recognising a parent-child relationship between a child and his or her intended parent, the Court is in the field of positive obligations: in the advisory opinion of 10 April 2019, this time relating to the child's filiation with regard to his or her intended mother, the Court states that "the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad as a result of surrogacy, requires that domestic law provide for the possibility of recognising a parent-child relationship between the child and the intended mother, designated in the birth certificate lawfully drawn up abroad as the legal mother" (§ 46).

However, the European courts grant the States the choice of means of satisfying this positive obligation, in particular by resorting to adoption, without requiring them to be entered in the civil registers.

The European judge applies the same reasoning to the recognition of the filiation of a child born of a ROPA in a State that prohibits this process, the same reasoning consisting in not

requiring States to recognise the child's filiation – established abroad – with regard to the woman who has not given birth even if she is the child's genetic mother (R. F. et al. v. Germany, 12 Nov. 2024, No. 46808/16). In the judgment of 24 March 2022 in *C.E. and Others v. France*, the European Court refused to expressly impose the legal recognition of the filiation of a child born of ART in a female couple when other mechanisms make it possible to respect the family life and private life of the child and his mother's former partner.

The Court carries out a proportionality review on the limitations on actions relating to filiation.

In cases relating to the establishment or contestation of a parent-child relationship, the Court is called upon to decide a conflict between the interests of the child and the interests of the alleged father.

C. v. Italy (ECHR, 31 August 2023, No. 47196/21, C. v. Italy

1. The Court considers that there was no doubt as to the existence of an interference with the applicant's right to respect for her private life.

2. It points out that such interference infringes Article 8 unless, "provided for by law", it pursues one or more of the legitimate aims set out in the second paragraph of that provision and is "necessary in a democratic society" in order to attain them, the concept of "necessity" implying interference based on a pressing social need and, in particular, proportionate to the legitimate aim pursued. *Mennesson v. France*, no. 65192/11, § 50, ECHR 2014 (extracts)).

3. The Court notes that the rejection of the application for the transcription of the applicant's foreign birth certificate in the civil registers was provided for by law, within the meaning of the second paragraph of Article 8, surrogacy being prohibited.

4. It points out that it has already held that the refusal to recognise a parent-child relationship between a child born abroad as a result of surrogacy and the intended parents stems from the desire of a given State to discourage its nationals from using a method of procreation outside the national territory which it prohibits on its territory with the aim of preserving the children and the surrogate mother. *Mennesson*, cited above, § 62). In the light of these considerations, the Court therefore accepts that the impugned interference was directed at two of the legitimate aims listed in the second paragraph of Article 8 of the Convention: "the protection of health" and "the protection of the rights and freedoms of others".

Necessity in a democratic society

Relevant general principles

5. It remains to be determined whether this interference was "necessary in a democratic society" to achieve these goals.

6. In the judgment *Mennesson* (cited above, §§ 96 and 99) (see also *Labassee v. France* no. 65941/11, 26 June 2014), the Court examined from the point of view of Article 8 of the Convention the impossibility for two daughters born in California as a result of surrogacy to obtain in France recognition of the filiation legally established in the United States between them and their biological father.

7. The Court found that the right to respect for private life of children had been violated. In reaching this conclusion, it first stressed that "respect for private life requires that everyone be able to establish the details of his or her identity as a human being, which includes his or her parentage", and that "an essential aspect of the identity of individuals is at stake when filiation is concerned" (§ 96 of the judgment). It added that "the right to respect for the private life [of children born abroad as a result of surrogacy], which implies that everyone can establish the substance of their identity, including their filiation, [was] significantly affected [by the non-recognition in French law of the parent-child relationship between these children and their biological father]". It concluded that there was "a serious question of the compatibility of this situation with the best interests of the children, respect for which must guide any decision concerning them").

8. It then ruled on the question of the recognition of the filiation link between the two children and their intended father, who was their biological father. It held as follows. *Ibid*, § 100) :

"Not only was the link between the applicants [i.e. the children] and their biological father not admitted at the time of the application for the transcription of the birth certificates, but also its consecration by means of a recognition of paternity or adoption or by the effect of possession of status would be contrary to the prohibitive case-law also established on these points by the Court of Cassation (...). The Court considers, in view of the consequences of this serious restriction on the applicants' identity and right to respect for private life, that by thus impeding both the recognition and the establishment in domestic law of their parent-child relationship with their biological father, the respondent State went beyond its margin of appreciation. »

9. On April 10, 2019, the Court issued a *Advisory opinion on the recognition in domestic law of a parent-child relationship between a child born of surrogacy carried out abroad and the intended mother* [GC], (application No P16-2018-001, French Court of Cassation, 10 April 2019), the operative part of which is worded as follows:

"In the situation where, as in the case set out in the questions of the Court of Cassation, a child is born abroad by surrogacy and is the result of the gametes of the intended father and a third party donor, and where the parent-child relationship between the child and the intended father has been recognised in domestic law:

1. the right to respect for the child's private life, within the meaning of Article 8 of the Convention, requires that domestic law provide for the possibility of recognising a parent-child relationship between the child and the intended mother, designated in the birth certificate lawfully drawn up abroad as the "legal mother";

2. the right to respect for the child's private life, within the meaning of Article 8 of the Convention, does not require that such recognition be effected by the transcription in the civil registers of the birth certificate lawfully drawn up abroad; It may be carried out by another means, such as the adoption of the child by the intended mother, provided that the procedures laid down by domestic law guarantee the effective and expeditious implementation of the child, in accordance with the best interests of the child. »

10. More generally, the Court emphasised in that opinion that the choice of the means to be used to enable the recognition of the relationship between a child and an intended parent falls within the margin of appreciation of the States. In this respect, it observed that there is no European consensus on the matter (where the establishment or recognition of the link between the child and the intended parent is possible, the modalities vary from one State to another) and that the identity of the individual is less directly at stake when it is not a question of the actual principle of establishing or recognising his or her parentage but of the means to be implemented to that end (§ 51).

11. The Court added in the same opinion that the need to offer an opportunity to recognize the relationship between the child and the intended mother is valid *especially* when the child was conceived with the gametes of the intended father and the gametes of the intended mother and the parent-child relationship between the child and the intended father has been recognised in domestic law (§ 47).

12. In the case *D v. France* (no. 11288/18, 16 July 2020), which concerned the refusal to establish a parent-child relationship between a child born abroad through surrogacy and his or her intended mother, the Court applied the principles elaborated in the above-mentioned advisory opinion. It thus stated that, when a child is born abroad from surrogacy and is born from the gametes of the intended father, the right to respect for the child's private life requires that domestic law offer a possibility of recognition of a parent-child relationship between the child and the intended father and between the child and the intended mother, whether or not she is his genetic mother (§ 54). It stated that that recognition of the parent-child relationship between the child and the intended father, the biological father, and between the child and the intended mother, who is not the genetic mother, may duly be effected by means other than the transcription of the child's foreign birth certificate.*Ibid*).

13. In that case, the Court concluded that the adoption of the spouse's child was an effective and sufficiently rapid mechanism in the present case for the recognition of the parent-child relationship between the child and the intended mother (§ 70). It held that, consequently, the respondent State had not, by refusing to enter the foreign birth certificate in the national civil registers in so far as it designated its intended mother as the child's mother, exceeded its margin of appreciation in the circumstances of the case (§ 71), and therefore held that there had been no violation of Article 8 of the Convention (§ 72).

14. Finally, in the case *D.B. and Others v. Switzerland* (Nos. 58817/15 and 58252/15, 22 November 2022), the Court found a violation of Article 8 of the Convention (right to respect for private life) on the part of the child and a violation of Article 8 (right to respect for family life) on the part of the intended

father and the genetic father. With regard to the child, the Court noted in particular that at the time of the child's birth, domestic law did not provide for the recognition of the parent-child relationship between the intended parent and the child. As a result, the applicants had been deprived for almost seven years and eight months of any possibility of having the parent-child relationship definitively recognized. The Court therefore held that by refusing to recognize the parent-child relationship duly established by a foreign birth certificate between the intended father and the child born in the United States through surrogacy without offering another means of having the relationship in question recognized, the Swiss authorities had disregarded the best interests of the child. In other words, the general and absolute impossibility of obtaining recognition of the relationship between the child and the intended father for a significant period of time constitutes a disproportionate interference with the child's right to respect for his or her private life.

Application of these principles to the present case

15. The Court recalls that respect for private life requires that everyone be able to establish the details of his or her identity as a human being, which includes his or her parentage. In that regard, the applicant is in a situation of legal uncertainty resulting from the fact that, first, the domestic courts do not recognise the parent-child relationship between her, according to her Ukrainian birth certificate, and L.B. (her biological father) and E.A.M. (her intended mother) and, secondly, she does not have Italian nationality.

16. In order to determine whether this situation entails a violation of Article 8 of the Convention, the Court will examine the impossibility for the applicant to have her filiation recognised first in respect of her biological father and then in respect of her intended mother.

The establishment of the parent-child relationship between the applicant and her biological father

17. The Court recalls that, according to its case-law, Article 8 of the Convention requires that domestic law provide for the possibility of recognising the link between a child born of surrogacy practised abroad and the intended father where he is the biological father. It stated, in the judgment *Menesson*, that the absence of such an opportunity entailed a breach of the child's right to respect for his or her private life, as guaranteed by that provision. *Menesson*, cited above, §§ 100-101; See also *Labassee*, and *Foulon and Bouvet v. France*, Nos. 9063/14 and 10410/14, 21 July 2016, and *Laborie v. France*, no. 44024/13, 19 January 2017).

18. The Court recalls that it concluded in the Advisory Opinion that^oP162018001, cited above, § 40) that the choice of the means to be used to enable the recognition of the relationship between a child and an intended parent falls within the margin of appreciation of the States. It has observed in that regard that there is no European consensus on the matter and that the identity of the individual is less directly at stake when it is not a question of the actual principle of establishing or recognising his or her parentage, but of the means to be used to that end. *Ibid.*, § 51).

In addition, it found that the lack of recognition of a parent-child relationship between a child born of surrogacy carried out abroad and the intended parent has negative consequences on several aspects of the child's right to respect for private life and disadvantages the child when it places him or her in a form of legal uncertainty as to his or her identity in society (*ibid.*, §§ 96 and 75 respectively). It is in the interest of the child in this situation that the duration of the uncertainty in which he finds himself as to the establishment of his filiation be as short as possible.

19. In this respect, the Court recalls that an exceptional duty of care is required when the relationship between a person and his or her child is at stake, the passage of time being likely to result in the question being decided by a *fait accompli* (see, for example, with regard to the right to respect for private life, *Ahrens v. Germany*, no. 45071/09, §§ 76 and 78, 22 March 2012, and, as regards the right to respect for family life, *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 212, 10 September 2019).

20. It is for each Contracting State to equip itself with an adequate and sufficient legal arsenal to ensure compliance with its positive obligations under Article 8 of the Convention, including the obligation of exceptional diligence when a person's relationship with his or her child is at stake (see, for example, *Soares de Melo v. Portugal*, no. 72850/14, § 92, 16 February 2016).

21. The Court notes that, according to its case-law (Advisory Opinion No^oP16- 2018-001, *supra*, and *D v. France*, cited above), it is not concerned by the procedures for establishing or recognising a parent-child relationship of a child born from surrogacy carried out abroad (transcription of the partial or complete foreign birth certificate, full or simple adoption, establishment of a child or a child's *ex novo* of the link in the child's country of residence), but it must ascertain, on the other hand, whether the decision-making process of the child's State of residence, considered as a whole, has ensured adequate

protection of the interests at stake. Indeed, it is essential that the procedures for establishing filiation provided for by domestic law guarantee the effectiveness and speed of its implementation (Advisory Opinion No. P16-2018-001, cited above, § 55), in accordance with the best interests of the child so as to avoid the child being kept in legal uncertainty for a long time.

22. The Court notes that, in the present case, following the refusal to transcribe the birth certificate in 2019, L.B. and E.A.M. brought an action before the V. court, requesting the full transcription of the birth certificate or, in the alternative, the partial transcription in respect of the biological father. The court, notwithstanding the favourable opinion of the public prosecutor's office, which asked to grant the partial transcription, rejected the appeal on the grounds that taking into account the best interests of the child could not lead to a breach of the principle of the incompatibility of surrogacy with public policy. No specific response was given to the auxiliary request.

23. L.B. and E.A.M. appealed against that decision and, by way of an application for interim measures, requested the partial transcription of L.B.'s birth certificate. The Court also notes that the Public Prosecutor's Office has again expressed a favourable opinion.

24. In a judgment of 14 June 2021, the Court of Appeal dismissed the appeal, declaring the request for partial transcription inadmissible on a matter of form, as the original application concerned exclusively the full transcription of C's birth certificate, which was contrary to public policy.

25. Subsequently, L.B. applied to the registrar for partial transcription, which was also refused (see paragraphs 11 and 12 above).

26. Clearly, the domestic courts rejected the impugned claims without weighing up the various interests at stake and, above all, without considering the requirements of speed and efficiency required in proceedings such as the one in the present case (see paragraph 9 above). In particular, as regards "efficiency", the Court can only find that:

- the refusals of the public prosecutor's opinions have not been justified except for reasons of conflict with public order;

- as regards the request for partial transcription, it was rejected on the sole ground of excessive formalism, namely that it was not the subject of the appeal, a question which cannot be relevant in a procedure focused on the best interests of the child; and

- no indication, at all stages of the proceedings, was given as to a possible alternative means of obtaining the establishment of the parent-child relationship between the applicant and her biological father, by placing the applicant in front of a simple refusal not based on the absence of the preconditions.

27. As regards the requirement of 'expeditiousness', the Court notes that:

- notwithstanding that some four years had elapsed since the application for transcription of the applicant's foreign birth certificate, in the face of the favourable opinion of the Public Prosecutor's Office, the domestic courts denied the full transcription and, for procedural reasons, did not examine the application for partial transcription; and

- after the refusal of the applications for transcription, no procedural passerelle was envisaged by the courts to transform the procedure into one more appropriate to enable the establishment of the parent-child relationship, with the result that, in the absence of such a bridge, L.B. had to start the proceedings again, by applying to the civil registrar, who – seized of an application for partial transcription – refused it notwithstanding the fact that the partial transcription is normally allowed to the biological parent.

28. The Court cannot speculate on the outcome of any new proceedings before the national courts seeking recognition of the parent-child relationship between the applicant and her biological father. However, it must be concluded that in the present case the domestic courts were not in a position to take a swift decision in order to protect the applicant's interest in having her biological parentage established and no other alternative solution seems to have been envisaged. The four-year-old applicant has been kept in a state of prolonged uncertainty as to her personal identity since birth. In particular, she has no established filiation, with significant consequences for her civil status, and is considered stateless in Italy.

Conclusion

29. In the light of the foregoing considerations (paragraphs 17-28 above), the Court recalls, inter alia, that, in order to ensure a "prompt" and "effective" result in accordance with the best interests of the child in relation to the establishment of the parent-child relationship between the biological parent and the child born as a result of surrogacy carried out abroad: (a) the decision-making process must be sufficiently focused on the best interests of the child and, in that sense, free from excessive formalism

and capable of realizing this interest independently of possible procedural defects; (b) domestic courts must cooperate with the parties by indicating the solutions chosen by the system, regardless of the requests of the parties concerned.

Thus, the Court held that, in the light of the particular circumstances of the case, despite the margin of appreciation accorded to the State, the Italian authorities had failed to fulfil the positive obligation to guarantee the applicant's right to respect for her private life to which she was entitled under the Convention. Accordingly, there had been a violation of Article 8 of the Convention on this point.

The establishment of the parent-child relationship between the applicant and her intended mother

30. As to the fact that it was impossible for the applicant to have her relationship with her intended mother recognised, the Court notes that E.A.M. may apply for the applicant's adoption on the basis of section 44 of Act no. 184 of 1983.

31. In this regard, the Court wishes to recall that the Constitutional Court has declared the provisions on adoption "in special cases" to be unconstitutional in so far as they preclude the creation of the same family relationship between the adoptee and the adoptive parent's parents as that established by other types of adoption (paragraph **Erreur ! Source du renvoi introuvable.** above).

32. It also notes that in November 2022, the Plenary Assembly of the Court of Cassation, while recalling that the transcription of the birth certificate of a child born of surrogacy carried out abroad was, in so far as it concerned the intended parent, prohibited as being contrary to public policy, established, by referring to the judgments *D.B. and Others v. Switzerland* and *D v. France* above, that "adoption is the means by which it is possible to have the de facto link between the child in question and the person who shared with the biological parent the project of procreation with the biological parent and contributed to the maintenance of the child from birth" (paragraphs **Erreur ! Source du renvoi introuvable.-Erreur ! Source du renvoi introuvable.** above).

33. Having recalled this, the Court must now determine whether the refusal to recognise the parent-child relationship established by the Ukrainian birth certificate between the applicant and her intended mother is compatible with the applicant's right to respect for her private and family life within the meaning of Article 8 of the Convention.

34. In this respect, the Court considers that the principles developed on the one hand in the cases *Mennesson* and *Labassee*, cited above, on the other hand in the abovementioned advisory opinion, and finally in the case *D v. France*, are applicable to the present case.

35. It points out, in particular, that although the States' discretion is limited as regards the very principle of establishing or recognising parentage (Advisory Opinion No P16-2018-001, cited above, §§ 44-46), that discretion is greater as regards the means to be used to that end. *Ibid*, § 51).

36. Admittedly, Italian law does not allow the transcription of the birth certificate in the case of the intended mother, but it nevertheless guarantees the latter the possibility of legally recognising the child through adoption.

37. In this connection, the Court notes that, according to the plenary session of the Court of Cassation, adoption enables the courts seised to assess the requirements of Article 8 of the Convention and the best interests of the child. That examination is carried out on the basis of the preconditions which each State lays down, subject to its margin of discretion, for example by a link between the two parents and the participation of the intended parent, by means of specific acts, in the parental project. *mutatis mutandis D v. France*, supra).

38. The Court therefore finds that the desire for recognition of a link between the applicant and the intended mother is not met with a general and absolute impossibility.

39. In the light of the foregoing, the Court is of the opinion that, by refusing to transcribe the applicant's Ukrainian birth certificate in the Italian civil registers in so far as it names E.A.M. as her mother, the respondent State did not, in the circumstances of the case, exceed its margin of appreciation.

40. Accordingly, there has been no violation of Article 8 of the Convention on this point.