CASE NOTE

MENNESSON v FRANCE[1]

AND

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[2]

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I INTRODUCTION

Surrogacy — a woman carrying and giving birth to another person's or couple's child — is prohibited in some countries. This creates problems when people living in a country where surrogacy is banned — such as France — travel to places where it is allowed, have surrogate children, return home and then seek recognition that they are those children's parents.[3] These situations — which can occur worldwide — create a risk of statelessness when neither the country of birth nor the country of the parents' nationality recognises these children as their citizens by operation of law.

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1 *Mennesson v France* (European Court of Human Rights, Fifth Section, Application No 65192/11, 26 June 2014) ('*Mennesson*'). The English version is incomplete, and ends at [102]. For references to [103]–[120] please refer to the original French version of the judgment: <http://hudoc.echr.coe.int/eng?i=001-145179>.

2 *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* (European Court of Human Rights, Grand Chamber, Request No P16-2018-001, 10 April 2019) ('*Advisory Opinion*').

3 *Code civil* [Civil Code] (France) arts 227(12), 511(24).

The French authorities have, in the past, refused to register the births of children born abroad through surrogacy arrangements organised by French parents.[4] This refusal will not necessarily lead to statelessness. In these two cases under review (which arise out of one set of facts), it did not: the children were born in the USA.[5] But if they had been born in a country without *jus soli*, the children would have been at risk of being stateless.

Article 18 of the *French Civil Code* ensures that any child, born anywhere in the world, is a French citizen as long as one of their parents is a French citizen.[6] In practice, if the French authorities refuse to register the birth of such a child, France does not recognise that child as the child of a French citizen and so will not recognise that child as a French citizen herself.

This raises important principles about the rights of children, including the well-known best-interests principle[7] and the common-sense notion that children should not suffer because of their parents' conduct.[8]

II FACTS

The Mennesons are husband and wife.[9] They could not conceive a child.[10] They decided to have a child through a surrogacy arrangement, combining the husband's sperm with a donor's egg, and implanting the embryo in the uterus of another woman, who was not the egg donor.[11] They travelled to California, where surrogacy arrangements are legal. Prior to the birth of their twins, they obtained a court order from the Supreme Court of California stating that they would be named as mother and father on the birth certificate.[12] The children were born on 25 October 2000.[13]

The French consular authorities in Los Angeles refused to register the children's birth because the father could not provide evidence that the mother had given birth to the children.[14] The matter was referred to the responsible authorities in France.[15] The couple secured American passports for the children and returned to France with them.[16]

In May 2001, prosecutors in France opened an investigation into whether the parents had committed a criminal offence; they closed the matter in September 2004, having decided that there was no basis for prosecuting the couple.[17]

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4 *Foulon v France* (European Court of Human Rights, Fifth Section, Application Nos 9063/14 and 10410/14, 21 July 2016).

5 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside': *United States Constitution* amend XIV § 1.

6 *Code civil* [Civil Code] (France) art 18.

7 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1) ('*CRC*').

8 This notion is arguably covered by art 2 of the *CRC*: 'States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the … activities … of the child's parents': ibid art 2.

9 *Mennesson* (n 1) 2 [7].

10 ibid 2 [8].

11 ibid.

12 ibid 2 [9].

13 ibid 2 [10].

14 ibid 3[12].

15 ibid 3 [14].

16 ibid 3 [13].

17 ibid 3 [16].

As for the registration of the children's birth, in November 2002, the French authorities instructed the consulate to proceed with the registration.[18] In May 2003, the authorities filed a lawsuit against the couple to have the registration cancelled.[19] In December 2005, the Créteil High Court of First Instance declared the suit inadmissible, reasoning that the authorities, having instructed the consulate to register the birth, could not then ask for it to be annulled.[20] The Court of Appeal of Paris upheld the judgment in October 2007.[21] In December 2008, the Court of Cassation overturned the judgment and returned the matter to the Court of Appeal of Paris, which, in March 2010, cancelled the registration of the children's birth.[22] The Court of Appeal reasoned that the authorities' aim was to prevent a foreign civil status registration, which was 'considered contrary to French public policy', from having any legal effects in France.[23] The judgment of the courts in California was contrary to the 'French concept of international public policy', making it appropriate to annul the registration.[24] Contrary to the opinion of its own Advocate General, the Court of Cassation upheld the judgment.[25]

In the meantime, the parents were unable to secure documents recognising their children's French nationality.[26]

On 26 June 2014, the European Court of Human Rights found that France had violated the children's right to respect for their private life, protected under art 8 of the *European Convention on the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*').[27] Following that judgment, the case law in France changed, making it possible for children born to a surrogate mother abroad to obtain a birth certificate indicating the name of the intended father if he was also the biological father.[28] It was still impossible for the intended mother to be included in the birth certificate.[29] She could nonetheless adopt the children.[30]

Following the 2014 judgment of the European Court of Human Rights, in February 2018 the French Civil Judgments Review Court (which has the power to reopen cases) granted a request for a re-examination of the couple's appeal.[31] That led to a new set of proceedings before the Court of Cassation.[32]

In the course of those proceedings, the Court of Cassation made the first-ever request to the European Court of Human Rights for an advisory opinion under

18 ibid 3 [17].
19 ibid 3 [18].
20 ibid 4 [19], citing *Tribunal de grande instance de Créteil* [High Court of First Instance Créteil] 13 December 2005.
21 *Mennesson* (n 1) 4 [20], citing *Cour d'appel de Paris* [Paris Court of Appeal] 25 December 2007.
22 *Mennesson* (n 1) 4 [21], [22], citing *Cour de cassation* [French Court of Cassation], 07-20468 reported in (2008) Bull civ nº 10, 251 ('*Application 07-20468*').
23 *Mennesson* (n 1) 4–5 [23], citing *Cour d'appel de Paris* [Paris Court of Appeal] 18 March 2010 ('*2010 Appeal*').
24 ibid (n 1) 5 [24].
25 *Mennesson* (n 1) 6–7 [25], citing *Cour de cassation* [French Court of Cassation], 10-19.053 reported in Bull civ nº, 71.
26 ibid 8 [43].
27 *Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR'*).
28 *Advisory Opinion* (n 2) 4 [14].
29 ibid 13 [2].
30 ibid.
31 ibid 4 [16].
32 ibid 4 [18].

Protocol no 16 of the *ECHR*.[33] Courts of last resort in states such as France that have adopted the Protocol can request such an advisory opinion.[34]

III ISSUES

In the original case, which led to the 2014 judgment, the couple asked the Court to find a violation of the family's right to respect for family and private life. They argued that, contrary to the best interests of the child, they could not secure the recognition of their parental relationship with the children.[35] Article 8 of the *ECHR* requires the Court to examine whether there has been an interference with the right, whether the interference is in accordance with the law, whether the interference pursues a legitimate aim, and whether the interference is 'necessary in a democratic society' (ie proportionate).[36]

The couple also argued that there was discrimination: the children were being treated differently from other children who had surrogate mothers where the identity of the egg donor was known; and they were being treated differently from other children in the same situation whose births had in fact been registered.[37]

The couple also invoked the family's right to a fair trial.[38]

In the 2019 case, the Court of Cassation formulated the following questions in its request for an advisory opinion:

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*?[39]

33 *European Convention on the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 2 October 2013, CETS No 214 (entered into force 1 August 2018) art 1.

34 ibid.

35 *Mennesson* (n 1) 5 [24], citing *2010 Appeal* (n 23).

36 ibid 9 [50], citing *ECHR* (n 27) art 8(2). The term 'proportionality' in this context arose from the Court's interpretation of art 8(2) of the *ECHR*. Namely, where it states that interference will be in breach of art 8 if, in part, it cannot be justified as an interference 'necessary in a democratic society', meaning a necessity that 'corresponds to a pressing social need and, in particular that is, *proportionate* to the legitimate aim pursued': at [50] (emphasis added).

37 ibid [103].

38 ibid [109].

39 *Advisory Opinion* (n 2) 2 [9].

IV HOLDING

In its 2014 judgment, the Court found that the interference was 'in accordance with the law', because it had a sufficiently predictable basis in French domestic law: the couple should have known there was a serious risk the French courts would not allow the children's births to be registered.[40] The Court also found that the interference had a legitimate aim: dissuading parents from travelling abroad to undertake surrogacy arrangements, which is part of protection of public health and the protection of the rights and freedoms of others.[41] When it came to the question of proportionality, the Court looked first at the rights of the parents, and then those of the children. The Court found that, as far as the parents were concerned, there was no violation: the parents were able, in practice, to live with the children and enjoy family life with them.[42] However, the interference was not proportionate when it came to the children. The children were confronted with a 'worrying uncertainty as to the possibility of obtaining recognition of French nationality'.[43] They would also be unable to inherit from their parent's estates.[44] While France might want to discourage its citizens from travelling abroad to engage in surrogacy arrangements, the consequences raised serious questions about the best interests of the child. This was particularly so where one of the intended parents was the child's biological parent.[45] As a result, France had violated the right to respect for the private life of the children.[46]

The Court decided it was not necessary to consider the complaint about discrimination.[47] The Court also did not find that there were any fair-trial issues.[48]

In the 2019 advisory opinion, the Court found that

> the right to respect for private life … 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'.[49]

The Court was particularly concerned with ensuring respect for the best interests of the child. The Court explicitly stated that 'there is a risk that such children will be denied the access to their intended mother's nationality'.[50] The Court also raised the possibility that the children might not be able to live in the intended mother's country or inherit from her.[51] However, the Court did not find that France was required to register the intended mother as the 'mother' on the child's French birth certificate. Any effective mechanism to recognise a genuine relationship between the child and the intended mother would suffice.[52] Adoption was a possible solution, even if it meant there would be some delay and legal uncertainty in the situation of the child.[53]

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40 *Mennesson* (n 1) 11–12 [58].
41 ibid 13 [61]–[62].
42 ibid 13 [61].
43 ibid 25 [97].
44 ibid 25 [98].
45 ibid.
46 ibid 26 [101].
47 ibid [108].
48 ibid [110].
49 *Advisory Opinion* (n 2) 10–11 [46].
50 ibid 9 [40].
51 ibid.
52 ibid 11 [54]–[55].
53 ibid 11 [54].

V REASONING

The Court's analysis in the 2014 judgment is more thorough than usual, taking each point (legal basis, legitimate aim, proportionality) and subjecting it to exceptionally extensive scrutiny.[54] The couple had argued that the entire family's rights had been violated.[55] The Court made a special point of examining the parent's and children's rights separately under the rubric of proportionality,[56] and only finding a violation of the children's rights.[57] The implication is clear: the parents were responsible for the situation, while the children, whose best interests were at stake, were blameless.

Although statelessness was not at issue, the Court indirectly considered the matter, explicitly recognising that nationality is an element of a person's identity and that the uncertainty facing the children about their French citizenship contributed to the finding of an art 8 violation.[58] It seems clear that if the children had been at risk of statelessness, their case would have been even stronger.

As extensive as the 2014 judgment is, the 2019 advisory opinion leaves open some questions related to the risk of statelessness among children born through surrogacy arrangements. Notably, the Court's finding — that it is enough to allow the intended mother to adopt her child — might not guarantee that a stateless child can acquire a nationality, especially if adoptive mothers cannot pass on their nationality to their adopted children.[59] Furthermore, the Court did not clarify what happens when the child has no biological link with either intended parent. The Mennesson twins' biological father was also their 'intended father'. What if that had not been the case?

VI CONCLUSION

This was not a case about statelessness. It was fundamentally about the right of children to a legal identity. It was also, more broadly, about the idea that children should not be held responsible for their parents' actions. The Court made this clear by concluding that only the children's rights had been violated. It is an approach that can apply to many other situations, in particular migration.

Given the urgency of birth registration and the clarity of the 2014 judgment, the fact that the 2019 advisory opinion was necessary at all is worrying: the children's birth registration should have been resolved soon after the 2014 ruling, while they were still children. In effect, they had to wait until they were almost fourteen years old for the European Court of Human Rights to find that they had a right to have their births registered in France — an essential aspect of establishing their French nationality. And yet, a full five years later, the case was still ongoing. At eighteen years-old, the children are still engaged in a legal battle to determine their legal relationship with their mother.

All of this is hardly compatible with their human right to have their births registered 'immediately'.[60]

54 See generally *Mennesson* (n 1).
55 ibid 5–6 [25].
56 ibid 9 [50], citing *ECHR*.
57 ibid 26 [101].
58 ibid 22 [89].
59 ibid.
60 *International Covenant on Civil and Political Right,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 24(2); *CRC* (n 8) art 7(1).

Read at its narrowest, the judgment requires states to guarantee that they can register the births of children born abroad through surrogacy arrangements organised by those states' citizens; and it leaves those states a broad margin of appreciation for how to do so, including the possibility of allowing the intended mother or father to adopt the child.

The judgment should be read more broadly, as requiring states to guarantee that the birth of any child connected to a state has their birth registered by that state. This includes any child born in the territory of the state, as well as children born abroad whose intended parents are citizens. This will require states to show flexibility that is often lacking, and put in place laws, regulations and policies that ensure that children do not suffer because of the situation in which they were born.