

## ***Paradiso and Campanelli v Italy: Surrogacy and the Best Interests of the Child***

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Dear Editor,

In January 2015, the European Court of Human Rights (ECtHR) handed down judgment in *Paradiso and Campanelli v Italy*.<sup>1</sup> The claim was submitted in the name of a married couple and their child who was born in Moscow as the result of a gestational surrogacy agreement and identified by the Russian authorities as being their child. The applicants alleged an Article 8 ECHR (European Convention on Human Rights) violation because the Italian authorities refused to recognise the parental relationship legally established abroad, and removed the child from the couple's household.

The analysis sheds light on the surrogacy issues among Council of Europe (CoE) Member States in highlighting that two principles are at stake: the best interests of the child and the margin of appreciation doctrine. It is the purpose of this letter to examine how these principles were considered in *Paradiso and Campanelli*.

Harris defined assisted reproductive technologies and in vitro fertilisation as follows:

Assisted reproductive technology (ART) generally refers to a category of fertility treatments in which eggs are surgically removed from a woman's ovaries, fertilized with sperm in a laboratory by means of in vitro fertilization (IVF), and then placed in the uterus of the woman who provided the eggs or in the uterus of another woman.<sup>2</sup>

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<sup>1</sup> *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR, 27 January 2015). This decision is not final as the case was resent to the Grand Chamber in June 2015.

<sup>2</sup> Dean M Harris, *Ethics in Health Services and Policy: A Global Approach* (John Wiley & Sons 2011) 71.

Furthermore, the ECtHR's press release on *Paradiso and Campanelli v Italy* defined gestational surrogacy arrangements as occurring when a woman bears a child for a couple whom subsequently have parental responsibility of the new-born. Such couples are referred to as the 'intended parents', while the gestational mother is called the 'carrier'. Two types of gestational surrogacy arrangements are addressed in this letter. First, when the child results from the insemination of the male gametes of the intended father with the female gametes of a donor and implanted in the carrier, the male is both the genetic and the intended father. Second, when the child's conception results from the donation of both male and female gametes and subsequently implanted in the gestational mother, neither of the intended parents are genetically related to the new-born.<sup>3</sup>

Kilkelly noted that children's rights are 'essentially absent' in the ECHR, as the text provides limited expressed references to children's rights.<sup>4</sup> However, in studying the ECtHR decisions on child protection from punishment and abuse, she concluded that the ECtHR uses a child centric-approach.<sup>5</sup> Although not always expressly, the ECtHR refers to principles set forth in the Convention on Rights of the Child (CRC), which all CoE Member States are signatory to.<sup>6</sup> Moreover, Hodson explained that the protection of children's rights is fundamental at European level as all CoE member states agree on the pivotal principle that 'in every decision relating to children, protecting the best interests of the child is a primary consideration'.<sup>7</sup> However, the author notes that whilst the heterosexual nuclear family as the only valid form of family is being slowly replaced by the concept of the de facto family, children raised in de

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<sup>3</sup> ECtHR, *Questions and Answers on the Paradiso and Campanelli v Italy judgment* (27 January 2015), 4 [http://www.echr.coe.int/Documents/Press\\_Q\\_A\\_Paradiso\\_and\\_Campanelli\\_ENG.pdf](http://www.echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf) accessed 19 February 2016; Francoise Baylis and Carolyn McLeod (eds) *Family-Making: Contemporary Ethical Challenges* (OUP 2014).

<sup>4</sup> Ursula Kilkelly 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 *Human Rights Quarterly* 308, 311.

<sup>5</sup> *ibid.*, 326.

<sup>6</sup> *ibid.*

<sup>7</sup> Loveday Hodson 'Ties That Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families under the ECHR' (2012) 20 *The International Journal of Children's Rights* 501, 501.

facto families may be precluded from living with their parents or limited in their enjoyment of private and family life.<sup>8</sup> These limitations are not coherent with the principle of the best interests of the child.<sup>9</sup> Similarly, this letter shows that the ECtHR prefers bionormative family frames, with consequent limitations of the best interests of children born from surrogacy agreements.<sup>10</sup>

On the other hand, the doctrine of margin of appreciation is based on the assumption that national governments are better placed to decide upon conflicts between individual rights and public interests, and is defined as the ‘room of manoeuvre’ that the ECtHR is willing to concede to national authorities.<sup>11</sup> However, this doctrine has been deemed to have a disproportionate application,<sup>12</sup> to promote the development of double standards,<sup>13</sup> and to be applied unnecessarily.<sup>14</sup> This letter argues that, in the *Paradiso and Campanelli* case, the principle of the best interest of the child is partially limited by the doctrine of the margin of appreciation.

The former European High Commissioner for Human Rights, Thomas Hammarberg, explained that the ECtHR ‘has not identified a positive obligation for states to ensure a right to assisted reproduction’.<sup>15</sup> For consistent jurisprudence, Article 8 ECHR does not guarantee the right to form a family through assisted reproductive treatments or through adoption.<sup>16</sup>

CoE Member States have a wide margin of appreciation regarding surrogacy, and there is no

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<sup>8</sup> *ibid.*, 519-520.

<sup>9</sup> *ibid.*

<sup>10</sup> Charlotte Witt, ‘A Critique of a Bionormative Concept of Family’ in Baylis and McLeod (n 3) 49.

<sup>11</sup> Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (OUP 2014) 3; Eyal Benvenisti, ‘Margin of Appreciation, Consensus, and Universal standards’ (1998) 31 *New York University Journal of International Law and Politics* 843, 843.

<sup>12</sup> Christine Ryan, ‘The Margin of Appreciation in A, B and CV Ireland: A Disproportionate Response to the Violation of Women’s Reproductive Freedom’ (2014) 3 *University College of London Journal of Law and Jurisprudence* 237.

<sup>13</sup> Paolo Ronchi ‘Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lausi v Italy*’ (2011) 13 *Ecclesiastical Law Journal* 287.

<sup>14</sup> Jan Kratochvil ‘The Inflation of the Margin of Appreciation by the European Court of Human Rights’ (2011) 29 *Netherlands Quarterly of Human Rights* 324, 336.

<sup>15</sup> Thomas Hammarberg, *Discrimination on grounds of sexual orientation and gender identity in Europe* (Council of Europe Publishing 2011) 98.

<sup>16</sup> *Paradiso and Campanelli* (n 1) para 67.

European consensus on this matter.<sup>17</sup> Before the *Paradiso and Campanelli* case, the ECtHR considered surrogacy on two occasions; *Mennesson v France*<sup>18</sup> and *Labassee v France*.<sup>19</sup>

In both cases, the couples went to the United States for gestational surrogacy agreements. As a consequence of surrogacy, twins were born in the Mennesson family, and a baby girl in the Labassee family. The twins are genetically related to Mr Mennesson, and the baby girl is genetically related to Mr Labassee. When both families returned to France, they asked that the French authorities recognise the parental relationships legally established in the United States. They were denied such recognition as gestational surrogacy agreements are prohibited in France. Nonetheless, the children were not removed from the couples' households.

In both cases unanimously, the ECtHR denied violation of Article 8 ECHR in respect of the parents because the lack of recognition of the parental relationships had not prevented the parents from living with their children.<sup>20</sup> However, the ECtHR noted that the French refusal to recognise the parental relationships established abroad 'undermined the children's identity within the French society'.<sup>21</sup> Considering the principle that the best interests of the child must prevail, the ECtHR found France in breach of the right to the protection of privacy and family life of the children. In other words, not recognising the parental relationship between the children and their biological fathers, France 'had overstepped the permissible margin of appreciation'.<sup>22</sup> A different approach was taken in the *Paradiso and Campanelli* case.

In the *Paradiso and Campanelli* case, the applicants claimed that Italy has violated their rights in not recognising the birth certificate of their child born in Russia with a gestational surrogacy with both sperm and eggs donation. The applicants noted that the donation of

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<sup>17</sup> Registrar of the Court, *Totally prohibiting the establishment of a relationship between a father and his biological children born following surrogacy arrangements abroad was in breach of the Convention* (ECHR, 26 June 2014) 1-3.

<sup>18</sup> *Mennesson v France* App no 65192/11 (ECtHR, 26 September 2014).

<sup>19</sup> *Labassee v France* App no 65941/11 (ECtHR, 26 June 2014).

<sup>20</sup> Registrar of the Court (n 17).

<sup>21</sup> *ibid* 3.

<sup>22</sup> *ibid* 4.

gametes and embryos is legal in Russia and, therefore, the Italian authorities should have recognised the parental relationship legally established abroad (as prescribed in Article 33 of Law 218/95).<sup>23</sup> Italy considered the birth certificate to be a false document as it indicated that Paradiso and Campanelli were the parents of the child. Additionally, Italy highlighted that there is no European consensus on regard of gestational surrogacy.<sup>24</sup>

The ECtHR discussed three aspects. First, regarding the refusal of the Italian state to recognise the parental relationship established abroad, the ECtHR accepted that the use of male gametes from a donor instead of Campanelli's gametes was a mistake of the Russian clinic, and that the couple believed in good faith that the child was biologically related to the intended father. However, the ECtHR concluded with a convoluted double negation in saying that 'the national judges did not take an unreasonable decision'.<sup>25</sup> Puppinck and De La Hougue argue that this sentence means that the ECtHR accepted the decision of the Italian authorities not to recognise the birth certificate issued abroad because of the lack of a biological relationship between the child and the intended parents.<sup>26</sup>

Second, on the removal of the child from the de facto family to a foster family, the ECtHR looked at the concept of necessity in relation to the best interests of the child. Indeed, the removal of the minor from the family, even the de facto family, is an extreme measure. The ECtHR considered that the interest of the state to preserve the public order is not a sufficient reason to justify the removal of the child from Paradiso and Campanelli's custody.<sup>27</sup> A dissent was issued arguing that, because the Juvenile Tribunal of Campobasso deemed that the child was not living in an adequate familial environment under the parameters of the

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<sup>23</sup> *Paradiso and Campanelli* (n 1) para 65.

<sup>24</sup> *ibid* para 66.

<sup>25</sup> My translation from *Paradiso and Campanelli* (n 1) para 77. The original text of the decision reads: 'les juges nationaux n'ont pas pris une décision déraisonnable'.

<sup>26</sup> Gregor Puppinck and Claire De La Hougue, 'Paradiso and Campanelli v Italy: The ECHR Validates the Sale of a Child through Surrogacy' (2015) 126 *Revue Lamy Droit Civil* 41, 46.

<sup>27</sup> *Paradiso and Campanelli* (n 1) paras 80-82.

international adoption law, the situation was delicate and had a certain degree of urgency.<sup>28</sup> Therefore, the dissenting judges found there was no reason to overcome the decision of Italian authorities.<sup>29</sup>

Finally, the ECtHR noted that the child had only obtained a new birth certificate in April 2013 and did not have an official identity for more than two years with consequences on a number of administrative issues.<sup>30</sup> The ECtHR noted that the child should not be disadvantaged by the fact that he was born from a surrogate mother.<sup>31</sup> Puppink and de La Hougue viewed the judgment as being ‘benevolent but impossible’ because the Russian clinic had eradicated the child ‘from his roots, from his biological filiation’ and sold to an aging couple.<sup>32</sup>

A violation of Article 8 ECHR was found and Italy was condemned to pay €30,000 of material and immaterial damages. However, because the child has developed a familial relationship with the foster family, the decision cannot be interpreted as creating an obligation to return the child to the applicants.<sup>33</sup> It is argued that in accepting the Italian authorities’ decision to not recognise the Russian birth certificate the ECtHR indirectly expressed an opinion on surrogacy, taking no consideration of the best interests of the child.

*Paradiso and Campanelli* shows that surrogacy cases raise contrasting interests. On one hand, there is the right of the couple to have their status of parents legally established abroad recognised in their home country. On the other hand, there is the interest of the government to protect public order. When private and public interests are competing, the ECtHR may allow a margin of appreciation to the government. In addition, when cases involve children, their

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<sup>28</sup> *ibid* paras 11-12.

<sup>29</sup> *ibid* para 13.

<sup>30</sup> *ibid* para 34.

<sup>31</sup> *ibid* para 85.

<sup>32</sup> Puppink and De La Hougue (n 26) 8.

<sup>33</sup> *Paradiso and Campanelli* (n 1) paras 87–88.

best interests must be a pivotal consideration in the decision making. The *Paradiso and Campanelli* decision can be broken down into two parts to clarify how these interests have interacted.

The ECtHR answered two questions: whether the removal of the child from the couple's custody was justifiable and whether the Italian non-recognition of the parental relationship established abroad breached the ECHR. As regards the first question the ECtHR answered no and did not extend a margin of appreciation to the Italian government, instead taking the best interests of the child into consideration. The answer to the second question was a timid yes. With a convoluted double negation, the ECtHR accepted the decision of the Italian authorities not to recognise the birth certificate issued abroad. This allowed a margin of appreciation to the government which does not consider the best interests of the child.

The French cases and the Italian case have different outcomes, which derive from the factual differences of the cases.<sup>34</sup> France was not allowed any margin of appreciation for not recognising the parental relationship legally established abroad and the best interests of the child principle prevailed because the children were genetically related to the intended fathers. On the other hand, in the Italian case, the margin of appreciation prevailed over the best interests of the child principle, because the child born in Russia was not genetically related to Mr Campanelli. Although the ECtHR is slowly recognising forms of de facto families, it still prefers a bionormative frame. Arguably, in future cases regarding surrogacy agreements, CoE Member States can persist in not providing a legal identity to a child, if the child is not genetically related to the intended parents. This lack of legal recognition is in breach of the best interests of the child.

To conclude, without a clear statement from the ECtHR that CoE Member States should recognise parental relationships legally established abroad, situations as the one of *Paradiso*

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<sup>34</sup> ECtHR (n 3) 2.

and Campanelli will occur again, to the inevitable detriment of the best interests of the children born from gestational surrogacy, especially those not genetically related to the intended parents. It is hoped that further jurisprudence will provide greater clarity.

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