



**Australian
Human Rights
Commission**

National Children's Commissioner

Megan Mitchell

Our Ref: 2016/96

13 April 2016

Mr Muzammil Ali
Inquiry Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
Parliament House
PO Box 6100
Canberra ACT 2600

Dear Mr Ali,

Inquiry into surrogacy

Thank you for the opportunity to appear at the Committee's hearing in relation to the above bill.

We have now had the opportunity to review the transcript of that hearing which was circulated by the Secretariat on 11 April 2016. During the hearing, we asked to take two questions on notice. This letter responds to those questions.

1 European decisions

On page 2 of the transcript, the following question was asked:

CHAIR: ... Can I kick off with a question about one of the points you have raised there to do with children who are born of surrogacy arrangements if a country decides to stop the issuing of citizenship and passports to children that are born of those arrangements where it is done illegal circumstances. You mentioned that there is obviously an onus on the country not to render anyone stateless, particularly a child. This is being done in other countries, though—I am talking about the process, not rendering stateless. I am wondering if you have had a look at how they are managing their human rights obligations in not rendering someone stateless and yet implementing that same policy. I believe that certain Scandinavian countries and countries throughout Europe are doing this.

...

Mr Edgerton: I do not know if we have done a comprehensive analysis of that. I know that there are some countries that have refused to change a birth certificate of a child when the child is returned from a surrogacy arrangement in another country. There have been a couple of French cases dealing with that. I am happy to take on

notice the details of those cases. They are cases that have subsequently gone to the European Court of Human Rights. I think there has tried to be a reconciliation between what state law provides and what the human rights of the child dictate.

1.1 European Court of Human Rights, Grand Chamber

To date there have only been two decided cases of the Grand Chamber of the European Court of Human Rights that the Commission is aware of which have considered issues around international surrogacy arrangements.

The Grand Chamber considered whether French laws prohibiting international surrogacy arrangements were consistent with human rights in two judgments delivered on 26 June 2014: *Menesson v France* (Application no. 65192/11) and *Labassee v France* (Application no. 65941/11).

Both cases had similar facts and the court applied the same reasoning. This letter deals with the case of *Menesson v France* as a copy of the judgment is available in English.

Mr and Mrs Menesson are French nationals. They were unable to have a child because Mrs Menesson was infertile. In 2000, they travelled to California and entered into a gestational surrogacy agreement which was lawful under Californian law. The surrogate mother gave birth to twins, a boy and a girl, and the Supreme Court of California made orders that the Mr and Mrs Menesson were their parents. Because the twins were born on US territory, they became US citizens (under clause 1 of the 14th amendment to the US Constitution). US authorities issued US passports for the twins naming Mr and Mrs Menesson as their parents.

The parents sought to have the details of the children's birth certificates entered in the French register of births, marriages and deaths. This was refused on the basis that Article 16-7 of the French Civil Code provided that surrogacy agreements were null and void on public policy grounds, even if they were lawful in the country in which they were entered into. As a result of this decision, the children were not rendered stateless (they remained US citizens) but French law did not recognise Mr and Mrs Menesson as their parents. The children were permitted to live with Mr and Mrs Menesson in France.

Mr and Mrs Menesson and their children complained of a violation of the right to respect for their private and family life under article 8 of the European Convention on Human Rights.

The Court found that:

- there had been an 'interference' with family life and with private life
- the interference was in accordance with French law
- the law had a legitimate aim, namely, deterring French nationals from engaging in conduct outside France that was prohibited in France, in order to protect children and surrogate mothers; but
- the law exceeded what was necessary in a democratic society to achieve that aim.

In relation to the last point, the Court noted that:

- there was no consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children thus conceived abroad (some statistics on the position taken by various states were set out)
- the lack of consensus reflects the fact that surrogacy arrangements involve serious ethical issues, and confirms that States must be given a wide margin of appreciation in determining whether or not to authorise this method of assisted reproduction and whether to recognise a legal parent-child relationship between children legally conceived as a result of a surrogacy arrangement entered into abroad
- however, regard should also be had to the fact that an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned, which limits States' margin of appreciation.

As to the right to family life, the Court considered that the refusal to recognise Mr and Mrs Mennesson as parents of the children had not prevented the family from enjoying their right to family life and struck a fair balance between the interests of the applicants and those of the State.

As to the right to private life, the Court noted that respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship. The Court considered that failure of French law to recognise the parent-child relationship in this case undermined the children's identity within French society. This had implications for their ability to obtain French citizenship and their ability to inherit from Mr and Mrs Mennesson under French law. It also had implications for the recognition of their relationship with their biological father. Having regard to the best interests of the children, the Court found that the children's right to respect for their private life had been infringed.

Following the Court's decision in this case, there have been developments in some European countries which have taken this case into account. Some of these domestic decisions in Germany, Switzerland, Spain, France, Ireland and England are described in a paper by the Hague Conference on International Law, *The Parentage / Surrogacy Project: An Updating Note* (February 2015), Annex I, available at <https://assets.hcch.net/docs/82d31f31-294f-47fe-9166-4d9315031737.pdf>.

The European Parliament has recently published a report on *Practices and Approaches in EU Member States to Prevent and End Statelessness* (2015), available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536476/IPOL_STU\(2015\)536476_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536476/IPOL_STU(2015)536476_EN.pdf). The *Mennesson* case is referred to but the potential for international surrogacy arrangements to result in statelessness is not dealt with in any detail.

1.2 European Court of Human Rights, Chamber

Two other cases dealing with international surrogacy arrangements have been heard by the first instance chamber of the European Court of Human Rights.

The first was *D and others v Belgium* (Application no. 29176/13) in which judgment was delivered on 8 July 2014. In that case, the Court found that it was not a breach of article 8 of the European Convention on Human Rights for Belgium to delay the issuing of a travel document to permit a child born to a surrogate mother in the Ukraine to travel to Belgium. The delay of 5 months was not an unreasonably long period for Belgian authorities to determine whether Belgian and Ukrainian legislation had been complied with, in particular to ensure that the child had not been trafficked.

The second was *Paradiso and Campanelli v Italy* (Application no. 25358/12) in which judgment was delivered on 27 January 2015. In that case, the applicants entered into an agreement with a Russian clinic to engage a surrogate mother in Russia. The applicants said that they believed (wrongly) that Mr Campanelli's gametes were used in the process. The surrogate mother gave birth to a baby boy and the applicants were registered in Russia as his parents. Mr Campanelli asked the Italian authorities to enter the details of the birth in the civil-status register but this request was refused. The applicants were investigated for misrepresenting of the status of the child. Subsequent investigations revealed that Mr Campanelli was not the child's biological father. The child, who was then 8 months old, was removed from the applicants and placed in foster care. The child was considered, from an administrative point of view, to have unknown parents.

The Court found that the Italian courts had not acted unreasonably in refusing to recognise the applicants as the parents of the child despite the legal status recognised in Russia. However, it also found that the removal of the child from the applicants was a breach of article 8 of the European Convention on Human Rights. It said: 'The removal of a child from the family setting is an extreme measure which should only be resorted to as a very last resort. Such a measure can only be justified if it corresponds to the aim of protecting a child who is faced with immediate danger.' However, this finding did not oblige Italy to take the child (who at the time of the judgment was almost 4 years old) from the foster parents and return him to the applicants because the child by that stage 'had undoubtedly developed emotional ties with the foster family'. Instead, the Court made an award of damages and costs in favour of the applicants (€30,000 in total).

The case of *Paradiso and Campanelli* has been referred to the Grand Chamber at the request of the Italian Government. A hearing took place on 9 December 2015 and judgment is currently reserved.

There are also three other cases which have been brought against France and which are pending in the first instance chamber. These cases are:

- *Laborie and others v France* (Application no. 44024/13)
- *Foulon v France* (Application no. 9063/14)
- *Bouvet v France* (Application no. 10410/14)

Each of those cases deals with a non-recognition of the parent-child relationship in France of children born of international surrogacy arrangements. In *Laborie*, the children were born in Ukraine, in *Foulon* and *Bouvet* the children were born in India.

2 Safeguards

On page 7 of the transcript, the following question was asked:

Ms CLAYDON: Thank you. That helps clarify it. I am not sure that I read it in your submission, but you said earlier on something around the possibility of caps on the number of times that you might be a surrogate mother.

Ms Mitchell: It is not in our submission, but I am aware that that occurs in other jurisdictions around the world. When you are thinking about regulation and potential exploitation, this is one of the things that you may wish to consider.

Ms CLAYDON: Have there been other preventative measures that you are aware of other than a possible cap, around how you might try to regulate as best you can to avoid exploitation?

Ms Mitchell: I was aware of some of those, but it is slipping my mind, so I would like to take that on notice. There are also sometimes limits on the amount of payment that you can have, for instance. I will take that on notice and get back to you.

The Commission's written submission refers to a number of preconditions that must be satisfied in Australian jurisdictions before a court makes an order transferring parentage to the intended parents. Some of these conditions are aimed at providing protection to the surrogate mother. Paragraphs 51 and 52 of the Commission's submission provides:

51. There are a number of preconditions that must be satisfied before the court may make an order transferring parentage. These preconditions vary from jurisdiction to jurisdiction but typically they require:
 - a. a surrogacy agreement that was entered into prior to conception;
 - b. legal advice to the parties about the nature and effect of the arrangement;
 - c. counselling for the parties;
 - d. minimum ages for the surrogate mother and intended parents (ranging from 18 to 25 years).

52. Other preconditions that are imposed by only some jurisdictions include:
 - a. the surrogacy arrangement is limited to gestational surrogacy (not genetic surrogacy);
 - b. at least one of the intended parents is a genetic parent of the child;
 - c. there is a demonstrated medical or social need for the surrogacy arrangement;
 - d. the surrogate mother must have previously given birth to a live child.

Some additional requirements are imposed by ART clinics who provide surrogacy services. For example, organisations involved in the treatment of patients using ART are required to comply with the Code of Practice for Assisted Reproductive Technology that has been developed by the Reproductive Technology Accreditation

Committee (RTAC) of the Fertility Society of Australia. One issue dealt with by the Code is limiting the number of embryos transferred to a woman in order to minimise the incidence of multiple pregnancies.

One of the Commission's guiding principles is that the surrogate mother must be able to make a free and informed decision about whether to act as a surrogate mother. There are two aspects to that. The first is that the surrogate mother needs to have sufficient information about the process. We expect that this would involve:

- advice about the medical process and the treatment she can expect to receive
- independent advice about the terms of the proposed agreement, in a language that she understands
- independent advice about her rights and the rights of the intended parents
- a discussion about what could happen in the process and how conflicts would be resolved.

The second aspect is that her decision to participate must be a free one. That is, she should be making her own decision and not be subject to coercion. In making an assessment about whether a decision is 'free', it would be necessary to consider:

- the potential for power imbalances between the parties
- whether she has been given counselling prior to agreeing to participate and the results of that counselling
- the potential for pressure on her from relatives
- her financial position and the impact of any proposed payment on her decision to participate.

In *Ellison & Karnchanit* [2012] FamCA 602, Ryan J in the Family Court of Australia set out a number of 'best practice principles' for international surrogacy cases. Her Honour was dealing primarily with the kind of evidence that the Court should be provided with when considering whether to make parenting orders in order to be able to be satisfied, among other things, that the surrogate mother had not been exploited. Some of the matters raised by her Honour could form the basis for regulatory requirements for international surrogacy agreements. At [132]-[139] of the judgment, her Honour said:

132. The AHRC and ICL made submissions in relation to the desirability of either the formulation of Rules of Court or a Practice Direction applicable to surrogacy cases. As is clear, these cases are complex cases the number of which is increasing. I agree that the position of the birth mother requires close attention to ensure that she has given free and informed consent and has not been subjected to exploitation, coercion or undue influence and that her rights have been adequately protected. This can be problematic in cases that involve cross-border arrangements in which the birth mother may be difficult to locate and in which there may be complexities with communication. The Court must also be able to determine that the subject child or children are who the applicants say. It is thus vital that the Court has sufficient evidence before it so that these issues can be determined with a high degree of certainty.
133. The gravamen of the submissions made by the AHRC and the ICL are set out below. Essentially it is their recommendation that the Court considers how

and whether these recommendations should be approached. For all surrogacy cases, the steps set out below should be followed.

134. An Independent Children's Lawyer is appointed to represent the child's interests.
135. Affidavit evidence of the applicant(s) and the birth mother comprising:
 - a) their personal circumstances, in particular the circumstances at the time the procedure took place;
 - b) their circumstances leading up to the surrogacy agreement and of the procedure itself;
 - c) the circumstances after the birth of the child and subsequent arrangements for the care of the child.
136. Independent evidence regarding the identification of the child including:
 - a) the surrogacy contract/agreement entered into between the persons seeking the parenting orders and the clinic and/or surrogate mother;
 - b) a certified copy of the child's birth certificate, and, if not in English, a translation accompanied by an affidavit of the person making the translation verifying that it is a correct translation and setting out the translator's full name, address and qualifications;
 - c) parentage testing in accordance with the Regulations to ascertain whether that the child is the biological child of the person/s seeking the parenting orders;
 - d) evidence of Australian citizenship of the child if citizenship has been granted.
137. Independent evidence with respect to the surrogate birth mother. This may be obtained by a family consultant or an independent lawyer, including:
 - a) confirmation that legal advice and counselling were provided to the surrogate mother prior to entering into the surrogacy arrangement;
 - b) confirmation that the surrogacy arrangement was entered into before the child was conceived;
 - c) confirmation that the surrogacy arrangement was made with the informed consent of the surrogate mother;
 - d) evidence after the birth of the child of the surrogate mother's views about the orders sought and what relationship, if any, she proposes with the child;
 - e) if the child has been granted a visa to enter Australia, evidence of participation by the surrogate mother in an interview with immigration officials prior to the grant of the visa, and the views expressed by her during this interview.

138. The preparation of a Family Report which addresses:
- a) the nature of the child's relationship with the persons seeking parenting orders;
 - b) the effect on the child of changing their circumstances;
 - c) an assessment of the persons seeking the parenting orders capacity and commitment to the long-term welfare of the child;
 - d) the persons seeking the parenting orders' capacity to promote the child's connection to their country of birth's culture including but not limited to their birth mother;
 - e) advice in relation to issues which may arise concerning the child's identity and how those issues are best managed;
 - f) the views of the birth mother, in particular her consent to the proposed parenting orders, and other matters with respect to the birth mother referred to above.
139. Other evidence including:
- a) evidence of the legal regime in the overseas jurisdiction in which the procedure took place with respect to surrogacy arrangements;
 - b) evidence of the legal regime in the overseas jurisdiction in which the procedure took place with respect to the rights of the birth mother, and if applicable, of her husband or de facto partner.

These principles were endorsed by a number of individuals and organisations who made submissions to the Family Law Council's inquiry, see Family Law Council, *Report on Parentage and the Family Law Act (2013)*, p 84.

The principles were also used by the Council in its Recommendation 13 as a basis for developing a set of minimum requirements for the transfer of parentage in international surrogacy cases, to ensure compliance with Australia's international human rights obligations. Again, these principles could be used to form the basis for regulatory requirements for international surrogacy agreements. Recommendation 13 provided:

The provisions in the new federal Status of Children Act dealing with the transfer of parentage in surrogacy cases where state and territory Acts do not apply should contain a set of minimum requirements based on the proposals considered by Ryan J in *Ellison and Anor & Karnchanit* [2012] FamCA 602 with the aim to ensure compliance with Australia's international human rights obligations, including the following:

- That any order is subject to the best interests of the child;
- Provision is made for when the parties change their minds;
- Evidence of the surrogate mother's full and prior informed consent;
- Evidence of the surrogacy agreement, including any sums paid;

- Consideration should be given to whether the intending parents have acted in good faith in relation to the surrogate mother;
- Evidence of the intending parent/s actions in relation to ensuring the child will have access to information concerning the child's genetic, gestational and cultural origins;
- Provision is made that where a surrogacy arrangement involves multiple births, orders must be made in relation to all children born;
- The legality of the surrogacy arrangement should be a relevant consideration for the court when determining parentage.

Yours sincerely,

Megan Mitchell
National Children's Commissioner