Private and family life of children born abroad via surrogacy and that of their intended mother. *Case K.K. and Others v. Denmark* (Application no. 25212/21). European Court of Human Rights (Second Section), Judgment of 6 December 2022

La vie privée et familiale des enfants nés à l'étranger par gestation pour autrui et celle de leur mère d'intention. *Affaire K.K. et Autres c. Danemark* (Requête n° 25212/21). Cour Européenne Des Droits de L`homme (Deuxième Section), Arrêt du 6 Décembre 2022

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Abstract: This article is a case study of the case *K.K. and Others v. Denmark,* decided by the European Court of Human Rights in 2022. The case concerned a surrogacy arrangement concluded in Ukraine and its consequences to the applicant children and their intended mother who was not able to adopt the children in Denmark. The issue at stake falls within the scope of Article 8 of the European Convention on Human Rights which guarantees the right to respect for private and family life. The Court has relatively vast case-law on surrogacy issues both under the private life aspect and under the family life aspect and the judgment in *K.K. and Others v. Denmark* adds to this case-law.

Keywords: European Court of Human Rights, Article 8 of the Convention, private and family life, surrogacy abroad, intended mother's possibility to adopt

Résumé : Cet article consiste en une étude de l'arrêt *K.K. et autres c. Danemark*, rendu par la Cour européenne des droits de l'homme en 2022. Cette affaire concernait une gestation pour autrui réalisée en Ukraine et ses conséquences pour les enfants requérants et leur mère d'intention, qui n'a pas pu les adopter au Danemark. La question en litige relève de l'article 8 de la Convention européenne des droits de l'homme, qui garantit le droit au respect de la vie privée et familiale. La Cour dispose d'une jurisprudence relativement abondante en matière de gestation pour autrui, tant sous l'angle du respect de la vie privée que sous celui du respect de la vie familiale, jurisprudence que l'arrêt *K.K. et autres c. Danemark* vient enrichir.

*Any errors or omissions are the responsibility of the author. The opinions expressed are those of the author and do not engage the responsibility of the European Court of Human Rights or of the Council of Europe.

Mots-clés : Cour européenne des droits de l'homme, article 8 de la Convention, vie privée et familiale, gestation pour autrui à l'étranger, possibilité d'adoption pour une mère d'intention

I. Introduction

1. Surrogacy arrangements and their consequences to the child and parents are an issue falling within the scope of Article 8 of the European Convention on Human Rights (hereafter the Convention) which guarantees the right to respect for private and family life. Surrogacy arrangements can be examined either under the private life aspect or under the family life aspect of Article 8 or – as is often the case – under both. The European Court of Human Rights (hereafter the Court) has relatively vast case-law on surrogacy issues both under the private life aspect and under the family life aspect. The judgment of the Second Section of the Court in the case *K.K. and Others v. Denmark* is a part of this case-law. It follows the principles established in earlier landmark cases of *Mennesson v. France*[1], *Paradiso and Campanelli v. Italy*[2], *D. v. France*[3], and *Valdís Fjölnisdóttir and Others v. Iceland*[4], as well as those established in *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* (hereafter the *Advisory opinion*)[5].

II. Facts of the case

2. The first applicant in the case is the intended mother and the second and third applicants are twins born in 2013. In December 2013, a surrogate mother in Ukraine gave birth to the second and third applicants following a surrogacy agreement with the first applicant and her husband, who were the intended parents of the children. The husband was the biological father of the children. The Ukrainian authorities issued birth certificates for the children, naming the first applicant as their mother and her husband as their father[6].

3. The children were brought to Denmark in February 2014. In Denmark, the woman giving birth to a child is the legal parent of the child. Accordingly, the surrogacy agreement stating that the first applicant was to be named as the mother of the two children on the birth certificates had no legal effect in Denmark. However, the children obtained Danish nationality because of their family ties to their father. In addition, on 22 March 2018, the authorities granted the first applicant and her husband the joint custody of the children[7].

4. In the meantime, the first applicant applied for adoption of the children as a step-parent (step-child adoption). By a decision of 26 February 2014, the State Administration refused the application for adoption as the first applicant and the children had only lived together in Denmark for sixteen days. On 26 July 2016 the National Social Appeals Board affirmed the decision of 26 February 2014, stating

[1] ECtHR, 26 June 2014, *Mennesson v. France*, no. 65192/11, paras. 78-102.

[2] ECtHR, 24 January 2017, *Paradiso and Campanelli v. Italy*, no. 25358/12, paras. 140-141, 157 and 161-165.

[3] ECtHR, 16 July 2020, *D. v. France*, no. 11288/18, paras. 41-72 and 81-89.

[4] ECtHR, 18 May 2021, *Valdís Fjölnisdóttir and Others v. Iceland*, no. 71552/17, paras. 62-79.

[5] ECtHR, 10 April 2019, *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*, request no. P16-2018-001, French Court of Cassation, paras. 35-59.

[6] ECtHR, 6 December 2022, *K.K. and Others v. Denmark*, no. 25212/21, paras. 2 and 5-6.

[7] Ibid., paras. 7-8.

that an adoption would be contrary to section 15 of the Adoption Act[8], since the surrogate mother had been paid to consent to adoption. On 20 February 2017 the National Social Appeals Board confirmed its decision. The first applicant then brought the case before the courts. The decision to refuse adoption was upheld by the District Court on 6 June 2018 and by the High Court on 14 June 2019 respectively. With the permission from the Appeals Permission Board, the judgment of 14 June 2019 was brought before the Supreme Court, which in a judgment of 16 November 2020 found against the applicants.[9]

5. The Supreme Court, first of all, noted that section 15 of the Adoption Act contained an absolute ban on granting adoption if anybody having to consent to the adoption had been paid or received remuneration. It found it established that a payment of 32,265 euros by the first applicant and her husband to a clinic in Ukraine had included remuneration to the surrogate mother for giving birth to the children, and for her consenting to the first applicant and her husband being the legal parents of the children, including adopting the children. Thus, the Supreme Court found that the adoption was contrary to section 15 of the Adoption Act[10].

6. The Supreme Court then conducted a very detailed analysis on whether the refusal of the application for stepchild adoption conflicted with Article 8 of the Convention. It held that the National Social Appeals Board's refusal of the application for an adoption to the first applicant had to be deemed to be an interference with the second and third applicant's rights under Article 8 para. 1 of the Convention. It followed from Article 8 para. 2 that such interference was not justified unless it was in accordance with the law and was necessary in a democratic society in the interests of, *inter alia*, the protection of the rights and freedoms of others. Referring, *inter alia*, to *Mennesson v. France* and the *Advisory opinion*, the Supreme Court considered that the *Advisory opinion* had to be interpreted to mean that it applied, *inter alia*, to such cases of paid surrogacy as mentioned in section 15 of the Adoption Act. However, the first sentence of section 15 of the Adoption Act did not allow for any assessment of the best interests of the child to be made as the provision unconditionally prohibited the grant of an adoption in cases where any payments had been made. As section 15 of the Adoption Act contained an absolute ban, the Supreme Court concluded that the legislative authorities needed to review section 15 of the Adoption Act, and that until an amendment of section 15 had entered into force, the authorities should in all cases involving that provision carry out an individual assessment of whether refusing an application for adoption would be contrary to Article 8 of the Convention[11].

7. The Supreme Court went on to note that it followed from the *Advisory opinion* that when determining whether to recognise the legal relationship between a child born through a surrogacy arrangement and the intended mother, for example through adoption, regard should be had to what was best for the child, and that the best interests of that child were paramount. As the *Advisory opinion* was given on the basis of the *Mennesson v. France* case, in which the surrogate mother had not been remunerated, there was some doubt about how the interests of the individual children affected in concrete cases should be weighed against the interests underlying section 15 of the Adoption Act, namely the interest to discourage commercial surrogacy arrangements and to protect children against being turned into a commodity, and the interest in countering the exploitation of vulnerable women in commercial surrogacy arrangements. The Supreme Court acknowledged that the second and third applicants, who had lived with the first applicant all their lives, had a vital interest in her adopting them in order for their identity as her children to be legally recognised. On the other hand, there were the interests of general deterrence

[8] Section 15 of the Adoption Act reads as follows: "Adoption cannot be granted if any of the persons required to consent to the adoption pay or receive remuneration or any other kind of consideration whatsoever, including compensation for loss of earnings. The Family Law Agency (formerly the State Administration) may require from any person having knowledge of the circumstances that he or she provides all information necessary to clarify whether remuneration, and so on, as mentioned in the first sentence has been paid or received ...". See *K.K. and Others v. Denmark*, cit., para. 18.

[9] Ibid., paras. 9-13.

[10] Ibid., paras. 14-15.

[11] Ibid., para. 15.

safeguarded by the prohibition against adoption in section 15 of the Adoption Act. At the same time, the Supreme Court observed that the first applicant's own interests in obtaining recognition of the legal relationship between her and the children through adoption could be given no particular weight as this would be equal to legalising the situation that she had created by making a payment for a consent to adoption contrary to section 15 of the Adoption Act. There was nothing to suggest that it would have a significant impact on the private life of the second and third applicants if the first applicant was not granted an adoption. The children had obtained Danish nationality at birth and they were therefore entitled to reside in Denmark. The first applicant's shared custody further implied that she had a duty to care for the children and that, in the event of legal separation or divorce or the death of the genetic father, she would be able to retain custody under the general rules of the Parental Responsibility Act. Moreover, the first applicant would be able to make provision for the children in her will under the rules of the Inheritance Act, and for inheritance tax purposes the children would be in the same position as if they were her children. Based on an overall assessment, the majority of the Supreme Court (four judges) found that the interests of the second and third applicants in being adopted by the first applicant did not imply that the refusal of the first applicant's application for an adoption should be deemed to constitute a violation of Article 8 of the Convention and it refused to grant the adoption[12].

8. The minority of the Supreme Court (three judges) disagreed. They noted that the Court had held in its *Advisory opinion* that the general and absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother was incompatible with the child's best interests and that the best interests of the child required that each situation be examined in the light of the particular circumstances of the case. They held that the best interests of the child should be weighed against the interests underlying section 15 of the Adoption Act, including the interests in preventing commercial surrogacy agreements and the implementation of any agreements on commercial surrogacy. In the present case, the children had lived with the first applicant and her husband, who was their genetic father, since they were born in December 2013. The children considered them both to be their parents, and in 2018, the State Administration had granted the father and the first applicant their joint custody. The minority considered that it would be best for the second and third applicants to be adopted by the first applicant to the effect that they obtained the same legal relationship with her as they had with their father. The interests in preventing the implementation of agreements on commercial surrogacy arrangements were not particularly weighty in the present case where the children had lived with the first applicant and the father for almost seven years, and where the father had been recognised for the whole time as the lawful father and holder of custody of the children. The agreement on the surrogacy arrangement had thus been fully performed for his part. In these circumstances, the fact that the first applicant and the father once remunerated the Ukrainian surrogate mother could not, in the minority's opinion, result in the children being barred from obtaining recognition that the person whom they had regarded as their mother for their entire life was also their mother from a legal point of view. Against this background, the minority found that the children's right to respect for their private life under Article 8 of the Convention implied that the relationship between the children and the first applicant had to be legally recognised, and that for such recognition it did not suffice that she had shared custody.[13]

III. The Court's judgment

9. The applicants complained before the Court that the Supreme Court's judgment of 16 November 2020 amounted to an infringement of their right to respect for private and family life as guaranteed by Article 8 of the Convention.

[12] Ibid., para. 15.
[13] Ibid., para. 17.

10. The Court noted that it was not in dispute between the parties that the refusal to let the first applicant adopt the second and third applicants amounted to an interference in the applicants' right to respect for their family and private life, that the interference was in accordance with the law, namely section 15 of the Adoption Act, and that it pursued the legitimate aim of protecting the rights and freedom of others. The Court held that it had no reason to hold otherwise. In order to determine whether the interference in question was "necessary in a democratic society", the Court considered that a distinction had to be drawn between the applicants' right to respect for their family life and their right to respect for their private life[14].

11. The Court thus first examined whether there was a violation of the applicants' right to respect for family life. It noted that the applicants had not pointed to any particular obstacles or practical difficulties in enjoying family life together on account of the refusal of the adoption. In the domestic proceedings, the courts had focused on the children's right to respect for their private life. It thus appeared that the Supreme Court had proceeded on the assumption that the applicants' right to respect for their family life, in so far as it had been affected, was outweighed by the public interests at stake. The Court saw no reason to hold otherwise. It noted that the applicants had lived together uninterruptedly since February 2014, when the twins were brought to Denmark. The children had immediately obtained Danish nationality because of their biological father. Lastly, on 22 March 2018 the authorities had approved the first applicant and her husband being given joint custody of the children. It did not therefore appear that the applicants had encountered any obstacles or practical difficulties in enjoying family life together on account of the refusal to let the first applicant adopt the second and third applicants. Having regard to the margin of appreciation afforded to the respondent State, the Court considered that the conclusions of the Danish courts, including that of the Supreme Court, struck a fair balance between the interests of the applicants and those of the State in so far as the applicants' right to respect for family life was concerned. There was thus no violation with regard to the applicants' right to respect for their family life under Article 8 of the Convention[15].

12. The Court then went on to examine the private life aspect of Article 8. It first noted that the Danish Supreme Court had found that section 15 of the Adoption Act needed to be amended, and that until an amendment had entered into force, the authorities should in all cases involving the provision in question carry out an individual assessment of whether refusing an application for adoption would be contrary to Article 8 of the Convention. As interpreted by the Supreme Court – and subsequently followed by the relevant public authorities – section 15 thus now allowed stepchild adoption of children born through a surrogacy agreement if the adoption was in the best interests of the child and a refusal would contravene Article 8 of the Convention. The Court noted that the Supreme Court had carried out its assessment on the basis of those premises, assessing also the individual circumstances of the persons involved. It further noted that the Supreme Court had been unanimous in finding that it would be in the children's interest to be adopted by the first applicant in order for their identity as her children to be legally recognised but, having regard to the various specific cumulative solutions provided for by Danish law, the majority finally found that nothing suggested that it would have a significant impact on the private life of the children if the first applicant was not granted adoption[16].

13. The Court recalled that, in its *Advisory opinion,* it had found that the child's right to respect for private life within the meaning of Article 8 of the Convention did not require a specific form of legal recognition such as entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad but that "another means", such as adoption of the child by the intended mother, could be used provided that the procedure laid down by domestic law ensured that it could be implemented promptly and effectively, in accordance with the child's best interests. The question the-

[14] Ibid., paras. 42-43 and 48.
[15] Ibid., paras. 49-51.
[16] Ibid., paras. 24, 56 and 62.

refore arose, which other means – if not adoption of the child by the intended parent – could satisfy the requirement of legal recognition in the present case. The Court went on to examine its judgments and decisions adopted in this matter subsequent to the adoption of *Advisory opinion*[17]. As a result, the Court noted that, in those cases, it had adopted a holistic approach, taking into account not only the situation when the child was born or even when it considered the complaint, but also whether there was a possibility for subsequent legal recognition. In each case, the Court had determined, *in concreto*, the effect of the interference on the applicants' right to private life. However, it noted that none of the cases had concerned a refusal to adopt decided on by the authorities but it nevertheless appeared from the specific circumstances of the studied cases that "another means" could be putting the child into foster care with the intended mothers, or issuing a court order for the exercise of joint parental responsibility, or jointly recognising a child who had a legal parent-child relationship only with the woman who had given birth[18].

14. Concerning the case at stake, the Court noted that Danish law provided for various legal possibilities, such as the possibility for the first applicant to retain custody in the event of legal separation, divorce or the death of the biological father, and possibility to make provision for the children in her will. The fact still remained that, besides adoption, domestic law did not provide for other possibilities of recognition of a legal parent-child relationship with the intended mother. Accordingly, when the applicants had been refused adoption, they had *de facto* been refused being recognised as having a legal parent-child relationship. For the Court, such lack of recognition *per se* had a negative impact on the children's right to respect for their private life, in particular because it placed them in a position of legal uncertainty regarding their identity within society. In terms of inheritance, it was also clear that although the first applicant could make a will to that effect, the children would not be her heirs by virtue of a legal parent-child relationship, unlike the situation for other children in Denmark. The Court further noted that the children had lived with the first applicant and their biological father since they had arrived in Denmark in February 2014 and that they had thus for a significant time considered them both to be their parents. It was clearly in their best interest to obtain the same legal relationship with the first applicant as they had with their father. Furthermore, there were no opposing parental interests between the first applicant and the biological father of the children, nor were there any other persons claiming parentage. The majority of the Court was therefore not convinced that, in the particular circumstances of the present case, the cumulative solutions provided for by Danish law had such an impact on the private life of the children that they could make up for the refusal to let them be adopted by the first applicant. The majority was not satisfied that the Danish authorities, when refusing to let the second and third applicants be adopted by the first applicant, struck a fair balance between, on the one hand, the specific children's interest in obtaining a legal parent-child relationship with the intended mother, and, on the other, the rights of others, namely those who, in general and the abstract, risked being negatively affected by commercial surrogacy arrangement. The majority thus concluded that there had been a violation of Article 8 of the Convention in respect of the second and third applicants' right to respect for their private life[19].

IV. Analysis

15. Surrogacy arrangements are often examined under both the private life and the family life aspects of Article 8 of the Convention and this case makes no exception. The applicants invoked both the private life and the family life aspects and the Court thus naturally examined them both. Considering the nature of the problem raised, it is clear that the emphasis on the Court's examination was less on the family life aspect and more on the private life aspect. Also, the Court was unanimous as to the outcome

[17] Ibid., paras. 63-69. These judgments and decisions were the following: *Valdís Fjölnisdóttir and Others v. Iceland*, cit.; ECtHR, 24 March 2022, *A.M. v. Norway*, no. 30254/18; ECtHR, 24 March 2022, *C.E. and Others v. France*, nos. 29775/18+; ECtHR, 31 May 2022, *H. v. the United Kingdom* (dec.), no. 32185/20.

[18] *K.K. and Others v. Denmark*, cit., para. 70.

[19] Ibid., paras. 71-77.

concerning the family life aspect while being rather split as concerned, in particular, the private life aspect of the children.

1. Family life

16. In order to examine the applicability of Article 8 of the Convention under its family life aspect, there must exist some family life. The existence of family life is mainly a question of fact and depends on whether persons have close personal ties to each other in reality and in practice[20]. In general, where family life is not found to exist, Article 8 may still be applicable under its private life head[21].

17. In surrogacy cases, the Court has in some cases found no existence of family life. In *Paradiso and Campanelli v. Italy*, the applicant couple had – trying to circumvent the ban on surrogacy and the rules of international adoption – brought a child born in Russia through a surrogacy arrangement to Italy and had tried to register the child as their own child. The Court considered that there had been no *de facto* family life between the couple and the child because the couple had acted in violation of Italian law, there was no biological connection at all between the couple and the child, and their life together had lasted for a relatively short period of time[22].

18. A similar situation but with a different outcome was at stake in *Mennesson v. France*, which also concerned a couple that had acquired twin girls much in the same way as the couple in *Paradiso*, namely through surrogacy in California and in violation of French law. Contrary to the situation in *Paradiso*, the girls had been conceived with the husband's sperm and he was registered in France as their father while the wife could not be registered as the children's mother. It seems that, for the Court, the existence of family life between the applicants was so evident in this case that the Court did not even touch upon this issue. Instead, it directly concluded that it was not in dispute between the parties that the refusal of the French authorities to legally recognise the family tie between the applicants amounted to an "interference" in their right to respect for their family life[23].

19. The case *K.K. and Others v. Denmark* clearly follows the example set in *Mennesson v. France*. The Court did not touch upon the issue whether there was family life between the applicants but it noted straight away that it was not in dispute between the parties that the refusal to let the first applicant adopt the second and third applicants amounted to an interference in the applicants' right to respect for their family life[24]. The concept of family life is very broad covering not only families living together and benefitting from a legal recognition of family life through institutions such as marriage, but also covering other forms of relationships and cohabitation. Therefore, there is often no legal obstacles for families to lead family life even in the absence of the legal recognition, such as adoption in the present case[25]. Moreover, the Court rightly stressed that the family had lived together uninterruptedly for more than seven years, the first applicant and her husband had been given joint custody of the children, and they had not reported any particular problems. Against this background, it seems thus quite obvious that the Court unanimously found no violation of Article 8 of the Convention with regard to the applicants' right to respect for their family life[26].

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[20] ECtHR, 12 July 2001, *K. and T. v. Finland*, no. 25702/94, para. 150; ECtHR, 1 June 2004, *L. v. the Netherlands*, no. 45582/99, para. 36. See also P. Hirvelä/S. Heikkilä, *Right to Respect for Private and Family Life, Home and Correspondence – A Practical Guide to the Article 8 Case-Law of the European Court of Human Rights*, Cambridge/Antwerp/Chicago, Intersentia, 2022, p. 191.

[21] *Paradiso and Campanelli v. Italy*, cit., para. 165; ECtHR, 17 April 2018, *Lazoriva v. Ukraine*, no. 6878/14, paras. 61 and 66.

[22] *Paradiso and Campanelli v. Italy*, cit., paras. 140-141 and 157, 24 January 2017.

[23] *Mennesson v. France*, cit., para. 48.

[24] *K.K. and Others v. Denmark*, cit., para. 42.

[25] P. Hirvelä/S. Heikkilä, *Right to Respect*, cit., p. 192.

[26] *K.K. and Others v. Denmark*, cit., paras. 49-51.

2. Private life

20. As concerned the first applicant's right to respect for her private life[27], which was curiously ignored by the Danish Supreme Court, the Court found unanimously no violation of Article 8[28].

21. The most interesting part of this judgment is the private life aspect of the children. This is also that part of the judgment where the Court was very divided. The narrowest possible majority of four judges found that there had been a violation of Article 8 of the Convention with regard to the second and third applicants' right to respect for their private life while the three dissenting judges Kjølbro, Koskelo and Yüksel would not have found a violation.

22. The Court first addressed the issue of margin of appreciation in its judgment by referring extensively to its case-law adopted in the two above-mentioned cases *Mennesson v. France* and *Paradiso and Campanelli v. Italy.* It appears that when these two cases were adjudicated by the Court in 2014 and 2017 respectively, 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. According to a comparative-law survey conducted by the Court at that time, surrogacy was expressly prohibited in fourteen of the thirty-five member States of the Council of Europe studied. In ten of these it was either prohibited under general provisions or not tolerated, or the question of its lawfulness was uncertain. However, it was expressly authorised in seven member States and appeared to be tolerated in four others. In thirteen of these thirty-five States it was possible to obtain legal recognition of the parent-child relationship between the intended parents and the children conceived through a surrogacy agreement legally performed abroad. This also appeared to be possible in eleven other States but excluded in the eleven remaining States[29].

23. The Court paid attention to the fact that, in the *Mennesson* case, the lack of European consensus confirmed that, in principle, the States had to be afforded a wide margin of appreciation, *inter alia*, when deciding whether or not to recognise a legal parent-child relationship in surrogacy cases[30]. However, on the other hand, it noted that regard should also be had to the fact that an essential aspect of the identity of individuals was at stake where the legal parent-child relationship was concerned and that the margin of appreciation afforded to the respondent State would therefore need to be reduced[31]. Moreover, the Court referred to its recent finding in *C.E. and Others v. France*[32] that two factors carried particular weight, namely the primary interests of the child, and the consequently reduced margin of appreciation of the State[33]. The dissenting judges agreed that the margin of appreciation should be reduced in circumstances where the requirement to protect the best interests of a child was at stake but, in their opinion, the majority in the present context had taken this approach so far as to practically eliminate altogether, in substance, the margin of appreciation available to the Contracting States[34]. They even considered that the approach taken by the majority, based on the idea that only the maximum achievement of the child's best interests was good enough and that no other considerations could matter, appeared to them to come very close to acknowledging that there was a "right to a child" through commercial surrogacy[35].

24. In its assessment concerning the second and third applicants' right to respect for their private life, the Court focused on the reasoning by the Danish Supreme Court which had explicitly assessed

[27] Namely her right to personal development through her relationship with the children, and her interest in continuing that relationship with them.

[28] *K.K. and Others v. Denmark*, cit., para. 55.

[29] Ibid., para. 52, quoting paragraph 78 of the *Mennesson* judgment.

[30] Ibid., para. 52, quoting paragraph 79 of the *Mennesson* judgment.

[31] Ibid., para. 52, quoting paragraphs 79-80 of the *Mennesson* judgment.

[32] *C.E. and Others v. France*, cit., para. 100.

[33] *K.K. and Others v. Denmark*, cit., para. 53.

[34] Ibid., para. 88.

[35] Ibid., para. 105.

whether the decision to refuse the adoption was in compliance with Article 8 of the Convention. The majority of the Court does not seem to criticise in any way the analysis made by the Supreme Court but it still reaches a different conclusion than the domestic court. The minority of the composition pointed rightly out that it was a well-established principle of the Court that where the domestic authorities had "carefully examined the facts, applied the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the individual interests against the public interest in a case, the Court would require strong reasons to substitute its view for that of the domestic courts"[36]. In the minority's view, the majority had not shown sufficiently strong reasons for the Court to substitute its view for that of the domestic authorities.[37] Nor was the time taken by the domestic authorities to resolve the matter alone a sufficient ground for finding a violation of Article 8[38]. It is easy to agree with these views. Had there been no strong reasons for the Court to substitute its view for that of the domestic authorities, also the margin of appreciation left to the respondent State would have naturally been wider.

25. The Court rightly accepted that the prohibition on adoption under section 15 of the Adoption Act had the legitimate aim of seeking to avoid commercial exploitation of surrogate mothers and to reduce the risk of children being turned into a commodity. This is clearly so, especially in cases raising sensitive moral or ethical issues, like in the present case. The Court further noted that the Danish Supreme Court had been unanimous in finding that it would be in the children's interest to be adopted by the first applicant in order for their identity as her children to be legally recognised. Despite this, the majority of the Supreme Court composition nevertheless found "nothing to suggest that it would have a significant impact on the private life of the children if the first applicant was not granted adoption" since various specific cumulative solutions had already been provided for by Danish law. The Court recalled that in its *Advisory opinion,* it had found that the child's right to respect for private life within the meaning of Article 8 of the Convention did not require a specific form of legal recognition such as entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad but that "another means, such as adoption of the child by the intended mother, [might] be used provided that the procedure laid down by domestic law ensure[d] that it [could] be implemented promptly and effectively, in accordance with the child's best interests." The Court then legitimately asked the question which other means – if not adoption of the child by the intended parent – could satisfy the requirement of legal recognition in the present case[39].

26. In order to find an answer to this question, the Court turned to its case-law adopted in the same matter subsequent to the *Advisory opinion.* In *Valdís Fjölnisdóttir and Others v. Iceland*[40], the solution was to place the child immediately in foster care with the intended mothers and to give him Icelandic citizenship. Even when the intended mothers had divorced, the child was put alternately into foster care with each of the intended mothers, while guaranteeing equal access to the other. Moreover, the intended mothers could still apply to adopt the child either as individuals or together with their new spouses[41]. In *C.E. and Others v. France*[42], the other means was the possibility for the former partner to

[36] See ECtHR, 7 February 2012, *Axel Springer AG v. Germany*, no. 39954/08, para. 88; ECtHR, 7 February 2012, *Von Hannover v. Germany (no. 2)*, nos. 40660/08+, para. 107; ECtHR, 23 October 2018, *Levakovic v. Denmark*, no. 7841/14, para. 45; ECtHR, 9 July 2021, *M.A. v. Denmark*, no. 6697/18, para. 149.

[37] *K.K. and Others v. Denmark*, cit., para. 100.

[38] Ibid., para. 104.

[39] Ibid., paras. 54, 60 and 62-64.

[40] *Valdís Fjölnisdóttir and Others v. Iceland*, cit.. The case concerned a married couple, two women, who engaged the paid services of a surrogacy agency in the United States. The child was not biologically related to any of the intended mothers. Upon their return to Iceland, the authorities refused to register the intended mothers as the parents of the child.

[41] *K.K. and Others v. Denmark*, cit., para. 66.

[42] *C.E. and Others v. France*, cit. The joint case concerned two cases. The first related to the rejection by the domestic courts of an application for full adoption of a child, made by the biological mother's former partner. The second concerned the domestic courts' refusal to issue a document attesting to a matter of common knowledge (*acte de notoriété*) recognising a legal parent-child relationship, on the basis of *de facto* enjoyment of status (*possession d'état*), between a child and the biological mother's former partner.

exercise certain rights and duties associated with parenthood, and the possibility for the other woman who had not given birth, of jointly recognising a child who had a legal parent-child relationship only with the woman who had given birth. The Court noted that both these solutions amounted to a degree of legal recognition of the relationship[43]. In *H. v the United Kingdom*[44], where the applicant was the child, the Court observed that, to date, it had not held that the intended parents had to immediately and automatically be recognised as such in law. On the contrary, the child's best interests could include fundamental components other than the legal recognition of the intended parents, such as protection against the risks of abuse which surrogacy arrangements might have. However, it had not been necessary to consider whether there existed a possibility for the legal recognition of the intended parents, for example, through an application for parental responsibility, a child arrangements order or a parental order, since in that case that had not been the subject of the complaint[45].

27. It seem that this kind of comparative study was partly done in vain since the Court in the end concluded that, in fact, none of the cited cases concerned a refusal to adopt decided by domestic authorities, since adoption had not either been requested, such request had been withdrawn, or the granting of adoption depended on the consent of the biological parent.[46] Another striking element is that in all cited cases no violation was found, meaning that the different solutions amounting to some degree of legal recognition of the parent-child relationship in surrogacy cases were found to be acceptable by the Court.

28. Although the majority held in *K.K. and Others v. Denmark* that Danish law provided for various legal possibilities, for them the fact still remained that, besides adoption, domestic law did not provide for other possibilities of recognition of a legal parent-child relationship with the intended mother. They pointed out that the lack of legal parent-child relationship prevented the children from becoming heirs of the first applicant, that the children considered first applicant to be their parent, and that it was clearly in their best interest to obtain the same legal relationship with the first applicant as they had with their father. The majority thus considered that the cumulative solutions provided for by Danish law were not enough[47]. For them, on the other side of the scale, were the facts that there were no opposing parental interests involved between the first applicant and the biological father of the children, nor were there any other persons claiming parentage. Moreover, the rights of others, namely those who, in general and the abstract, risked being negatively affected by commercial surrogacy arrangement did not weigh heavy enough to tip the balance for not allowing the adoption[48].

29. The minority found it difficult to accept that the rights provided under Danish law should be considered incapable of satisfying the requirements of "other means" of establishing a "legal parent-child relationship" as contemplated in the Court's *Advisory opinion* due to the fact, in particular, that parental responsibility for the children on the part of both intended parents had been legally established. In their view, the reference to "other means" should not be interpreted as narrowly as the majority had done in this case. The minority pointed out that, in another recent judgment of *D.B. and Others v. Switzerland*[49], the majority of another Chamber of the Court had found a violation of Article 8 in respect of

[43] *K.K. and Others v. Denmark*, cit., para. 68.

[44] *H. v the United Kingdom* (dec.), cit. The case concerned a child, H, born out of surrogacy. The arrangement had been entered into by a same sex couples A and B, with a married couple C and D. C had become pregnant using donated eggs, and sperm from both A and B. According to the birth certificate, and by virtue of the Human Fertilisation and Embryology Act, C and D were H's parents. By a court order, they all had parental responsibility, and by a child arrangement order, H were to live with A and B, and C and D should have regular contact. A and B did not seek a parental order as C and D did not consent. H complained that the recording of D, rather than A, as her father on her birth certificate, breached her right to respect for private life.

[45] *K.K. and Others v. Denmark*, cit., para. 69.

[46] Ibid., para. 70.

[47] Ibid., paras. 71-75.

[48] Ibid., paras. 74 and 76.

[49] See ECtHR, 22 November 2022, *D.B. and Others v. Switzerland*, nos. 58817/15+.

a child born through surrogacy abroad in circumstances where, unlike in the present case, the intended non-biological parent was without parental responsibility for the child during the period concerned[50].

30. Overall, the minority considered it problematic that the narrowest possible majority of the composition had effectively dictated the policy of the Contracting States in a highly sensitive matter, which hardly was an optimal situation. They stressed that the current state of the Court's case-law in this field would be a source of considerable legal uncertainty, unless and until the Grand Chamber seized the opportunity to create greater clarity. The approach taken was also bound to have further implications in other types of situations arising in variable family constellations[51].

V. Concluding remarks

31. It is true that the case *K.K. and Others v. Denmark* marks a deviation from the clear case-law established by the cases cited by the Court in the present case. It seems to me that the various legal possibilities Danish law provided for the applicants to protect their right to respect for private life were not in any way less than for example those in cases *Valdís Fjölnisdóttir and Others v. Iceland* and *C.E. and Others v. France* where no violation was found but were actually more than in *D.B. and Others v. Switzerland* where a violation was found. Moreover, several similar cases have been decided by different sections of the Court since the case *K.K. and Others v. Denmark* where no violation has been found.[52] The Grand Chamber has not yet had an opportunity to create greater clarity in the matter[53]. Maybe it is not even needed, since, in the light of the subsequent case-law in the matter, the violation found in case *K.K. and Others v. Denmark* seems to have been an isolated incident.

32. What comes to the execution of the judgment in *K.K. and Others v. Denmark*, it is interesting to note that the case has already been closed. Once the Chamber judgment had become final in 2023, the first applicant had applied for reopening of the adoption case and the authorities had accepted her request. The first applicant was subsequently granted the adoption of the applicant children. Moreover, on 1 January 2025, the amendments to the Children Act came into force. According to it, it is now possible to apply for establishment of parenthood for intended parents in Denmark based on a foreign surrogacy agreement. In order to establish parenthood, a number of conditions must be met, such as that the surrogate mother, at the time of concluding the surrogacy agreement, must have been residing abroad for at least the past six months. The legislative amendments to the Adoption Act also came into force on 1 January 2025. Those amendments removed the absolute ban on allowing stepchild adoption for intended parents in cases of children born through foreign commercial surrogacy agreements. There are now thus two routes available in Denmark (stepchild adoption and establishment of parenthood for (an) intended parent(s) under the amended legislation) to establish the same legal parent-child relationship as that of children and parents with a biological link. Despite the short period of time that has elapsed since the legislative amendments came into force, the Committee of Ministers estimated that it was already clear from the administrative practice that children in situations similar to those of the applicants in the present case are benefitting from the legislative measures taken, thereby preventing potential new violations under Article 8 of the Convention from occurring[54].

[50] *K.K. and Others v. Denmark*, cit., para. 102.

[51] Ibid., paras. 107-108.

[52] See, for example, ECtHR, 31 August 2023, *C. v. Italy*, no. 47196/21; ECtHR, 12 November 2024, *R.F. and Others v. Germany*, no. 46808/16; ECtHR, 9 October 2025, *X. v. Italy*, no. 42247/23. However, in some of these cases the option of adoption was available.

[53] HUDOC research done on 22 November 2025.

[54] H46-15 *K.K. and Others v. Denmark* (Application No. 25212/21), Supervision of the execution of the European Court's judgments, Final Resolution CM/ResDH(2025)140), adopted on 10 June 2025.