

June 2014

***Mennesson v. France* - 65192/11**

Judgment 26.6.2014 [Section V]

Article 8

Article 8-1

Respect for family life

Respect for private life

Refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy arrangement and the couples who had had recourse to such arrangements: *violation*

[This summary also covers the judgment in the case of *Labassee v. France*, 65941/11, 26 June 2014]

Facts – The applicants in the first case are Mr and Mrs Mennesson, who are French nationals, and the Mennesson girls, American nationals who are twins and were born in 2000. The applicants in the second case are Mr and Mrs Labassee, who are French nationals, and Juliette Labassee, an American national born in 2001.

Owing to Mrs Mennesson's and Mrs Labassee's infertility, the applicant couples entered into surrogacy arrangement in the United States. The embryos, produced using the sperm of Mr Mennesson and Mr Labassee, were implanted in each case in another woman's uterus. As a result, the Mennesson twins and Juliette Labassee (the applicant children) were born. Judgments given in California in the first case and in Minnesota in the second ruled that Mr and Mrs Mennesson were the twins' parents and that Mr and Mrs Labassee were Juliette's parents.

The French authorities, suspecting that the cases involved surrogacy arrangements, refused to enter the birth certificates in the French register of births, marriages and deaths. In the *Mennesson* case, the birth certificates were nevertheless entered in the register on the instructions of the public prosecutor, who subsequently brought proceedings against the couple with a view to having the entries annulled. In the *Labassee* case, the couple did not challenge the refusal to register the birth, but sought to have the legal relationship recognised on the basis of *de facto* enjoyment of status ("*possession d'état*"). They obtained an "*acte de notoriété*", a document issued by a judge attesting to the status of son or daughter, that is, the existence of a *de facto* parent-child relationship, but the public prosecutor refused to enter this in the register. The couple then took the matter to court.

The applicants' claims were dismissed at final instance by the Court of Cassation on 6 April 2011 on the grounds that recording such entries in the register would give effect to a surrogacy agreement that was null and void on public-policy grounds under the French Civil Code. The court found that there had been no infringement of the right to respect for private and family life since the annulment

of the entries had not deprived the children of the maternal and paternal legal relationship recognised by the laws of California and Minnesota and had not prevented them from living in France with Mr and Mrs Mennesson and Mr and Mrs Labassee.

Law – Article 8: There had been interference with the exercise of the “family life” and “private life” aspects of the right guaranteed by Article 8. The measures complained of had a basis in domestic law and the law in question had been accessible to the persons concerned and foreseeable.

France’s refusal to recognise a legal relationship between children born abroad as a result of surrogacy arrangements and the intended parents stemmed from a wish to discourage French nationals from having recourse outside France to a reproductive technique that was prohibited within the country with the aim of protecting the children and the surrogate mother. Accordingly, the interference in question had pursued two legitimate aims, namely the “protection of health” and the “protection of the rights and freedoms of others”.

There was no consensus in Europe either on the lawfulness of surrogacy arrangements or on the legal recognition of the relationship between intended parents and children lawfully conceived abroad as a result of such arrangements. This lack of consensus reflected the fact that recourse to surrogacy raised difficult ethical issues. Accordingly, States had to be allowed a wide margin of appreciation in making surrogacy-related decisions. Nevertheless, that margin of appreciation was necessarily narrow when it came to parentage, which involved a key aspect of individuals’ identity. The Court also had to ascertain whether a fair balance had been struck between the State’s interests and those of the individuals directly concerned, with particular reference to the fundamental principle according to which, whenever children were involved, their best interests must prevail.

(a) *The applicants’ right to respect for their family life* – The lack of recognition in French law of the parent-child relationship between the applicants affected their family life on various levels. The applicants were obliged to produce the American civil-status documents – which had not been entered in the register – accompanied by a sworn translation whenever access to a right or a service required proof of parentage. Furthermore, the applicant children had not obtained French nationality to date, a situation which affected the families’ travels and caused concern regarding the children’s right of residence in France once they became adults and hence regarding the stability of the family unit. There were also concerns as to the continuation of family life in the event of the death of one of the biological fathers or the separation of one of the couples.

Nevertheless, irrespective of the extent of the potential risks to the applicants’ family life, the Court considered that its decision must be based on the actual obstacles they had faced as a result of the lack of recognition in French law of the parent-child relationship between the biological fathers and the children. The applicants had not claimed that the difficulties they referred to had been insurmountable, nor had they demonstrated that their inability to secure recognition in French law of a legal parent-child relationship had prevented them from exercising in France their right to respect for their family life. They had been able to settle in France shortly after the birth of the children, they were able to live there together in circumstances which, by and large, were comparable to those of other families, and there was nothing to suggest that they were at risk of being separated by the authorities because of their situation in the eyes of French law.

In addition, in rejecting the applicants' Convention-based arguments, the Court of Cassation had not omitted to examine their specific situation, as the judges had found – implicitly but necessarily – that the practical difficulties which the applicants were liable to face in their family life in the absence of recognition under French law of the parent-child relationship established between them abroad would not exceed the limits imposed by compliance with Article 8 of the Convention.

Hence, given the practical implications for the applicants' family life of the lack of recognition in French law of the parent-child relationship, and the respondent State's margin of appreciation, the situation stemming from the findings of the Court of Cassation in the instant case struck a fair balance between the applicants' interests and those of the State in so far as the applicants' right to respect for their family life was concerned.

Conclusion: no violation (unanimously).

(b) *Right of the applicant children to respect for their private life* – The French authorities, although aware that the applicant children had been identified elsewhere as the children of the intended parents, had nevertheless denied them that status in the French legal system. This contradiction undermined their identity within French society. Furthermore, although Article 8 of the Convention did not guarantee a right to obtain a particular nationality, the fact remained that nationality was a component of individual identity. Although their biological fathers were French, the applicant children faced worrying uncertainty as to the possibility of obtaining French nationality, a situation that was liable to have negative repercussions on the definition of their own identity. Furthermore, the fact that the applicant children were not identified under French law as the children of the intended parents had implications in terms of their inheritance rights.

France might conceivably wish to discourage its nationals from having recourse abroad to a reproductive technique that was prohibited inside the country. However, it followed from the above considerations that the effects of the refusal to recognise a parent-child relationship in French law between children conceived in this way and the intended parents were not confined to the situation of the latter, who alone had chosen the reproductive techniques complained of by the French authorities. The effects also extended to the situation of the children themselves, whose right to respect for their private life – which implied that everyone should be able to establish the essence of his or her identity, including his or her parentage – was significantly affected. There was therefore a serious issue as to the compatibility of that situation with the children's best interests, which must guide any decision concerning them.

This analysis took on particular significance when, as in the present case, one of the intended parents was also the child's biological father. Given the importance of biological parentage as a component of each individual's identity, it could not be said to be in the child's best interests to deprive him or her of a legal tie of this nature when the biological reality of that tie was established and the child and the parent concerned sought its full recognition. Not only had the tie between the children and their biological fathers not been acknowledged when the request was made for the birth certificates to be entered in the register; in addition, the recognition of that tie by means of a declaration of paternity or adoption, or on the basis of *de facto* enjoyment of status, would fall foul of the prohibition established by the case-law of the Court of Cassation in that regard. Given the implications of this serious restriction in terms of the identity of the applicant children and their right to respect for their private life, the European Court held

that, in thus preventing the recognition and establishment in domestic law of the children's relationship with their biological fathers, the respondent State had overstepped its permissible margin of appreciation. In view also of the importance to be attached to the child's best interests in weighing up the interests at stake, there had been a breach of the applicant children's right to respect for their private life.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 to each of the applicant children in respect of non-pecuniary damage.

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