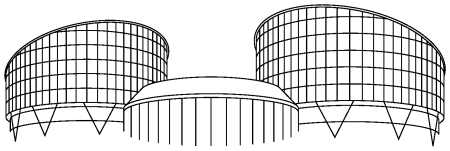

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF MENNESSON v. FRANCE

(Application no. 65192/11)

JUDGMENT
[Extracts]

STRASBOURG

26 June 2014

FINAL

26/09/2014

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Mennesson v. France,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

MarkVilliger, *President*,
AngelikaNußberger,
Boštjan M.Zupančič,
GannaYudkivska,
Vincent A.De Gaetano,
AndréPotocki,
AlešPejchal, *judges*,

and ClaudiaWesterdiek, *SectionRegistrar*,

Having deliberated in private on 10 June 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 65192/11) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by twoFrench nationals, Mr Dominique Mennesson ("the first applicant") and MsSylvieMennesson ("the second applicant"), andtwo nationals of the United States of America, Ms Valentina Mennesson and Ms FiorellaMennesson ("the third and fourth applicants"), on 6 October 2011.

2. The applicants were represented before the Court by MrP.Spinosi, of the *Conseild'État* and Court of Cassation Bar.The French Government ("the Government") were represented by their Agent, Ms E.Belliard, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. On 12 February 2012 notice of the application was given to the Government and the President of the Section decided that the proceedings in the present case should be conducted simultaneously with those in the case of *Labassee v. France* (no. 65941/11).

4. The applicants and the Government each filed observations on the admissibility and merits of the case.

5. On 10 October 2013 the President of the Section decided, under Rule 54 § 2(a) of the Rules of Court, to put additional questions to the applicants and the Government, who replied on 19 and 21 November 2013 respectively.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The first and secondapplicants were born in 1965 and 1955 respectively. The third and fourth applicants were born in 2000. They all live in Maisons-Alfort.

A. Birth of the third and fourth applicants

7. The first and second applicants are husband and wife. They were unable to have a child of their own because the second applicant is infertile.

8. After a number of unsuccessful attempts to conceive a child using*invitro*fertilisation (IVF) with their own gametes, the first and second applicants decided to undergo IVF using the gametes of the first applicant and an egg from a donor with a view to implanting the fertilised embryos in the uterus of another woman.Accordingly, they went to California, where the process is legal, and entered into a gestational surrogacy agreement.

The applicants specified that, in accordance with Californian law, the "surrogate mother" was not remunerated but merely received expenses. They added that she and her husband were bothhigh earners and therefore had a much higher income than the applicants and that it had been an act of solidarity on her part.

9. On 1 March 2000 the surrogate mother was found to be carrying twins and, in a judgment of 14 July 2000, the Supreme Court of California, to which the first and second applicants and the surrogate mother and her husband had applied, ruled that the first applicant would be the "genetic father" and the second applicant the "legal mother" of any child to whom the surrogate mother gave birth within the following four months. The judgment specified the particulars that were to be entered in the birth certificate and stated that the first and second applicants should be recorded as the father and mother.

10. Twins – the third and fourth applicants – were born on 25 October 2000 and their birth certificateswere drawn up in accordance with the terms stated above.

B. Refusal by the French consulate to register the particulars of the birth certificates

11. In early November 2000 the first applicant went to the French consulate in Los Angeles to have the particulars of the birth certificates entered in the French register of births, marriages and deaths and the children's names entered on his passport so that he could return to France with them.

12. The applicants stated that many French couples in their situation had previously succeeded in carrying out that procedure. The consulate rejected the first applicant's request, however, on the grounds that he could not establish that the second applicant had given birth and, suspecting a surrogacy arrangement, sent the file to the Nantes public prosecutor's office.

C. Investigation in respect of the first and second applicants

13. As the US Federal Administration had issued US passports for the twins on which the first and second applicants were named as their parents, the four applicants were able to return to France in November 2000.

14. In December 2000 a preliminary investigation was carried out at the request of the public prosecutor's office.

15. In May 2001 an investigation was commenced against a person or persons unknown for acting as intermediary in a surrogacy arrangementand in respect of the

first and second applicants forfalse representation infringingthe civil status of children.

16. On 30 September 2004, in accordance with the submissions of the Créteil public prosecutor, the investigating judge gave a ruling of no case to answer on the ground that the acts had been committed on US territory, where they were not classified as an offence, and therefore did not constitute a punishableoffence in France.

D. Proceedings in the civil courts

17. In the meantime, on 25 November 2002, on the instructions of the public prosecutor's office, the particulars of the birth certificates of the third and fourth applicants had been recorded in the central register of births, marriages and deaths in Nantes by the French consulate in Los Angeles.

18. However, on 16 May 2003 the Créteilpublic prosecutorinstituted proceedings against the first and second applicants in the Créteil*tribunal de grande instance* to have theentries annulled andthe judgmentrecorded in the margin of the entries thus invalidated. He observed that an agreement whereby a woman undertook to conceive and bear a child andrelinquish it at birth was null and void in accordance with the public-policyprinciple that the human body and civil status are inalienable. He concluded that, as the judgment of the Supreme Court of California of 14 July 2000 was contrary to the French concept of international public policy and of French public policy, it could not be executed in France and that the validity of civil-status certificates drawn upon the basis of that judgment could not be recognised in France.

1. *Judgment of the Créteil*tribunal de grande instance *of 13 December 2005, judgment of the Paris Court of Appeal of 25 October 2007 and judgment of the Court of Cassation of 17 December 2008*

19. By a judgment of 13 December 2005, the Créteil*tribunal de grande instance*declared the action inadmissible. It found that "the entries had been recorded on the sole initiative of the public prosecutor with the purpose, since avowed, of bringing proceedings to have the entries annulled". It concluded from this that "an action by the public prosecutoron grounds of public policy which he himself ha[d] infringed could not be deemed admissible where the provisions of Article 47 of the Civil Code on which he [relied] allowed him to verify the validity of the certificates in any respect and to reject any request for registration that would render them binding in France".

20. The public prosecutor's office appealed to the Paris Court of Appeal, which upheld the lower court's judgment on 25 October 2007. The Court of Appeal also considered the public prosecutor's action for annulment of the entries in the Nantes central register of births, marriages and deaths inadmissible as a matter of international public policy. It substituted its own grounds for that decision, however, finding that the contents of the entries were accurate as regards the judgment of the Supreme Court of California of 14 July 2000 and that the public prosecutor's office was not disputing the fact that the judgment was binding on France or that, under Article 47 of the Civil Code,the certificates drawn up in California in accordance with the usual procedures in that State should be deemed valid.

21. On 17 December 2008 the Court of Cassation (First Civil Division) quashed that judgment on the ground that the public prosecutor's office had an interest in bringing proceedings for annulment of the entries since, as established by the Court of Appeal, the birth certificates in question could only have been drawn up following asurrogacy arrangement.It remitted the case to the Paris Court of Appeal with a differently constituted bench.

2. Judgment of the Paris Court of Appeal of 18 March 2010

22. By a judgment of 18 March 2010, the Paris Court of Appeal overturnedthe judgment remitted to it, annulledthe entries pertaining to the birth certificates and ordered its judgment to be recorded in the margin of the invalidated birth certificates.

23. Regarding the admissibility of the action brought by the public prosecutor's office, the court found that it could not be seriously alleged that the prosecution authorities had contravened public policy or disrupted peaceful family relations by requesting that the contents of an entry that they themselves had ordered be annulled, since the purpose was to frustrate the effects of a foreign civil status which they considered contrary to French public policy or to guard against an applicationto have the entries recorded.

24. The Court of Appeal ruled on the meritsas follows:

> "... The birth certificates were drawn up on the basis of the Supreme Court of California's judgment of 14 July 2000 which declared [the first applicant] the genetic father and [the second applicant] the legal mother of any child to which [the surrogate mother] gave birth between 15 August and 15 December 2000. The civil-statusdocuments are therefore indissociable from the decision underlying them and the effectiveness of that decision remains conditional on its international lawfulness.
>
> Recognition, on national territory, of a decision delivered by a court of a State that is not bound to France by any convention is subject to three conditions: the indirect jurisdiction of the foreign court based on the connection between the court and the case;compliance of the merits and procedure with international public policy;and absence of circumvention of the law.
>
> It has been established in the present case that following a surrogacy agreement [the surrogate mother] gave birth to twins who were conceived from the gametes of [the first applicant] and of a third party and were relinquished to [the first and second applicants].
>
> Under Article 16-7 of the Civil Code, whose provisions deriving from Law no. 94-653 of 29 July 1994, and not amended by Law no. 2004-800 of 6 August 2004, are a matter of public policy by virtue of Article 16-9 of the same Code, any agreement concerning reproductive or gestational surrogacy is null and void. Accordingly, the judgment of the Californian Supreme Court, which indirectly validated a surrogacy agreement, contravenes the French concept of international public policy. Consequently, without having to ascertain whether the law has been circumvented,the entriesin the French central register of births, marriages and deaths of the particulars of theUS birth certificates naming [the second applicant] as the mother of the children must be annulledand the present judgment recorded in the margin of the invalidated birth certificates.
>
> [The applicants] cannot seriously claim that they have not had a fair hearing; nor do they have justifiable grounds for arguing that this measure contravenes provisions laid down in international conventions and domestic law. The concepts to which they refer, in particular the child's best interests, cannot allow them – despite the practical difficulties engendered by the situation – to validate *ex post facto* a process whose illegality, establishedfirst in the case-law and subsequently by the French legislature, is currently enshrined in positive law. Furthermore, non-registration does not have the effect of depriving the two children of their US civil status or calling into question their legal parent-child relationship with [the first and second applicants]recognisedunder Californian law ..."

3. Judgment of the Court of Cassation of 6 April 2011

25. The applicants appealed on points of law, submitting that the children's best interests – within the meaning of Article 3 § 1 of the International Convention on the Rights of the Child – had been disregarded and complaining of a breach of their right to a stable legal parent-child relationship and, further, of a violation of Article 8 of the Convention taken alone and in conjunction with Article 14. They submitted, further, that the decision of a foreign court recognising the legal parent-child relationship between a child and a couple who had lawfully contracted an agreement with a surrogate mother was not contrary to international public policy, which should not be confused with domestic public policy.

26. At a hearing on 8 March 2011 the advocate-general recommended quashing the judgment. He expressed the view that a right lawfully acquired abroad or a foreign decision lawfully delivered by a foreign court could not be prevented from taking legal effect in France on grounds of international public policy where this would infringe a principle, a freedom or a right guaranteed by an international convention ratified by France.

He noted in particular that in *Wagner and J.M.W.L. v. Luxembourg*(no. 76240/01, 28 June 2007) the Court had taken account, in its examination of the case under Article 8 of the Convention, of an"effective family life" and "*de facto* family ties" between a single mother and the child she had adopted in Peru, without attaching any importance to the fact that the former had gone abroad in search of a legal system which would allow her to obtain what the law of her country of origin refused her. In the advocate-general's opinion, if the same rationale were applied in the present case, even where domestic law had been circumvented, a legal relationship lawfully created abroad could not be prevented from producing the relevant legal effects where it concerned an effectivefamily set-up and allowed it to function and evolve in normal conditions from the standpoint of Article 8 of the Convention. He also observed that the third and fourth applicants had been living in France for ten years and "[were being] brought up there by genetic and intended parents in a *de facto* family unit in which [they were receiving] affection, care, education, and the material welfare necessary to their development" and that this effective and affective family unit – fully lawful in the eyes of the law of the country in which it had originated – [was] "legally clandestine", "the children having no civil status recognised in France and no parent-child relationship regarded as valid under French law". As to whether that state of affairs infringed their "right to a normal family life", the advocate-general replied as follows:

> "... At this stage two answers are possible: either – somewhat theoretically and largely paradoxically – the refusal to register the birth particulars is inconsequential and does not substantially affect the family's daily life, which means that registration is a mere formality and it is therefore difficult to see any major obstacle in the circumstances to recording the details of certificates with such minimal legal effect that it is inconceivable that they are capable in themselves of shaking the foundations of our fundamental principles and seriously contravening public policy (since they do not intrinsically contain any mention of the nature of the birth).
>
> Alternatively, the refusal to register the birth details permanently and substantially disrupts the family's life, which is legally split into two in France – the French couple on one side and the foreign children on the other – and the question then arises whether our international public policy – even based upon proximity – can frustratethe right to family life within the meaning of Article 8 [of the Convention] or whether, on the contrary, public policy of that kind, whose effects have to

be analysed in practical terms as do those of the foreign rights or decisions that it seeks to exclude, should not be overridden by the obligation to comply with a provision of the Convention.

If the second alternative is retained on the grounds that international conventions must take precedence over public policy based on a standard provided for in a legislative provision, this will not necessarily result in the automatic collapse of the barriers erected by the domestic public-policy provision in such circumstances. As long as the European Court has not given a clear ruling on the question of the lawfulness of surrogacy and allows the States to legislate as they deem fit in this area, it can be considered contrary to public policy to validate, on grounds of respect for family life, situations created illegally within the countries which prohibit them.

However, where it is merely a question of giving effect on the national territory to situations lawfully established abroad – be this at the cost of deliberately disregarding the strictures of a mandatory law – there is nothing topreclude international public policy – even based upon proximity – from being overridden in order to allow families to lead a life in conformity with the legal conditions in which they were created and the *de facto* conditions in which they now live. Furthermore, the best interests of the child,envisaged not only under the New York Convention but also under the case-law of the Court of Human Rights which has established this criterion as a component of respect for family life, also militate in favour of this interpretation. At least this is the lesson that I think we can draw from the judgment in *Wagner*[*and J.M.W.L.*]...”

27. However, on 6 April 2011 the Court of Cassation (First Civil Division) gave judgment dismissing the appeal on the following grounds:

“... the refusal to register the particulars ofa birth certificate drawn up in execution of a foreign court decision, based on the incompatibility of that decision with French international public policy, is justified where that decision contains provisions which conflict with essential principles of French law. According to the current position under domestic law, it is contrary to the principleof inalienability of civil status – a fundamental principle of French law – to give effect, in terms of the legal parent-child relationship, to a surrogacy agreement, which,while it may be lawful in another country, is null and void on public-policy grounds under Articles 16-7 and 16-9 of the Civil Code.

Accordingly, the Court of Appeal correctly held that, in giving effect to an agreement of this nature, the “American” judgment of 14 July 2000 conflicted with the French concept of international public policy, with the result that registration of the details of the birth certificates in question, which had been drawn up in application of that judgment, should be annulled. This does not deprive the children of the legal parent-child relationship recognised under Californian law and does not prevent them from living with Mr and Mrs Mennesson in France; nor does it infringe the children’s right to respect for their private and family life within the meaning of Article 8 of the Convention ..., or the principle that their best interests are paramount as laid down in Article 3 § 1 of the International Convention on the Rights of the Child ...”

4. Request for certificate of nationality

28. On 16 April 2013 the first applicant lodged an application with the Charenton-le-Pont District Court for a certificate of French nationality for the third and fourth applicants. The senior registrar sent him acknowledgement-of-receipt forms dated 31 October 2013 and 13 March 2014, indicating that the request “was still being processed in [his] departmentpending a reply to the request for authentication sent to the consulate of Los Angeles, California”.

...

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

43. The applicants complained that, to the detriment of the children's best interests,they were unable to obtain recognition in France of the legal parent-child relationship lawfully established abroad between the first two applicants and the third and fourth applicants bornabroadas the result of a surrogacyagreement. They complained of a violation of the right to respect for their private and family life guaranteed by Article 8 of the Convention as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

...

B. The merits

1. Whether there has beenan interference

48. It is not in dispute between the parties that the refusal of the French authorities to legally recognise the family tie between the applicants amounts to an "interference" in their right to respect for their family life and accordingly raises an issue with regard to the negative obligations of the respondent State under Article 8 rather than their positive obligations.

49. The Court agrees, reiterating that this was its approach in, among other cases, *Wagner and J.M.W.L.* (no. 76248/01, § 123, 28 June 2007) and *Negrepontis-Giannisis v. Greece*(no. 56759/08, § 58, 3 May 2011), whichconcerned the refusal of the Luxembourg and Greek courts respectively to recognise legally an adoption that had been established in foreign judgments. It specifies that, as in those cases, there has been an interference in the present case in the exercise of the right guaranteed by Article 8 not only regarding "family life" but also "private life".

50. Such interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of that Article as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned.The notion of "necessity" implies that the interference corresponds to a pressing social need and, in particular that it is proportionate to the legitimate aim pursued (see, for example, *Wagner and J.M.W.L.*, § 124, and *Negrepontis-Giannisis*, § 61, both cited above).

2. Justification for the interference

(a) "In accordance with the law"

(i) The applicants

51. The applicants alleged that there was an insufficient legal basis for the interference in question. In their submission, they had been justified, on the basis of the position under domestic law at the material time, in believing that their application for registration of the details of the birth certificates legally drawn up in California would not be refused on the ground of an infringement of public policy and would succeed without any difficulty. They referred to the principle of the attenuated effectof public policy according to which "the reaction to a provision that contravened public policyvari[ed] according to whether the case concerned the acquisition of a right in France or giving effect in France toa right validly acquired, without fraud, abroad" (*Rivière* judgment; Cass. Civ., First Division, 17 April 1953).

52. They pointed out, firstly, that Article 16-7 of the Civil Codewas confined to enshrining the principle that any reproductive or gestational surrogacy agreement was null and void and did not provide that nullity extended to the legal parent-child relationship in respect of children thus conceived, particularly where that relationship was legally establishedthrough the effect of aforeign judgment. Furthermore, in their view, no provision of French law prohibited the establishment of a legal parent-child relationshipbetween a child thus conceived and the woman and manto whom the child was relinquished, andArticle 47 of the Civil Code,as worded at the relevant time, provided thatcivil-status documents drawn up in a foreign country were deemed to be valid in so far as they had been drawn up in accordance with the procedures usedin that country. They submitted in that connection that the fact that the legislature had amended that provision in 2003 to make express provision for such certificates not to be deemed valid where the facts declared therein did not match the realityshowed that compliance with that condition had not previously been required. They also stated thatother couples who had entered into surrogacy agreements abroad had succeeded in having their children's birthdetails registered.

53. Secondly, at the material time the case-law did not precluderecognition of legal parent-child relationships on grounds of international public policy. The Court of Cassation had only made a contrary ruling in cases where the surrogate mother had also been the biological mother of the childor where the surrogacy arrangement had been carried outin France (judgments of 31 May 1991 and 29 June 1994), and the public prosecutor's office had decided not to appeal on points of law againsta judgment of the Paris Court of Appeal of 15 June 1990 validating the adoption of a child conceived in the United Statesby a reproductive or gestational surrogacy arrangement, whereas at the same time it had appealed against a judgment validating the adoption of a child thus conceived in France. They considered irrelevant the Government's submission thatthecase-law on Article 47 of the Civil Code deriving from the Court of Cassation's judgment of 12 November 1986 meant that civil-status documents drawn up in a third country did not have to be given effect in France where the details recorded therein did not match the reality. They pointed out in this connection that the certificates drawn up in the United States in theircase did not purport to establish a biological link between the second applicant and the third and fourth applicants.

54. Thirdly, while other couples in their situation had easily obtained passports for their children from the French consulate in Los Angeles, the applicants had been faced with an abrupt change of practice in that respect,designed to detectcases of surrogate mothers, which was comparable to the sudden change in practice that had been the subject of a finding of a violation by the Court in*Wagner and J.M.W.L.*(cited above, § 130).

(ii) The Government

55. The Government submitted that the interference had been "in accordance with the law". They observed in that connection that Article 16-7 of the Civil Code, which was a public-policy provision, provided that any reproductive or gestational surrogacy agreement was null and void,and that the Court of Cassation had observed in its judgments of 31 May 1991 and 29 June 1994 thatthe principle of inalienability of the human body and civil status, which were also a matter of public policy, precluded the attribution of the status of father or mother by contract and precluded giving effect to a parent-child relationship provided for in surrogacy agreements. In their submission, the fact that those judgments concerned the validity of adoption orders made following a surrogacy arrangement carried out on French territory did not affect their relevance in the present case. What was important was that they clearly established that agreements of this kind contravened these public-policy principles. In other words, according to the Government, the applicants could not have been unaware of the public-policy nature of the prohibition on surrogacy arrangements under French law when they entered into the agreement, or of the difficulties likely to arise subsequently.

56. They added that in accordance with the case-lawon Article 47 of the Civil Codederiving from the judgment of the Court of Cassation of 12 November 1986,the authorities were justified in refusing to give effect in France to civil-status documents drawn up in a third State where the details recorded therein did not match the reality. They specified further that, other than in isolated cases, there had been no practice in France,at the date of birth of the third and fourth applicants, consisting in registering the birth particulars of children bornas the result of a surrogacy agreement performed abroad. That distinguished the facts of the present case from those in*Wagner and J.M.W.L.*, cited above, in which the applicants had been deprived of the benefit of this type of practice with regard to adoption.

(iii) The Court

57. According to the Court's case-law, the expression "in accordance with the law" in Article 8 § 2 requires that the measure or measures in question should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects.In order for the law to meet the criterion of foreseeability, it must set forth with sufficient precision the conditions in which a measure may be applied, to enable the persons concerned – if need be, with appropriate advice – to regulate their conductaccordingly (see, for example, *Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V, and*Sabanchiyeva and Others v. Russia*, no. 38450/05, § 124, ECHR 2013).

58. The Court considers that these conditions are met in the present case. It notes first of all that the applicantshave not adduced any evidence in support of their

assertion that a more liberal practice used to exist in France regarding the recognition of a legal parent-child relationship between children born abroad as the result of a surrogacy agreement and the intended parents. It observes next that at the material timeArticles 16-7 and 16-9 of the Civil Code expressly provided that surrogacy agreements were null and void andspecified that this was on public-policy grounds. Admittedly, the Court of Cassation had not given a general ruling on the question of recognition under French law ofthe legal parent-child relationshipbetween intended parentsand children born abroad as the result of a surrogacy agreement. It had, however, previously specified – in a case in which the surrogate motherwasthe biological mother –that such an agreement contravened the principles of the inalienability of the human body and civil status. It had concluded in a similar case that thisprecluded the establishment of a legal parent-child relationship between the child thus conceived and the intendedmother, and precluded, among other things, registrationin the register of births, marriages and deathsof the details recorded in a birth certificate drawn up abroad...It was on the basis of those provisions of the Civil Code and in accordance with that explicit case-lawthat the Court of Cassation concluded in the present case that the judgment of the Supreme Court of California of 14 July 2000 was contrary to the French concept of international public policy in that it gave effect to a surrogacy agreement and that the entriesin the French register of births, marriages and deathsof the particulars of thebirth certificates drawn up in application of that judgment should be annulled. In the Court's view, the applicants could not thereforehave been unaware thatthere was at least a substantial risk that the French courts would rule accordingly in their case, even if no provision of domestic law expressly precluded recognition of a legal parent-child relationship between the first and second and the third and fourth applicants, and notwithstanding the principleof the attenuated effect of public policy (which, moreover, the *Conseild'État*considers inapplicable to thistype of situation ...). The Court therefore finds that the interference was "in accordance with the law" within the meaning of Article 8 of the Convention.

(b) Legitimate aims

59. The applicants observed that the public prosecutor's office had, of its own initiative, requested registration of the US judgmentdelivered in their caseand subsequently, several months after obtaining registration, applied to the domestic courts to have it annulled. They argued that, in the light ofthose contradictoryactions, the French authoritiescould not be deemed to have pursued a legitimate aim.

60. The Government replied that the reason for the refusal to recordthe particulars of the US birth certificates in the French register of births, marriages and deathswas that this would have given effect to a surrogacy agreement, which was formally forbidden under a domestic public-policyprovision and constituted a punishable offence ifperformed in France. French law accordingly reflected ethical and moral principlesaccording to whichthe human body could not become a commercial instrument and the child be reduced to the object of a contract. In their submission, the "legitimate aims" of the interference were the prevention of disorder or crime, the protection of health and the protection of the rights and freedoms of others. They added that the reason the public prosecutor's office had requested that the particulars of the birth certificatesof the third and fourth applicants be recordedwas precisely to enable it to request subsequently that these entries be annulled. In doing so it had

complied with Article 511 of thegeneral circular on civil status of 11 May 1999, which prescribed automatic registrationwhere public policy was concerned, particularly where it was necessary to annul a civil-status document concerning a French national that had been drawn up abroad in accordance with local procedures.

61. The Court is not convinced by the applicants' submission.The mere fact that the public prosecutor's office itself requested registration of the judgment of the Supreme Court of California of 14 July 2000,in order to then request that the entry be annulled, cannot lead the Court to conclude that the aim pursued by the interference in question did not appear among those listed in the second paragraph of Article 8. Nor, however, is it convinced by the Government's assertion that the aim was to "prevent disorder or crime". The Court observes that the Government have not established that where French nationalshave recourse to a surrogacy arrangement in a countryin which such an agreement is legalthis amounts to an offence under French law. It notes in this connection that,although an investigation was commenced in the present casefor "acting as an intermediary in a surrogacy arrangement" and for "false representation infringing the civil status of children", the investigating judge held that there was no case to answer on the ground that, as the acts had been committed on US territory, where theywere not classified as a criminal offence, theydid not constitute a punishable offence in France (see paragraphs 15-16 above).

62. The Courtunderstands, however, that the reason France refuses to recognise a legal parent-child relationship between children born abroad as the result of a surrogacy agreement and the intended parentsis that itseeks to deter its nationals from having recourse to methods of assisted reproduction outside the national territory that are prohibited on its own territory and aims, in accordance with its perception of the issue, to protect children and – as can be seen from the study by the *Conseild'État*of 9 April 2009 ... –surrogate mothers. Accordingly, the Court accepts that the Government may consider that the interference pursued two of the legitimate aims listed in the second paragraph of Article 8 of the Convention: the "protection of health" and "the protection of the rights and freedoms of others".

(c) "Necessaryin a democratic society"

(i) The applicants

63. The applicants conceded that, as there was no common European approach, the StatesParties in principle had a wide margin of appreciation regarding the content of legal provisionsconcerning surrogacy. They submitted that in the present case, however,the scope of that margin of appreciationwas relative. In their submission, the question was not whether the prohibition of surrogacy agreements by a member Statewas compatible with the Convention. What was in issue here was a decision which, in their country of residence, deprived childrenborn as the result of a surrogacy agreement lawfully performed abroad of civil-status documents indicating their legal relationship with their parents, including their biological father. They also considered that there was, at the very least, a favourable trend in Europe towardstaking account of situations such as theirs. Referring to*Wagner and J.M.W.L.*,cited above, they pointed out that the need to take account of the child's best interests had the effect ofrestricting the States' margin of appreciation.

64. Referring to that judgment (ibid.,§ 135), the applicants next submitted that the French courts had notcarried out the requisite concrete andthorough examination of their family situation and the competing interests. The Court of Appeal had simply

disregarded, without stating reasons, the ground of appealbased on an alleged violation of Article 8 of the Conventionand the Court of Cassation had upheld that judgment,merely stating that the measure in question did not prevent the applicants from living together.

65. Furthermore, according to the applicants, the rigid position of the Court of Cassation, whichset out to maintain theblanket"deterrent effect" of the prohibition of surrogacy, amounted to precluding any pragmatic arrangement that would recognise – in the child's best interests –the effects of a situation that had been lawfully created abroad.In their view, this was contrary to the Court's case-law on Article 8, which hadestablished a practical approach to the reality of family life (the applicants referred, in particular, to the judgment in*Wagner and J.M.W.L.*,cited above, § 133).

66. In the applicants' submission, the justification by the domestic courts was irrelevant since the principle of the inalienability of a person's civil status was the subject of numerous practical arrangements. Transsexuals, for example,could obtain a change of the sex stated on their birth certificate, andthe legal recognition of childrenlawfullyborn abroad as the result of a surrogacy agreementwas the subject of debate among legal commentators, in Parliament and in society. It was all the more irrelevantsincein principle French law was currentlyfavourable to "intended" parents. Accordingly, in the case of the implantation of embryos in the womb of a third party, which was legal in France (the applicants referred to Articles L. 2141-4 et seq. of the Public Health Code), a woman who carried the embryo of another couple and gave birth to a child who was not biologically hers, could –as could her partner –establish a legal parent-child relationship with that child that excluded the biological parents. Similarly, in cases ofdonor insemination (also legal in France), no legal parent-child relationship could be established with the sperm donor,whereas a legal parent-child relationship with the mother's partnercould be established (theapplicants referred to Articles 311-19 and 311-20 of the Civil Code).

67. The applicants observed that an additional factor to be taken into account was that the interference did not allow the pursued aim to be achieved, since, as pointed out by the Court of Cassation, it did not deprive the children ofthe legal parent-child relationship with the mother and father recognised under Californian law and did not prevent the applicants from living together in France. Furthermore, their effective and affective family life was "legallyclandestine". This was particularly shocking in the case of the first applicant, who was deprived of recognition of the legal parent-child relationship with the third and fourth applicants by the refusal to recordthe particulars of the children's birth certificatesin the French register of births, marriages and deaths even though he was their biological father and there was nothing to prevent that relationship from being officiallyrecorded. What was more,the applicants had no other possibility of having the family ties legally established, since the case-law of the Court of Cassation precluded not only registration of the birth details but also adoption or recognition oftheir *de facto* enjoyment of status (*possession d'état*). In that respect their case was clearly distinguishable from the situation examined by the Court in*Shavdarov v. Bulgaria*(no. 3465/03, 21 December 2010).

68. The applicants also observed that the measure in question had "grossly disproportionate consequences"for the situation of the third and fourth applicants: without recognition of a legal parent-child relationship with the first two applicants, they did not have French nationality, did not have a French passport, had no valid residence permit (even if,as minors, they could not be deported), and might find it

impossible to obtain French nationality and thusbe ineligible to vote and ineligible for unconditional leave to remain in France;they could also be prevented from inheriting under the first two applicants' estate. Furthermore, in the event of the first applicant's death or should the first two applicants separate, the second applicant would be deprived of any rights in respect of the children, to their and her own detriment.In order to carry outadministrativetasksfor which French nationality or an official legal parent-child relationship were required (registration of the children for social-security purposes, enrolment at the school canteen or outdoor centre,orapplications for financial assistance from theFamily Allowances Office), theyhad to produce the US birth certificates together with an officially sworn translationin order to prove that the children were theirs, and thesuccess of their application depended on the good will of the person dealing with it.The applicants pointed out in this connection thatthe advocate-general had recommended, before the Court of Cassation, recognising the legal parent-child relationship between the applicants,particularly on the ground of the children's best interests, and that the Paris Court of Appeal itself had observed that the situation would create practical difficulties for theMennesson family. They also referred to the report of the*Conseild'État*of 2009 on the reviewof bioethical laws, which indicated that "in practice,families' lives [were] more complicated without registration, because of the formalities that had to be completed on various occasions in life".They added that, in *Wagner and J.M.W.L.*(cited above, § 132), the Court had acknowledged that in this type of situation there had been a failure to take accountof the "social reality" and that "the child [had] not [been]afforded legal protection making it possible for her to be fully integrated into the [in that case] adoptivefamily". Theyalso questioned the purpose of refusing to register the particulars ofbirth certificates drawn up abroad if, as the Government maintained, such certificates took full effect in France and registration was a mere formality.

69. The applicants also submitted thatthe Court's ruling of no violation of Article 8 in*A, B and Cv.Ireland*([GC],no. 25579/05, ECHR 2010) and*S.H. and Others v.Austria*([GC], no. 57813/00, ECHR 2011), which concerned access to abortionand medically assisted reproduction respectively, was based on the finding that, although domestic law prohibited these practices, it did not prevent individuals from going abroad to take advantage of them, and, in*S.H. and Others v. Austria*, thatthe legal father-child and mother-child relationship was thus "[governed by] clear rules of the Civil Code [that respected] the parents' wishes".

70. In their replies to the additional questions put by the President of the Section (see paragraph 5 above), the applicants indicated that under Article 311-14 of the CivilCode, the legal parent-child relationship was governed by the law of the mother's country on the date of the child's birth (and where the mother was not known, by the law of the child's country), that is, according to the case-law of the Court of Cassation (Civ.,First Division, 11 June 1996), the law of the countryindicatedon the birth certificate. It was clear from the Supreme Court of California's decision of 14 July 2000 that the official parents of the third and fourth applicants were the first two applicants. The French authorities and courts had refused tomake that finding, however, with the resultthat as the mother was not recognised as having that status under French law, the legal parent-child relationship could not be governed by the law of her country. Accordingly, it was governed by the law of the country of the third and fourth applicants: US law. As the legal parent-child relationship between them and the first two applicants could not be established under

French law and the Court of Cassation's judgments of 13 September 2013 hadannulled the recognition of paternity by biological fathersof children born as theresult of a surrogacy agreement performed abroad..., the third and fourth applicants could not acquire French nationality under Article 18 of the Civil Code ("a child of whom at least one parent is French has French nationality") even though the first applicant was their biological father. The applicants added that, notwithstanding the circular of 25 January 2013 ..., the third and fourth applicants could not obtain a certificate of nationality. They submitted that, as a result ofthe judgment delivered in their case by the Court of Cassation and its decisions of 13 September 2013 describing as "fraudulent" the process by which the birth certificate of a child born abroadof a surrogacy agreement was drawn up, theUS birth certificates of the children were invalid for the purposes of Article 47 of the Civil Code, whereupon that provision was inoperative.They added that thethrust of the circular was not aimed at precluding the issuing of a certificate of nationalityon the basis of a mere suspicion that recourse had been had to a surrogacy arrangement, and that it was therefore inoperative in respect of situations such as theirs in which the courts had explicitly found that there had been a surrogacy arrangement. In support of that argument, they stated that they had not received a reply to the request for a certificate of French nationality for the third and fourth applicants lodged by the first applicant with the registry of theCharenton-le-Pont District Court on 16 April 2013. They produced acknowledgment-of-receipt formssigned on 31 October 2013 and 13 March 2014 by the registrar indicating that the request"[was] still being processed in [his] departmentpending a reply to the request for authentication sent to the consulate of Los Angeles, California". They added that, on account in particular of the Court of Cassation's decisionsof 13 September 2013, the first applicant could not recognise the third and fourth applicants even though he was their biological father.

(ii) The Government

71. The Government submitted that the failure to register the particulars of foreign civil-status documents such as the birth certificates of the third and fourth applicants did not preclude them from taking full effect in France. They argued firstly thatcertificates of French nationality were issued on the basis of such certificates where it was established that one of the parents was French (the Government produced a copy of the circular of the Minister of Justiceof 25 January 2013, and observed that the applicants had not taken any steps towards obtaining French nationalityfor the third and fourth applicants), and that minors could not be removed from France; secondly, the first and second applicants enjoyed full parental responsibility in respect of the third and fourth applicants, on the basis of the US civil-status documents; thirdly, were the first and second applicants to divorce, the family-affairs judge wouldddetermine their place of residence and the contact rights of the parents as named in the foreign civil-status document; fourthly,as evidence of one's status as heir could be provided by any means, the third and fourth applicants would be in a position to inherit under the first and second applicants' estate on the basis of their US civil-status documents, as provided for under ordinary law.The Government also observed that the applicants had overcome the problems they referred to as they did not claim to have been unable to register the third and fourth applicants for social-security purposes or enrol them at schoolor not to have received social benefits from theFamily Allowances Office, and that, generally, they had not shown that they were

faced with “numerous and daily difficulties” on account of the refusal to register the particulars of the children’s birth certificates. Accordingly, the Government questioned the actual extent of the interference with the applicants’ family life, that interference being limited to their inability to obtain French civil-status documents.

72. The Government stressed thatin the interests of proscribing any possibility of the human body becoming a commercial instrument,guaranteeing respect for the principle that the human body and a person’s civil status were inalienable, and protecting the child’s best interests, the legislature –thus expressing the will of the French people –had decided not to permit surrogacy arrangements.The domestic courts had duly drawn the consequences of that by refusing to register the particulars of the civil-status documents of persons born as the result of a surrogacy agreement performed abroad;to permitthis would have been tantamount to tacitly accepting that domestic law could be circumvented knowingly and with impunity and would have jeopardised the consistent application of the provision outlawing surrogacy.

They added, on the specific point regardingfailure to register the legal father-child relationship, thatthis was due to the fact that the first and second applicants had entered into the surrogacy arrangement as a couple and thatthe respective situations of each person in that couple were indissociable. They also considered that, having regard to the various different ways in which the legal parent-child relationship could be established under French law, giving priority to a purely biological criterion “appear[ed] highly questionable”. Lastly, they submitted that “in terms of the child’s interests, it seem[ed] preferable to placeboth parents on the same level of legal recognition of the ties existing between themselves and their children”.

73. The Government added that as surrogacy was a moral andethical issue and there was no consensus on the question among the States Parties, the latter should be afforded a wide margin of appreciation in that area and in the manner in which they apprehended the effects of the relevant legal parent-child relationship established abroad. In their view, having regard to that wide margin of appreciation and the fact that the applicants were leading a normal family life on the basis of the US civil status of their children and that the latters’ best interests were protected,the interference in the exercise of their rights guaranteed under Article 8 of the Convention was “entirely proportionate” to the aims pursued,with the result that there had been no violation of that provision.

74. In their replies to the additional questions of the President of the Section (see paragraph 5 above), the Government stated that the law applicable to the establishment of the legal parent-child relationship between the first two and the third and fourth applicants was, in accordance with Article 311-14 of the Civil Code, the law of their mother’s country, namely, according to the case-law of the Court of Cassation (Civ., First Division, 11 June 1996, *Bulletin civil*no. 244), that oftheir birth mother.It was therefore the law of the country of the surrogate mother, namely, in this case, US law; under US law, the first two applicants were the parents of the third and fourth applicants, the second applicant being their “legal mother”. The Government added thatin so far as they satisfied therequirementsof Article 47 of the Civil Code, and irrespective of whether or not the particulars were registered,foreign birth certificates took effect in France, particularly regarding proof ofthe legal parent-child relationship stated in them. They specified that Article 47 was applicable to the present case despite the fact that the entries of the particulars of the third and fourth applicants’US birth certificateshad beenannulled in accordance with the judgment of

the Court ofCassation of 6 April 2011 and that, according to the case-law of that court,surrogacy agreements were null and void as a matter of public policy and did not take effect under French law with regard to the legal parent-child relationship. Accordingly, Article 18 of the Civil Code – pursuant to which a child of whom at least one parent was French had French nationality – applied where proof ofa lawfully established parent-child relationship was provided bya foreign civil-status documentof unquestionable probative force. Lastly, the Government stated that the first applicant could not recognise the third and fourth applicants in France, as the Court of Cassation had held on 13 September 2013 that recognition of paternityby the intended father of a child born of a surrogacy agreementhad to be annulled where he hadcircumvented the lawby having recourse to such an arrangement.

(iii) The Court

(α) General considerations

75. The Court notes the Government's submission that, in the area in question, the Contracting States enjoyed a substantial margin of appreciationin deciding what was"necessary in a democratic society". It also notesthat the applicants conceded this but considered that the extent of that marginwas relative in the present case.

76. The Court shares the applicants' analysis.

77. It reiterates thatthe scope of the States' margin of appreciation will vary according to the circumstances, the subject matter and the context; in this respect one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, for example, *Wagner and J.M.W.L.*,and*Negrepontis-Giannisis*, both cited above, §§128 and 69 respectively). Accordingly, on the one hand, where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wide. On the other hand, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (see, in particular, *S.H. and Others v. Austria*,cited above, § 94).

78. The Court observes in the present case that there is no consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and childrenthus conceived abroad. A comparative-law survey conducted by the Courtshows that surrogacy is expressly prohibited in fourteen of the thirty-five member States of the Council of Europe – other than France – studied. In ten of these it is either prohibited under general provisions or not tolerated, or the question of its lawfulness is uncertain. However, it is expressly authorised in seven member States and appears to be tolerated in four others. In thirteen of these thirty-five States it is possible to obtain legal recognition of the parent-child relationship betweenthe intended parents and the children conceived through a surrogacy agreement legally performed abroad. This also appears to be possible in eleven other States (including one in which the possibilitymay only be available in respect of the father-child relationship where the intended father is the biological father), but excluded in the eleven remaining States (except perhaps the possibility in one of them of obtaining recognition of the father-child relationship where the intended father is the biological father) ...

79. This lack of consensus reflects the fact that recourse to a surrogacy arrangement raises sensitive ethical questions. It also confirms that the States must in principle be afforded a wide margin of appreciation, regarding the decision not only whether or not to authorisethis method ofassisted reproductionbut also whether or not to recognise a legal parent-child relationship between children legally conceived as the result of a surrogacy arrangement abroad and the intended parents.

80. 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. The margin of appreciation afforded to the respondent State in the present case therefore needs to be reduced.

81. Moreover, the solutions reached by the legislature – even within the limits of this margin – are not beyond the scrutiny of the Court. It falls to the Court to examine carefully the arguments taken into consideration and leading to the solution reached and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by that solution (see, *mutatis mutandis*, *S.H. and Others v. Austria*, cited above, § 97). In doing so, it must have regard to the essential principleaccording to which, whenever the situation of a child is in issue, the best interests of that child are paramount (see, among many other authorities,*Wagner and J.M.W.L.*, cited above, §§133-34, and*E.B. v. France* [GC], no. 43546/02, §§ 76 and 95, 22 January 2008).

82. In the present case the Court of Cassation held that French international public policy precluded registration in the register of births, marriages and deaths of the particulars of a birth certificate drawn up in execution of a foreign decision containing provisions which conflicted with essential principles of French law. It then observed that under French law surrogacy agreements were null and void on grounds of public policy, and that it was contrary to the "essential principle of French law"of the inalienability of civil status to give effect to such agreementsas regards the legal parent-child relationship. It held that, in so far as it gave effect to a surrogacy agreement, the judgment delivered in the applicants' case by the Supreme Court of California was contrary to the French concept of international public policyand that, as the US birth certificates of the third and fourth applicants had been drawn up in application of that judgment, the details of those certificatescould not be entered in the French register of births, marriages and deaths (see paragraph 27 above).

83. The applicants' inability to have the parent-child relationship between the first two applicants and the third and fourth applicants recognised under French law is therefore, according to the Court of Cassation, a consequence of theFrench legislature'sdecision on ethical groundsto prohibit surrogacy.The Government pointed out in that connection that the domestic courts had duly drawn the consequences of that decision by refusing to authorise entry in the register of births, marriages and deaths of the details of foreign civil-status documentsof children bornas the result of a surrogacy agreement performed outside France. To do otherwise would, in their submission, have been tantamount to tacitly accepting that domestic law had been circumvented and would have jeopardised the consistent application of the provisions outlawing surrogacy.

84. The Court observes that that approachmanifests itself in an objection on grounds of international public policy, which is specific to private international law. It does not seek to call this into question as such. It must, however, verify whether in applying that mechanism to the present case the domestic courts duly took account of

the need to strike a fair balance betweenthe interest of the community in ensuring that its membersconform to the choice made democraticallywithin that community and the interest of the applicants –the children's best interests being paramount – in fully enjoying their rights to respect for their private and family life.

85. It notes in that connection thatthe Court of Cassationheld that the inability to record the particulars of the birth certificates of the third and fourth applicants in the French register of births, marriages and deathsdid not infringe their right to respect for their private and family life or their best interests as children in so far as it did notdeprive them of the legal parent-child relationship recognised under Californian law and did not prevent them from living in France with the first and second applicants (see paragraph 27 above).

86. The Courtconsiders that a distinction has to be drawn in the instant case between the applicants' right to respect for their family life on the one hand and the right of the third and fourth applicants to respect for their private life on the other hand.

(β) The applicants' right to respect for their family life

87. With regard to the first point, the Courtconsiders that the lack of recognition under French law of the legal parent-child relationship between the first and second applicants and the third and fourth applicantsnecessarily affects their family life. It notes in this regard that, as pointed out by the applicants, the Paris Courtof Appealacknowledged in this case that the situation thus createdwould cause "practical difficulties" (see paragraph 24 above). It also observes that, in its report of 2009 on the reviewofbioethical laws, the*Conseild'État*observed that"in practice,families' lives [were] more complicated without registration, because of the formalities that had to be completed on various occasions in life"(see paragraph 68 above).

88. Accordingly, as they do not have French civil-status documents or a French family record book the applicants are obliged to produce – non-registered – US civil documents accompanied by an officially sworn translation each time access to a right or a service requires proof ofthe legal parent-child relationship, and are sometimes met with suspicion, or at the very leastincomprehension, on the part of the person dealing with the request. They refer to difficulties encountered when registering the third and fourth applicants with social security,enrolling them at the school canteen or an outdoor centre and applyingtothe Family Allowances Officefor financial assistance.

89. Moreover, a consequence – at least currently – of the fact that under French law the two children do not have a legal parent-child relationship with the first or second applicant is that they have not been granted French nationality. This complicatestravel as a family and raises concerns – be they unfounded, as the Government maintain – regarding the third and fourth applicants' right to remain in France once they attain their majority and accordingly the stability of the family unit. The Governmentsubmit that, having regard in particular to the circular of the Minister of Justice of 25 January 2013 ..., the third and fourth applicants could obtain a certificate ofFrench nationalityon the basis of Article 18 of the Civil Code, which provides that "a child of whom at least one parent is French has French nationality", by producing their US birth certificates.

90. The Court notes, however, thatit is still unclear whether this possibility does actually exist.Firstly, itnotes that according to the very terms of the provisionreferred

to, French nationality is granted on the basis of the nationality of one or the other parent. It observes that it is specifically the legal determination of the parents that is at the heart of the application lodged with the Court. Accordingly, the applicants'observations and the Government's repliessuggest that the rules of private international lawrender recourse toArticle 18 of the Civil Code in order to establish the French nationality of the third and fourth applicants particularly complex, not to mention uncertain,in the present case.Secondly, the Court notes that the Governmentrely on Article 47 of the Civil Code. Under that provision, civil-status certificates drawn up abroad and worded in accordance with the customary procedures of the country concernedare deemed valid"save where other certificates or documentsheld, external data, or particulars in the certificate itself establish ... that the document in question is illegal, forged, or that the facts stated therein do not match the reality". The question therefore arises whether that exception applies in a situation such as the present case, whereit has been observed that the children concerned were bornas the result of a surrogacy agreement performed abroad, which the Court of Cassationhas deemed a circumvention of the law. Although they were invited by the President to answer that question and specify whether there was a risk that a certificate of nationality thus drawn up would subsequently be contested and annulled or withdrawn, the Government havenot provided anyindications. Moreover, the request lodged for that purpose on 16 April 2013 with the registry of the Charenton-le-PontDistrict Court by the first applicant was stillpending eleven months later. The senior registrar indicated on 31 October 2013 and on 13 March 2014 that it was "still being processed in [his] departmentpending a reply to the request for authentication sent to the consulate of Los Angeles, California" (see paragraph 28 above).

91. To that must be added the entirely understandable concerns regarding the protection of family life between the first and second and the third and fourth applicantsin the event of the first applicant's death or the couple's separation.

92. However, whatever the degree of the potential risks for the applicants' family life, the Courtconsiders that it must determine the issue having regard to the practical obstacles which the family has had to overcome on account of the lack of recognition in French law of the legal parent-child relationship between the first two applicants and the third and fourth applicants (see, *mutatis mutandis*, *X, Y and Z*[*v. the United Kingdom*, 22 April 1997], § 48[, *Reports of Judgments and Decisions* 1997-II]). It notes that the applicants do not claim that it has been impossible to overcome the difficulties they referred to andhave not shown that the inability to obtain recognition of the legal parent-child relationship under French lawhas prevented them from enjoying in France their right to respect for their family life. In that connection it observes that all four of them were able to settle in France shortly after the birth of the third and fourth applicants, are in a position to live there together in conditions broadly comparable to those of other families and that there is nothing to suggest that they are at risk of beingseparated by the authorities on account of their situation under French law (see, *mutatis mutandis*, *Shavdarov*, cited above, §§ 49-50 and 56).

93. The Courtalso observes thatin dismissing the grounds of appeal submitted by the applicants under the Convention, the Court of Cassation observed that annulling registration of thedetails of the third and fourth applicants' birth certificates in the French register of births, marriages and deaths did not prevent them from living with the first and second applicants in France (see paragraph 27 above). Referring to the importance it had attachedin*Wagner and J.M.W.L.* (cited above, § 135) to carrying out

an actual examination of the situation, the Court concludes that in the present casethe French courts did duly carry out such an examination, since they consideredin the above-mentionedterms, implicitly but necessarily, that the practical difficulties that the applicants might encounter in their family life on account of not obtaining recognition under French law of the legal parent-child relationship established between them abroadwould not exceed the limitsrequired by compliance with Article 8 of the Convention.

94. Accordingly, in the light of the practical consequences for their family life of the lack of recognition under French law of the legal parent-child relationship between the first and secondapplicants and the third and fourth applicants and having regard to the margin of appreciation afforded to the respondent State, the Courtconsiders that the situation brought about by the Court of Cassation's conclusion in the present case strikes a fair balance between the interests of the applicants and those of the State in so far as their right to respect for family life is concerned.

95. It remains to be determined whether the same is true regarding the right of the third and fourth applicants to respect for their private life.

(γ) Right of the third and fourth applicants to respect for their private life

96. As the Courthas observed,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...; an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned(see paragraph 80 above).Asdomestic law currently stands, the third and fourth applicants are in a position oflegal uncertainty. While it is true that a legal parent-child relationship with the first and secondapplicants isacknowledged by the French courts in so far as it has been established under Californian law, the refusal to grant any effect to the US judgment and to record the details of the birth certificatesaccordingly shows that the relationship is not recognised under the French legal system. In other words,although aware that the children have been identified in another country as the children of the first and second applicants, France nonetheless denies them thatstatus under French law.The Courtconsiders that a contradiction of that nature undermines the children'sidentity within French society.

97. Whilst Article 8 of the Convention does not guarantee a right to acquire a particular nationality, the fact remains that nationality is an element of a person's identity (see *Genovese v. Malta*, no. 53124/09, § 33, 11 October 2011). As the Court has already pointed out, although their biological father is French the third and fourth applicants facea worrying uncertainty as to the possibility of obtaining recognition of French nationality under Article 18 of the Civil Code ...That uncertainty is liable to have negative repercussions on the definition of their personal identity.

98. The Courtalso observes that the fact that the third and fourth applicants are not identified under French law as the children of the first and second applicants has consequences for their inheritance rights. It notes thatthe Governmentdeny this, butobserves that the *Conseild'État*has ruled that in the absence of recognition in France of a legal parent-child relationship established abroad with regard to the intended mother, a child born abroad as the result of a surrogacy agreement cannot inheritunder the mother's estate unless the latter has namedthe child as a legatee, the death dutiesthen being calculated in the same way as for a third party..., that is, less favourably. The same situation arises in the context of inheritance under the intended

father's estate, even if he is the biological father as in this case. This is also a component of their identity in relation to their parentage of which children born as the result of a surrogacy agreement performed abroad are deprived.

99. The Court can accept that France may wish to deter its nationals fromgoing abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory (see paragraph 62 above). Having regard to the foregoing, however, the effects of non-recognition in French lawof the legal parent-child relationship between children thus conceived and the intended parents are not limited to the parents alone, who have chosen a particular method ofassisted reproduction prohibited by the French authorities. They also affect the children themselves, whose right to respect for their private life – which implies that everyone must be able to establishthe substance of his or her identity, including the legal parent-child relationship –is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation withthe children's best interests, respect for which must guide any decision in their regard.

100. This analysis takes on a special dimensionwhere, as in the present case, one of the intended parents is also the child's biological parent. Having regard to the importance of biological parentage as a component of identity (see, for example, *Jäggi*[*v. Switzerland*, no. 58757/00], § 37[, ECHR 2006-X]), it cannot be saidto be in theinterests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof. Not only was the relationship between the third and fourth applicants and their biological fathernot recognised when registration of the details of the birth certificates was requested, butformal recognition by means of a declaration of paternity or adoption or through the effect of *de facto* enjoyment of civil status would fall foul of the prohibition established by the Court of Cassation in itscase-law in that regard...The Courtconsiders, having regard to theconsequences of this serious restrictionon the identity and right to respect for private life of the third and fourth applicants, that by thus preventing both the recognition andestablishment under domestic law of their legal relationship with their biological father, the respondent State overstepped the permissible limits of its marginof appreciation.

101. Having regard also to the importance to be given to the child's interestswhen weighing up the competing interests at stake,the Court concludes that the right of the third and fourth applicants to respect for their private life was infringed.

3. General conclusion

102. There has been no violation of Article 8 of the Convention with regard to the applicants' right to respect for their family life. There has, however, been a violation of that provision with regard to the right of the third and fourth applicants to respect for their private life.

...

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

...

2. *Holds*that there has been no violation of Article 8 of the Convention with regard to the applicants' right to respect for their family life;

3. *Holds* that there has been a violation of Article 8 of the Convention with regard to the third and fourth applicants' right to respect for their private life;

...

Done in French, and notified in writing on 26 June 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

ClaudiaWesterdiek	MarkVilliger
Registrar	President