Accommodations of private and family life and non-traditional families: the limits of deference in cases of cross-border surrogacy before the European Court of Human Rights

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ABSTRACT

The European Court of Human Rights (ECtHR) case law on cross-border surrogacy establishes that a ‘general and absolute impossibility’ of obtaining recognition of the relationship, legally established in another country, between a surrogate-born child and their intended parents will violate the child’s right to respect for private life. This approach requires States to accommodate familial bonds created through cross-border surrogacy and limits the margin of appreciation available to States to determine their national response. In recent case law, the ECtHR has adopted an interventionist approach in respect of national decision-making and has gone further than might be expected under the principle of subsidiarity. Examination of the emerging body of jurisprudence on cross-border surrogacy, however, reveals a preference for ‘traditional’ family formations, with the ECtHR tending to adopt a less interventionist and more deferential approach to national decision-making where the family at the centre of the case deviates from the structure of the family reflected in the seminal cross-border surrogacy case of Mennesson v France App no 65192/11 (ECtHR, 26 June 2014). This approach leads to inconsistency in the cross-border surrogacy case law as it creates something of a moving target for the vindication of children’s rights in ‘less traditional’ family forms.

KEYWORDS: Cross-border surrogacy, Deference, ECtHR, Parent–child relationships, Private and family life, Subsidiarity
I. INTRODUCTION

Since the pivotal decision in Mennesson v France (‘Mennesson’),\(^1\) the European Court of Human Rights (‘ECtHR’ or ‘the Court’) has issued a series of judgments relating to the domestic recognition of legal parenthood in cases of cross-border surrogacy. Through its subsequent case law, and an advisory opinion on gestational surrogacy, the Court has expanded on the Mennesson principles, leading to the current position whereby a ‘general and absolute impossibility’ of obtaining legal recognition of the relationship, legally established in another country, between a surrogate-born child and their intended parents will violate the child’s right to respect for their private life.\(^2\) In keeping with ideas of subsidiarity and deference, the Court has consistently stated that the ‘choice of means’ to facilitate recognition of the parent–child relationships is a matter that is left to the discretion of each individual state on the basis that the national authorities are ‘better placed’ than the Court to determine the matter.\(^3\)

However, where the State has not provided any means of recognition of the parent–child relationships created through cross-border surrogacy, the ECtHR has shown a willingness to adopt a more interventionist approach. In its most recent case law, this approach has led the ECtHR to find not only that a recognition mechanism is needed but to dictate the outcome of the national recognition process as well. Examination of the more recent case law, however, underlines the narrow focus of the ECtHR when it comes to family recognition since it is only in those families that closely resemble the normative Mennesson form that the interventionist approach is adopted. Where, for example, there is no genetic connection between the intended parents and the child, the ECtHR has been more reluctant to intervene in the national decision provided that some accommodation of private and family life has been made.\(^4\) This results in a situation where the ECtHR has shown greater willingness to assess the ‘Conventionality’ of the measure and to intervene in national decisions concerning families that mirror the Mennesson structure, but has been more deferential to national decision-making in respect of families that deviate from this prototype, typically focusing more on issues of procedure and process in these cases.

This article examines the ECtHR’s approach to family recognition in recent cases of cross-border surrogacy where the families both fit with, and depart from, the Mennesson blueprint. Through examination of the emerging body of ECtHR case law on cross-border surrogacy, it is shown that the ECtHR has come to regard the Mennesson family structure as the standard for family recognition. The Mennesson family structure is, of course, a ‘non-traditional’ one since the intended mother in that case was not genetically related to the children and the children were carried by a surrogate.\(^5\) Hence, the judgment undoubtedly represents a ‘slightly more inclusive and liberal approach in the legal recognition of non-traditional families’.\(^6\) However, recognition of the parent–child relationships in Mennesson

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\(^1\) Mennesson v France App no 65192/11 (ECtHR, 26 June 2014).
\(^3\) Advisory Opinion, ibid [51].
\(^4\) Valdis Fjöhnisdóttir and Others v Iceland App no 71552/17 (ECtHR, 18 May 2021).
\(^5\) For discussion of definitions of ‘traditional’ and ‘non-traditional’ families, see among others, Susan Golombok, Modern Families: Parents and Children in New Family Forms (Cambridge University Press 2015) Ch 1; Alan Brown, What is the Family of Law? The Influence of the Nuclear Family (Hart Publishing 2019); Lydia Bracken, Same-Sex Parenting and the Best Interests Principle (Cambridge University Press 2020) 7–8.
was inextricably linked to the presence of a genetic link between the intended father and the children, and in the subsequent advisory opinion issued by the ECtHR in connection with the case, the marriage of the intended mother to the intended father. In this way, although the Mennessons are themselves ‘non-traditional’ due to their use of surrogacy, they otherwise meet all of the hallmarks of a ‘traditional’ family unit. Therefore, by regarding the Mennesson family structure as the normative form against which other complaints of non-recognition are measured, the ECtHR perpetuates a particular understanding of family relationships that is at odds with the ‘non-traditional’ diversity of family life made possible by assisted human reproduction.

In order to address the above, the article begins with a discussion of the concepts of subsidiarity and deference before outlining the seminal case of Mennesson and the subsequent advisory opinion on gestational surrogacy to understand the foundational principles for family recognition developed by the ECtHR in respect of cross-border surrogacy. Thereafter, the article examines key themes that have emerged from the case law since Mennesson that highlight the increasing limits of the margin of appreciation available to States Parties in certain cases of cross-border surrogacy and the implications of this for national decision-making. From this analysis, certain inconsistencies become apparent, in particular as regards the treatment of family relationships that deviate from the structure of the Mennesson family. This examination not only highlights the importance of ‘accommodations’ of private and family life but also bolsters the contention that, in many cases, the breadth of the margin of appreciation available to the State has a direct correlation with the extent to which the family in question mirrors or deviates from the ‘traditional’ Mennesson form.

The focus of this article is on the domestic legal recognition of parent–child relationships created through cross-boundary surrogacy since this was the subject of the complaint in Mennesson. The article does not consider the legal recognition of parent–child relationships created through domestic surrogacy since the cases that have arisen in that area raise different considerations that warrant separate consideration.

II. DEFERENCE AND SUBSIDIARITY

Protocol 15 of the European Convention on Human Rights (ECHR) added direct references to the margin of appreciation and the principle of subsidiarity to the Preamble to the ECHR, affirming that:

the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

The principle of subsidiarity recognises that the Contracting States have the primary responsibility to uphold Convention rights and are ‘better placed’ than the ECtHR to determine policy, particularly as it relates to ‘delicate moral and ethical questions’, such as the

7 ibid, 133–134, Levy suggests that ‘[t]he term traditional refers to two opposite-sex parents, a mother and a father, with children to whom they are biologically related (“nuclear ideal”). This notion of the family is the archetype that retains considerable influence in framing European domestic laws.’
8 See, eg, AL v France App no 13344/20 (ECtHR, 7 April 2022) and H v UK (2022) 75 EHRR SE7.
10 Paradiso v Italy (2017) 65 EHRR 2, [184].
questions that arise in the regulation of surrogacy.\textsuperscript{11} Hence, it is not the role of the Court to determine the most appropriate policy for each State, but it is to exercise a supervisory role that increasingly focuses on the process leading to the adoption of the particular policy or measure by the State, as discussed further below. The principle of subsidiarity is regarded as key to maintaining the ECtHR’s political influence and to maintaining signatories to the Convention.\textsuperscript{12} In the context of cross-border surrogacy, it has been noted that there is a particular need for deference and restraint on the part of the ECtHR due to the complexity of the issues involved, which are often ‘ill-suited to resolution by way of an ECtHR response to an individual complaint’.\textsuperscript{13}

Subsidiarity is not a new concept for the ECtHR, but the ‘age of subsidiary’ ushered in by Protocol 15 has led to an increasing willingness on the part of the ECtHR to ‘defer to the reasoned and thoughtful assessment by national authorities of their Convention obligations’.\textsuperscript{14} Thus, deference to the decisions of national authorities is central to the concept of ‘subsidiarity’. This deference, and the language used to describe it, can take many forms. In the surrogacy case law, it is often expressed in terms of the margin of appreciation.

Writing extrajudicially in 2018, former President of the ECtHR Robert Spano opined that the ‘process-based review’ had become ‘the mechanism by which the Court implements the principle of subsidiarity in practice’.\textsuperscript{15} In the ‘process-based review’:

the Court’s primary methodological focus [shifts] from its own independent assessment of the ‘Conventionality’ of the domestic measure towards an examination of whether the issue has been properly analysed by the domestic decision-maker in conformity with already embedded principles.\textsuperscript{16}

The process-based review focuses on the procedure or framework leading to the domestic decision, rather than strictly reviewing the nuances of the decision itself. Where the State has shown that it has ‘taken their obligations to secure Convention rights seriously’,\textsuperscript{17} the Court will be less likely to interfere with the national decision.

Examination of the expanding body of ECtHR case law concerning cross-border surrogacy demonstrates an increasing awareness of the process-based review, whereby ‘the quality of the parliamentary and judicial review of the necessity of a general measure … is of particular importance, including to the operation of the relevant margin of appreciation’.\textsuperscript{18} Hence, while it has been noted that the ECtHR has been ‘less cautious than expected’ in the surrogacy case law and has shown a willingness to intervene with national decision-making in

\textsuperscript{16} ibid 480.
\textsuperscript{17} ibid 481.
\textsuperscript{18} KK and Others v Denmark App no 25212/21 (ECtHR, 6 December 2022), [46].
order to uphold ECHR rights, this article suggests that it does so within the confines of the process-based review. As will be outlined, by focusing on the process underpinning the policy decision pertaining to cross-border surrogacy, the ECtHR has established that blanket refusals of recognition (or simply an absence of any means to facilitate recognition) of parent–child relationships created through cross-border surrogacy are difficult to justify because in this situation there can be no individualised assessment of the best interests of the child. On the other hand, where the State has gone through a considered process to identify some mechanism to facilitate recognition of parent–child relationships created through cross-border surrogacy, the ECtHR is typically more deferential to the State response.

However, the most recent case law on cross-border surrogacy points to a rather selective approach to the process-based review by the ECtHR. For example, while the process-based review is acknowledged by the ECtHR in the case of *KK and Others v Denmark* (‘KK’), the scope and quality of the national legislative process leading to the adoption of the impugned measure are largely ignored in the judgment, with the ECtHR instead focusing on the ‘Conventionality’ of the domestic measure. In doing so, the ECtHR employed a more interventionist approach in respect of the legal recognition of parent–child relationships created through cross-border surrogacy than might be expected under the process-based review. The ECtHR has consistently emphasised that States enjoy a wide margin of appreciation to regulate surrogacy given the absence of a European consensus on the matter, and so the narrowing of the margin in the most recent case law is significant. That said, the margin is only narrowed where the case concerns cross-border rather than domestic surrogacy, and where recognition of the parent–child relationships created through cross-border surrogacy is ‘impossible’ in the home State. At the same time, there is inconsistency in the narrowing of the margin and in the ECtHR’s assessment of the concept of ‘impossibility’ as the ECtHR fluctuates between the process-based review and the ‘Conventionality’ assessment in different cases depending on the nature of the family before it, as discussed in the following sections.

### III. DEFERENCE AND CROSS-BORDER SURROGACY

The past decade could be regarded as something of a ‘substantive embedding phase’ for Article 8 ECHR rights in the context of surrogacy, whereby the ECtHR has incrementally developed Convention principles that guide Member States in this area. The novel issues raised by the surrogacy case law have necessitated an interventionist approach whereby the ECtHR has limited the margin of appreciation available to States in order to vindicate the rights of stakeholders in the cross-border surrogacy process.

As the case law on cross-border surrogacy has developed, the margin of appreciation available to States to respond to the practice has reduced further. This has culminated in the most recent case law where the ECtHR has adopted an approach that has become progressively more interventionist and less deferential in respect of the national decision-making.

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20 *KK* (n 18), [46].

21 *Mennesson* (n 1) [78]–[79].

22 See, eg, the different approaches adopted in *Mennesson* (n 1); *DB* (n 2); *KK* (n 18); *Valdis* (n 4); *S-H v Poland* (2022) 74 EHRR SE4 concerning cross-border surrogacy and *AL* (n 8) and *H v UK* (n 8) concerning domestic surrogacy.

23 The phrase ‘substantive embedding phase’ is used by Spano (n 15) 475–476 to describe the approach adopted by the ECtHR for the first 40 years of its existence, which can be contrasted with the ‘procedural embedding phase’ that Spano now regards as central.
The origins of the interventionist approach can be found in the case of Mennesson and the subsequent ECtHR advisory opinion on gestational surrogacy. Hence, in order to understand the incremental decline of deference, it is necessary to consider the foundational principles for cross-border surrogacy established in those decisions before examining the more extensive limits placed on the margin of appreciation in the recent case law.

A. Mennesson and the advisory opinion

The case of Mennesson established important principles pertaining to cross-border surrogacy that have been applied and refined in subsequent case law. In this case, the French authorities had refused to recognise the legal relationship between children born through a surrogacy arrangement that was conducted in the USA and their intended parents. The applicants took their case to the ECtHR claiming that the non-recognition of the legal parent–child relationships violated both their right to respect for family life and their right to respect for private life under Article 8 of the ECHR.

The ECtHR found no violation of the children’s right to family life on the basis that the non-recognition of their family relationships had not created insurmountable difficulties for the children as they could still exercise family life with their intended parents in France.24 There was, however, a violation of the children’s right to respect for their private life under Article 8 of the ECHR. The ECtHR noted that the non-recognition of the family relationships created uncertainty as to whether the children would be able to obtain French nationality25 and affected their inheritance rights,26 both of which were regarded by the Court as encompassing aspects of the children’s identity and took on a ‘special dimension’ since the intended father was also the children’s biological father.27 The Court found that respect for private life ‘implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship’.28 Accordingly, the ‘serious restriction on the identity and right to respect for private life’ of the children that was created through their inability to secure recognition or establishment of their legal relationship with the intended father, was found to exceed the permissible margin of appreciation afforded to the State and a violation of Article 8 of the ECHR was found.29

Mennesson established that the child’s right to respect for their private life will be breached where there is no possibility under national law to obtain legal recognition of the relationship with the genetically related intended father in circumstances where he is listed as the legal father on a foreign birth certificate. In essence, ‘it means that once the surrogacy has taken place and the child was legally relinquished to the commissioning parents in the country of birth, recognition of the relationship in their home country cannot be denied, at least where there is a genetic link with one of the commissioning parents.’30 The judgment did not, however, address the recognition of the relationship between the children and their (non-genetically related) intended mother. Instead, this relationship was the subject of an advisory opinion issued by the ECtHR to France in 2019.31 The request for the advisory opinion was made by the French Court of Cassation during a domestic review of the Mennesson case, and essentially asked the ECtHR whether the refusal to recognise the

24 Mennesson (n 1), [92].
25 ibid [97].
26 ibid [98].
27 ibid [100].
28 ibid [99].
29 The same result was found in Labassee v France App no 65941/11 (ECtHR, 26 June 2014).
31 Advisory Opinion (n 2).
relationship between the surrogate-born children and their intended mother amounted to a violation of the children’s right to respect for their private life under Article 8 of the ECHR.

In the advisory opinion, the ECtHR noted that non-recognition of the mother–child relationship had a negative impact on several aspects of the child’s right to respect for private life. Furthermore, it found that the child’s best interests ‘also entail the legal identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare’ and require that the child has the opportunity to live in a stable environment. Hence, ‘the general and absolute impossibility’ of obtaining recognition of the mother–child relationship was found to be incompatible with the child’s best interests, which had to be assessed in the light of the particular circumstances of the case. The Court concluded that in a factual situation of the type referred to in the request for the advisory opinion:

the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad through a gestational surrogacy arrangement requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the ‘legal mother’.

In the advisory opinion, the ECtHR emphasised that Article 8 of the ECHR does not mandate a particular form of recognition for the mother–child relationship nor does it require that the recognition occurs *ab initio*. Instead, States have a margin of appreciation as regards the choice of means to enable the recognition. The Court noted that Article 8 simply requires that recognition ‘be possible at the latest when it has become a practical reality’ and determination of when the relationship has ‘become a practical reality’ is a matter ‘first and foremost for the national authorities to assess’. Thus, the choice of means to facilitate recognition of the mother–child relationship is left to the national authorities, which have broad discretion to determine the matter although the chosen mechanism must produce ‘similar effects to registration of the foreign birth details’, and must be effected promptly to avoid a lengthy period of legal uncertainty for the child.

Since the advisory opinion leaves the choice of recognition mechanism and recognition criteria to the discretion of the national authorities, it could be interpreted as allowing for a situation where the ‘home’ State might legitimately refuse to recognise the legal relationship between mother and child. Certainly, as Tesfaye notes, the focus on the genetic link in the advisory opinion ‘does give a good indication that states would be within their allowed margin of appreciation to refuse recognition of legal parent relationships if there is no genetic link’ between the child and the intended parents. Indeed, this was the situation in *Paradiso*
and Campanelli v Italy, but as this case was decided before the publication of the advisory opinion on gestational surrogacy it is not scrutinised in this article.

But even where there is a genetic parent–child relationship, the advisory opinion could be read as leaving the ultimate decision as regards recognition of the parent–child relationship in the hands of the national authorities. After all, having conducted an individualised assessment of the best interests of the child, a State might find that recognition is not appropriate in a particular case. This interpretation of the advisory opinion aligns with the ideas of subsidiarity and deference, whereby States have ‘the primary responsibility’ to secure ECHR rights.

However, more recent case law casts doubt on this interpretation of the advisory opinion as violations of Article 8 of the ECHR have been found in situations where the State did provide a possibility of recognition of parent–child relationships created through cross-border surrogacy, but the applicants did not meet the criteria for recognition. In the more recent cases, the ECtHR has afforded the State less leeway to determine the matter than might have been expected from an initial reading of the advisory opinion. These cases show that, while the choice of means to facilitate recognition of the parent–child relationships created through cross-border surrogacy remains within the State’s margin of appreciation, the fact of recognition does not—at least not in cases concerning families that follow the Mennesson structure.

The following sections examine the increasingly interventionist approach adopted by the ECtHR in the cross-border surrogacy case law that has emerged since Mennesson and the advisory opinion and the consequences that this has for national decision-making. It is shown that the ECtHR has progressively limited the margin of appreciation available to States to respond to cross-border surrogacy. This has resulted in situations where the ECtHR has effectively usurped the national legislative function by constraining the ability of the State to determine the nature and outcome of the process for recognising the parent–child relationships formed through cross-border surrogacy. As will be outlined, this approach has particular consequences for the area of domestic adoption. However, analysis of the case law also highlights the importance of accommodations as a way to avoid such intervention—where the State has provided some recognition of the family relationships, the ECtHR has been much slower to override the national decision-making process. At the same time, we see a divergence in approach as regards the treatment of less traditional family formations with the ECtHR revealing a tendency to adopt a more deferential position to the national decision-making in respect of such families.

B. Increasing limits on the margin of appreciation

Since Mennesson and the advisory opinion, the ECtHR has demonstrated an increasing willingness to limit the margin of appreciation available to States to respond to certain cases of cross-border surrogacy. This has resulted in an interventionist approach, whereby the ECtHR has, in effect, curtailed the ability of the respondent States to determine their own response to cross-border surrogacy. In doing so, the ECtHR has utilised both the process-based review and the ‘Conventionality’ assessment to find violations of

41 Paradiso (n 10).
42 For analysis of Paradiso, see Bracken (n 5) 207–208. The case of Valdis Fjölnisdóttir and Others v Iceland (n 4), which also concerned intended parents without a genetic connection to their child, is analysed later in this article.
44 Protocol 15 (n 9).
45 KK (n 18).
Article 8 of the ECHR due to non-recognition of family relationships formed through cross-border surrogacy.

In the 2022 case of DB and Others v Switzerland, a Chamber of the ECtHR adopted the process-based review to find, for the first time, that the principles established in Mennesson and the advisory opinion extended to a cross-border surrogacy arrangement undertaken by same-sex intended parents. In this case, a male couple who had engaged in surrogacy in California complained to the ECtHR against the refusal of Swiss authorities to recognise the parent–child relationship between the non-genetically related intended father and the child. At the time of the child’s birth, the Swiss law did not contain any mechanism to facilitate recognition of the relationship. This meant that, until 2018, when an amendment to the Swiss Civil Code enabled the non-genetically related intended father to apply to adopt the child, he had no possibility of obtaining a legally recognised relationship with the child.

Applying the principles from the advisory opinion, the ECtHR concluded that ‘the general and absolute impossibility’ of obtaining legal recognition of the relationship between the child and the non-genetically related intended father ‘for a significant period of time’ constituted a disproportionate interference with the child’s right to respect for private life under Article 8 of the ECHR, and a violation of the Article was found.

DB endorses and extends the Mennesson principles, clarifying that the child’s right to respect for their private life requires the existence of a mechanism to enable recognition of parent–child relationships established abroad following a cross-border surrogacy arrangement. In this way, the case provides an example of the process-based review, in that the ECtHR’s focus was on applying the established Mennesson principles and reviewing the domestic decision for its conformity with same. Drawing on the Mennesson principles, the ECtHR in DB emphasises that the choice of mechanism to enable the recognition of parent–child relationships remains within the State’s margin of appreciation and it does not mandate that recognition is facilitated through a specific means.

However, DB makes it clear that the State must provide a recognition mechanism and underlines that a failure to do so will result in the ECtHR intervening in the domestic policy. The case demonstrates that where adoption represents the only way to secure the legal parent–child relationship, access to it cannot be restricted. Thus, it is not legitimate for a State to prohibit same-sex couples from accessing domestic adoption to secure the parent–child relationships created through cross-border surrogacy, but (in accordance with prior case law) the State is permitted to exclude same-sex couples from accessing domestic adoption in other contexts. As such, while the State maintains discretion to determine its own national adoption law, the autonomy of the national authorities to decide on national eligibility and suitability criteria for adoption in the context of cross-border surrogacy is curtailed in the absence of another mechanism to recognise the legal parent–child relationships. In this way, the case illustrates that the process-based review does not insulate the State from interference by the ECtHR with its national law and policy. The implications of the approach for domestic adoption law are considered in Section III(C) below.

The DB judgment represents the natural progression of the case law on cross-border surrogacy—since same-sex couples who engage in cross-border surrogacy are in a directly

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46 DB (n 2).
47 ibid [87].
48 ibid [89].
49 ibid [90].
comparable position to different-sex couples who do so, then the same opportunity for recognition of the parent–child relationships should be afforded to all cases.\textsuperscript{51} The decision illustrates that, even in the process-based review where the focus of the ECtHR is on reviewing the domestic decision for conformity with the already established principles pertaining to surrogacy rather than creating new principles, an interventionist approach is possible and the State’s margin of appreciation can be significantly curtailed.

The subsequent judgment of \textit{KK and Others v Denmark},\textsuperscript{52} which was issued by a Chamber of the Second Section of the ECtHR just 2 weeks after \textit{DB}, is more radical. In \textit{KK}, the intended mother in a surrogacy arrangement applied for step-parent adoption as a way to secure a legal relationship in Denmark with her surrogate-born children. The application was initially refused as the applicants did not meet the required time periods for residence in Denmark, and, on appeal, the refusal was upheld on the basis that the surrogate mother had been ‘paid to consent to adoption’, which was contrary to the domestic adoption law.\textsuperscript{53}

In considering the complaint, the ECtHR highlighted the importance of the process-based review when assessing the proportionality of the actions of the national authorities, noting that the ‘quality’ of the parliamentary and judicial review of the necessity of the impugned measure ‘is of particular importance, including to the operation of the relevant margin of appreciation’.\textsuperscript{54} This reference to the process-based review did not, however, filter down into the body of the judgment, with the ECtHR preferring to substitute its own ‘Conventionality’ assessment for that of the national courts, as discussed below. Moreover, notwithstanding the ECtHR’s acknowledgement that its role is not to ‘substitute itself for the competent national authorities in determining the most appropriate policy for regulating the complex and sensitive matter’ of recognising parent–child relationships in cross-border surrogacy,\textsuperscript{55} it did precisely that in \textit{KK}.

In \textit{KK}, the intended mother was not recognised as a legal parent in Denmark but had been granted custody of the children. The Danish Supreme Court had found that because the mother exercised custody, the refusal of the step-parent adoption would have little impact on the children’s right to private life.\textsuperscript{56} This finding suggested that, in the Supreme Court’s view at least, the custody arrangement had already bestowed comparable parenting rights and responsibilities on the intended mother. Yet, the ECtHR found that custody alone was not sufficient for the purpose of recognising the mother–child relationship, and that, without the legal recognition brought about by the step-parent adoption, the children were ‘in a position of legal uncertainty regarding their identity within society’.\textsuperscript{57} This was so notwithstanding the Court’s acknowledgement that a diverse range of mechanisms including adoption, foster care, and parental responsibility arrangements had been found to constitute acceptable means of legal recognition in prior case law.\textsuperscript{58}

According to the ECtHR, it was in the best interests of the children to have the same legal relationship with the mother as they have with the father.\textsuperscript{59} However, other than making this point, the ECtHR did not explain why the custody arrangement was insufficient for the

\textsuperscript{51} Bracken (n 43); Elena Brodeala and Marie-Hélène Spiess, ‘Surrogacy and Same-Sex Parenthood Before the European Court of Human Rights: Reflections in Light of Cases Against Switzerland’ (2022) 3 Swiss Review of International and European Law 397.

\textsuperscript{52} \textit{KK} (n 18).

\textsuperscript{53} ibid [11].

\textsuperscript{54} ibid [46].

\textsuperscript{55} ibid [45].

\textsuperscript{56} ibid [62].

\textsuperscript{57} ibid [71]–[73].

\textsuperscript{58} ibid [70].

\textsuperscript{59} ibid [74].
purpose of recognising the mother–child relationship in the instant case. Moreover, the ECtHR did not elaborate on how the custody arrangement differed from the foster care and parental responsibility arrangements that were deemed to be adequate in earlier cases. On the contrary, the advantages of the custody arrangement were highlighted throughout the judgment. For example, the ECtHR noted that the family had not experienced any obstacles or practical difficulties in enjoying family life together; the mother would retain custody in the event of the death of the father or breakup of the marriage, and there was limited impact on the children’s inheritance rights. Nonetheless, the ECtHR concluded that the custody arrangement was an insufficient mechanism to recognise the mother–child relationship—without any real explanation as to why that was the case.

It is also notable that the Danish Supreme Court in KK had carefully scrutinised the policy rationale underpinning the domestic adoption legislation, which had led to the refusal of the intended mother’s application for step-parent adoption. The Supreme Court had noted that an absolute prohibition on adoption in situations where a payment was made to the surrogate (which applied under the impugned Danish law) impeded an individualised assessment of the child’s best interests. While the Court found that the step-parent adoption would be in the best interests of the children in the instant case, it concluded that the refusal of the adoption order was justified when the interests of the children at the centre of the case were weighed against the interests of children in general to be protected against the possibility of commodification. In addition, as outlined above, the Court was not convinced that the adoption would have a significant impact on the children’s right to private life.

Notwithstanding this scrutiny of the case by the Supreme Court, and in spite of the ECtHR’s acknowledgement that the national authorities are ‘better placed’ to evaluate the local needs, the ECtHR did not agree with the Danish Court’s findings. The ECtHR instead concluded that the national authorities had not ‘struck a fair balance’ between the interests of the KK children in obtaining a legal parent–child relationship with the intended mother and the rights of children in general to be protected from commodification, which the legislation sought to enshrine. Thus, while the approach in KK had the veneer of a process-based review, ultimately the ECtHR substituted its own ‘Conventionality’ assessment for that of the national authorities. This approach enabled the ECtHR to override the national judicial and parliamentary processes, establishing that the step-parent adoption order had to be granted in order to vindicate the rights of the children even though the legislative criteria for adoption had not been met. The implications of this interventionist approach for domestic law making in the area of adoption are considered in the following section.

C. Implications for domestic adoption law

The emerging ECtHR jurisprudence on cross-border surrogacy makes it clear that States have limited discretion when it comes to the domestic recognition of parent–child relationships formed through cross-border surrogacy. Thus, where adoption represents the only mechanism to recognise the relationship in the ‘home’ State, that State will also be curtailed in its ability to determine its own national adoption law, including eligibility and suitability.

60 Valdis (n 4); CE and Others v France App nos 29775/18 and 29693/19 (ECtHR, 24 March 2022).
61 KK (n 18) [50].
62 ibid [71].
63 ibid [15].
64 ibid [16].
65 ibid [62].
66 ibid [76].
criteria, as it applies to situations where the child has been born through cross-border surrogacy. This is exemplified by the cases of DB and KK, discussed in the previous section.

On the one hand, this approach is justified by the fact that, in cross-border surrogacy, the relationship between the child and the intended parents has already been established (legally and factually) in accordance with the law of another country, and it will most likely be in the best interests of the child for the adoption to be granted so as to allow for the relationship to be legally recognised in the ‘home’ country. Moreover, recognition of the parent–child relationship is necessary to avoid ‘a state of (de facto) parentlessness of the child’. On the other hand, restricting the ability of a State to refuse an application for adoption in a particular case sits uneasily with the idea that States have the ‘primary responsibility’ to secure human rights within their borders, and raises questions about the role of the national best interests assessment in protecting the child’s rights. After all, if a State has conducted an individualised assessment of the best interests of the child, and if the assessment indicates that the adoption is not in that particular child’s best interests, but the State is nonetheless required to grant the adoption application (because no other mechanism exists to recognise the parent–child relationship in a case involving cross-border surrogacy), the best interests assessment is reduced to a tokenistic gesture.

In the advisory opinion, the ECtHR endorsed an individualised assessment of best interests following situations of cross-border surrogacy and acknowledged that surrogacy arrangements may include ‘fundamental components that do not necessarily weigh in favour of recognition of a legal parent-child relationship with the intended mother’. The approach in the most recent ECtHR case law on cross-border surrogacy seems to disregard the importance of the outcome of the best interests assessment in this context by effectively removing the State’s discretion to refuse an adoption application where it concerns a child born through cross-border surrogacy. This approach goes beyond the process-based review and allows the ECtHR to adopt an interventionist approach that does not fit comfortably with its supervisory role in the Convention schema.

The judgments in both DB and KK make it clear that States have limited discretion to determine the application of domestic adoption law in the context of cross-border surrogacy where no other recognition mechanism is available. The cases establish that in order to vindicate the right to respect for the private life of the child born through cross-border surrogacy, the intended parents must be permitted to access domestic adoption where this represents the only means to regularise the parent–child relationship in the home State. While this finding represents the logical progression of the cross-border surrogacy case law, it is problematic as it opens up the possibility of a two-tier system for adoption, whereby different criteria may apply to adoptions concerning children born through cross-border surrogacy and those who are not. Such an approach would appear to be at odds with the principle of non-discrimination in Article 14 of the ECHR, and could potentially generate future applications to the ECtHR if some children are deemed eligible for adoption but other, comparably placed, children are not.

The creation of a two-tier system of adoption would mean that intended parents with the means to travel abroad to engage in surrogacy would be able to circumvent the domestic adoption criteria because, once the child is born through cross-border surrogacy, the domestic adoption order would have to be granted where it represents the only mechanism

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68 Advisory Opinion (n 2) [42] [emphasis added].
to regularise the parent–child relationship under national law.\textsuperscript{69} By contrast, intended parents who engage in domestic surrogacy within the home State would not be able to rely on the ECtHR case law to demand access to domestic adoption. Commenting on \textit{Mennesson}, Ní Shúilleabháin notes that, in effect, the judgment ‘requires Contracting States to accommodate private acts of circumvention, and to defer to the regulatory choices of other countries as they evolve into the future’.\textsuperscript{70} The same can be said about the more recent case law except that the impact on the ‘distribution of regulatory competence’\textsuperscript{71} is arguably greater due to its implications for domestic law making in the field of adoption. Not only must access to domestic adoption be facilitated following cross-border surrogacy, but the application for the adoption must be granted—even where the applicants do not meet the legislative criteria as indicated in KK.

The above should not, however, be taken to mean that States have lost all competence to respond to cross-border surrogacy, nor that domestic adoption must be made available to all intended parents who engage in cross-border surrogacy. The ECtHR jurisprudence makes it clear that a State \textit{can} avoid interference with its national adoption law by providing some other mechanism to recognise the relationship between the intended parents and surrogate-born child. This is apparent in the advisory opinion, which leaves the choice of recognition mechanism to the respondent State,\textsuperscript{72} and in case law, which has found other mechanisms to recognise the parent–child relationship to be compliant with Article 8 of the ECHR.\textsuperscript{73} For example, in the case of \textit{Valdis Fjölnisdóttir and Others v Iceland},\textsuperscript{74} no violation of Article 8 of the ECHR was found in a situation where the State had provided recognition of the parent–child relationships through a foster care agreement. In so finding, the ECtHR was satisfied that the ‘practical hindrances’ associated with the refusal of more formal recognition were minimised due to the accommodations provided.\textsuperscript{75} Similarly, the ECtHR focused on the ‘practical obstacles’ to find no violation of Article 8 in the case of \textit{S-H v Poland},\textsuperscript{76} although in that case the respondent State, Poland, did not provide any recognition of the relationships—instead recognition in another State was found to be sufficient. Still, the case law shows that a State can avoid a violation being found against it provided that there is \textit{some accommodation} of the parent–child relationships created through cross-border surrogacy, albeit the advisory opinion requires that the mechanism used for this purpose must produce ‘similar effects to registration of the foreign birth details’ in terms of recognising the relationship.\textsuperscript{77}

In cases where the State has provided some recognition of the parent–child relationships created through cross-border surrogacy, the ECtHR has tended to adopt a more process-orientated and more deferential approach to the national decision-making process. Once more, however, the ECtHR has been somewhat selective in utilising this approach. This leads to the hypothesis that the increased deference shown by the ECtHR to the national decision-making is influenced by its perception of the nature of the family at the centre of the case before it; that is, by the extent to which the family mirrors or deviates from the

\textsuperscript{69} Fenton Glynn (n 30) 546–547 has used the term ‘circumvention tourism’ to describe the situation where ‘couples, and indeed individuals, who are restricted by domestic regimes travel to more permissive jurisdictions to achieve their goal of becoming parents’.

\textsuperscript{70} Ní Shúilleabháin (n 13) 113.

\textsuperscript{71} ibid.

\textsuperscript{72} Advisory Opinion (n 2) [51].

\textsuperscript{73} See, eg, \textit{Valdis} (n 4) and \textit{CE} (n 60). In KK (n 18) [70], the ECtHR confirmed that various mechanisms can be used for the purpose of recognising the parent–child relationships.

\textsuperscript{74} \textit{Valdis} (n 4).

\textsuperscript{75} ibid [75].

\textsuperscript{76} \textit{S-H v Poland} (n 22) [68].

\textsuperscript{77} Advisory Opinion (n 2) [53].
structure of the family reflected in the seminal case of *Mennesson*. This point is explored in the final section below.

**D. Differential treatment of non-traditional family forms**

To date, the interventionist approach adopted by the ECtHR in the cross-border surrogacy case law, as outlined above, has been largely confined to cases where the families closely resembled the *Mennesson* family structure. For example, while there were factual differences between DB and *Mennesson*, in that the intended parents in *Mennesson* were a married different-sex couple and the intended parents in DB were a same-sex couple who were registered partners, the cases were sufficiently similar to allow the *Mennesson* principles to apply equally in DB.\(^{78}\) In both cases, one intended parent was genetically related to the child(ren) and one was not. Hence, other than in respect of gender and sexual orientation, the two sets of intended parents were in a comparable position. Similarly, KK concerned a married different-sex couple where the intended father was genetically related to the child and hence the family was also in a comparable position to the family in *Mennesson*.

Where, by contrast, the family deviates from the *Mennesson* paradigm, the ECtHR has tended to adopt a less interventionist and more deferential approach to national decision-making. Admittedly, the less deferential approach that is apparent in such cases has always been justified by the ECtHR due to the presence of some other factor, such as an existing accommodation of private and family life, as discussed below. Still, scrutiny of the case law suggests that the less traditional family forms are held to a higher standard by the ECtHR when presenting their claims, as the Court has been less generous when interpreting certain matters as compared to cases involving more *Mennesson*-like family structures. This is apparent from the manner in which similar factual circumstances have been approached by the ECtHR in different cases.

An example of the differential treatment of ‘less traditional’ family forms can be seen in the case of *Valdis Fjölnisdóttir and Others v Iceland*, where there was no genetic relationship between either intended parent and the child. In this case, the ECtHR was less willing to intervene with the domestic decision on recognition of the parent–child relationships, albeit in that case the State had provided some accommodation of the relationships, which further distinguished the case. *Valdis* involved a female couple who had a child through surrogacy in the USA. The intended parents’ home State of Iceland had refused to recognise the intended parents as legal parents, but had put in place a permanent foster care arrangement allowing them to care for the child. The ECtHR focused on the practical impact of the State’s refusal to recognise the intended parents as legal parents of the family. Due to the existence of the foster care arrangement, the ECtHR was satisfied that ‘actual, practical obstacles to the enjoyment of family life created by the non-recognition of a family link … have been limited’,\(^{79}\) and no violation of the child’s right to family life\(^{80}\) or private life\(^{81}\) was found.

The ECtHR’s focus on the practical impact of the refusal of legal recognition of the parent–child relationships in *Valdis* is similar to the approach adopted in KK. However, there are notable differences between the ECtHR’s treatment of these practical consequences in the two cases. For example, in *Valdis*, having concluded that there was no violation of the applicant’s right to family life due to the absence of practical obstacles to its realisation, the ECtHR declined to consider in any detail whether there was a violation of the private

\(^{78}\) DB (n 2) [84].

\(^{79}\) *Valdis* (n 4) [72].

\(^{80}\) ibid [75].

\(^{81}\) ibid [76].
life limb of Article 8 of the ECHR. By contrast, in KK, having found no violation of the applicant’s right to respect for family life on the same basis, the ECtHR proceeded to consider and find a violation of the right to respect for private life under Article 8. As a result, the child’s right to identity was not discussed in Valdis, whereas it was a central feature in KK. Similarly, there was no consideration of the impact of the non-recognition on the child’s inheritance rights in Valdis, whereas this was specifically mentioned in KK.

It is difficult to avoid the conclusion that the different approaches adopted by the ECtHR to the issues outlined above are attributable to the ECtHR’s fixation on ‘biological truth’ in the context of family recognition in cases of cross-border surrogacy as per the normative Mennesson form. As noted by März, the intended parents in Valdis ‘had no biological link to the child, [which] meant that they could not profit of the Mennesson and Labassee jurisprudence which only privileged genetically linked families built through surrogacy.’ As a result, the child in Valdis was left ‘de facto parentless’ due to the absence of any means to recognise the intended parents as the legal parents, notwithstanding that the children in both cases were, arguably, in directly comparable positions. To use the words of Judge Lemmens in Valdis:

[t]he negative impact which the lack of recognition of a legal relationship between the child and the intended parents has ‘on several aspects of that child’s right to respect for its private life’ ... applies to all children born through a surrogacy arrangement carried out abroad. Indeed, for the children the impact is the same, whether or not one or both of their intended parents has a biological link with them.

The privileging of families that resemble the Mennesson form and the importance of accommodations as a way to mitigate the practical consequences of the State response is also apparent in the case of S-H v Poland. This case involved a male couple who had engaged in a cross-border surrogacy arrangement in California, similar to the situation in DB. The intended parents had sought Polish citizenship for their surrogate-born twins on the basis that the genetically related intended father was himself a Polish citizen. The application was refused by the Polish authorities resulting in the complaint to the ECtHR.

The ECtHR placed great weight on the fact that the children and their parents resided in Israel at the time of the application and had never lived in Poland. Given that the parent-child relationships were legally recognised in Israel, the ECtHR distinguished the case from Mennesson. The ECtHR acknowledged that Poland’s refusal to recognise the legal father-child relationships ‘clearly had some repercussions on the [children’s] personal identity’ and they ‘must have experienced some obstacles’ due to the refusal of Polish and consequently EU citizenship. However, the ECtHR was satisfied that these negative effects on the

82 For critique of this point, see Lydia Bracken, ‘Cross-Border Surrogacy Before the European Court of Human Rights: Analysis of Valdis Fjóhnisdóttir And Others v Iceland’ (2022) 29 European Journal of Health Law 194.
83 KK (n 18) [52]–[77].
84 ibid [72].
85 This was despite the fact that this issue was specifically raised by the applicants in their submissions. Valdis (n 4) [47].
86 KK (n 18) [73].
87 Levy (n 6) 156.
88 März (n 67) 280.
89 ibid 285.
90 Valdis (n 4), Concurring Opinion of Judge Lemmens, [4] [emphasis added].
91 S-H (n 22).
92 ibid [71].
93 ibid [73].
children’s private life had not ‘crossed the threshold of seriousness for an issue to be raised under Article 8 of the Convention’. Given the absence of ‘practical obstacles’, the complaint based on the children’s right to respect for their private life was dismissed.

S-H emphasises that a hypothetical breach of Article 8 is not sufficient to ground a complaint because there can be no serious ‘practical obstacles’ to the enjoyment of Convention rights in this situation. This approach aligns with that endorsed in other cross-border surrogacy cases whereby the assessment of issues must be ‘in concreto rather than in abstracto’.

It is notable, however, that the Court has, in the past, entertained hypothetical interferences in situations of cross-border surrogacy where the family was not living in the respondent State. For example, in Laborie v France, the applicants complained to the ECtHR against the refusal of the French authorities to transcribe the Ukrainian birth certificates of surrogate-born children into the French register of births. In their submissions, the French intended parents stated that they were living in Ukraine at the time that the surrogacy arrangement took place, and there were suggestions that the family planned to take up residence in Dubai where they had lived for the previous 10 years.

Similar to the approach of the ECtHR in S-H, the domestic courts in Laborie noted that the refusal by the French authorities to transcribe the Ukrainian birth certificates into the French register of births did not deprive the children of the parent–child relationship since this was recognised under Ukrainian law. Yet, unlike S-H, the ECtHR itself applied Mennesson to find that the refusal by the French authorities to transcribe the Ukrainian birth certificates into the French register of births did not deprive the children of the parent–child relationship since this was recognised under Ukrainian law. Thus, although the Laborie applicants were not living in the respondent State at the time of their complaint, and notwithstanding that the parent–child relationships were recognised in the country of residence (Ukraine), a violation of Article 8 was found. Here, the residence of the affected family outside of the respondent State was not considered to be a relevant factor in determining the ‘consequences’ of the impugned action by the respondent State. By contrast, in S-H, the fact that the family did not live in the respondent State meant that any alleged practical consequences attached to non-recognition were ‘purely speculative’.

S-H builds on the approach seen in Valdis by emphasising the significance of ‘accommodations’ as a way to alleviate the ‘practical consequences’ associated with non-recognition of parent–child relationships—in Valdis, the actions of the respondent State cushioned the potential for interference with the rights of the child by providing some recognition to their family life, while in S-H, the actions of a different State provided the cushion. The focus on the actions of the ‘other’ State in S-H arguably deflects responsibility from European States to uphold rights within their own jurisdiction, and suggests that the State can avoid its obligation to respect the child’s private and family life in cases of surrogacy provided that some other State does so. While the ‘impossibility’ of

94 ibid.
95 ibid [75].
96 KK (n 18) [70]; Advisory Opinion (n 2) [52].
97 Laborie v France App no 44024/13 (ECtHR, 19 January 2017).
98 ibid [12].
99 ibid.
100 ibid [30].
101 S-H (n 22) [75].
102 This approach is, however, used frequently. As discussed by Mulligan (n 11) 456, cases such as SH v Austria App no 57813/00 (ECtHR, 3 November 2011) and A, B and C v Ireland (2011) 53 EHRR 13 show that ‘[t]he Court’s view is that when a person is not prevented from travelling abroad to obtain a service not available at home this is, in some sense, a rights protection within the domestic legal system.’
recognition\textsuperscript{103} was not considered in \textit{S-H}, the judgment signifies a reluctance to interrogate this point where \textit{some recognition} is available to the family. \textit{S-H}, therefore, also highlights the limits of the ECtHR’s willingness to intervene in national decision-making in the context of cross-border surrogacy and once more reveals inconsistencies in the treatment of less traditional families when compared to the normative \textit{Mennesson} form.

\section*{IV. CONCLUSION}

The emerging ECtHR jurisprudence on cross-border surrogacy indicates that a ‘general and absolute impossibility’ of obtaining legal recognition of the parent–child relationships created through cross-border surrogacy will breach the child’s rights. The choice of means to facilitate such recognition is for each State to determine, but where the State has not chosen any means for this recognition, the ECtHR has shown a willingness to adopt an interventionist approach. In the recent cases of \textit{DB} and \textit{KK}, this resulted in a situation where the ECtHR took a rather prescriptive approach to the national adoption law.

However, where the State has chosen some means to recognise the relationships, the ECtHR is typically deferential to that decision. The ECtHR will, in this situation, focus on the practical consequences associated with the non-recognition to determine whether there has been a violation of Article 8 of the ECHR. As has been seen in this article, the margin of appreciation afforded to the State is much broader in this instance, although it has also been suggested that the breadth of the margin is influenced by the nature of the family structure. It has been shown that families that fall outside of the normative \textit{Mennesson} form have been treated differently from more ‘traditional’ families, notwithstanding the existence of similar practical obstacles in their enjoyment of their private and family life. As a result, the jurisprudence points to an increasing diversity of human rights protection in the context of cross-border surrogacy. This sort of inconsistency is inherent in the process-based review,\textsuperscript{104} which relies substantially on the national process attached to a particular policy or measure. Still, the manner in which the practical consequences associated with non-recognition of the family relationships were assessed in cases like \textit{Valdis} and \textit{S-H} creates the impression that this approach has become something of a moving target for the vindication of the ECHR rights of surrogate-born children. As this article has shown, this approach has been used to justify a less accommodating stance towards cross-border surrogacy in certain cases, namely those where the families deviate too far from the ‘traditional’ form.

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\textsuperscript{103} In the \textit{Advisory Opinion} (n 2) \cite{42}, the ECtHR found that ‘the general and absolute impossibility’ of obtaining recognition of the relationship between the child born through a surrogacy arrangement entered into abroad and the intended mother was incompatible with the child’s best interests.

\textsuperscript{104} Spano (n 15) 493–494 notes that it could be questioned whether the process-based review will result in ‘double standards of human rights protections in Europe’ where different standards apply in different States. While Spano answers the question in the negative, this article suggests that the contrary may be true—at least in the context of cross-border surrogacy.