SUROGGATE MOTHERHOOD: LEGAL AND ETHICAL DILEMMAS

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Hardly anything in life is as incredible, special, and miraculous as the birth of a child. To the people who have a desire for offspring, birth of a child imbues the feeling of supreme fulfilment and gives a different meaning to their lives. For many people to be a parent is one of the experiences they wish to have, but what happens when conceiving a child is not possible to achieve naturally, without the assistance of medicine? In consideration of the fact that the number of such cases is growing in these days, one of the technologies that makes that possible is surrogate motherhood. Despite the changes we are witnessing in the societies, surrogate motherhood is still an extremely sensitive topic, in view of the fact that a third person, a woman, carries and gives birth to the child for others, causes numerous controversies. In this paper, we will deal with some of the legal and ethical dilemmas that prate this institute, such as the reasons for and against the application of the institute, the way it should be regulated in legislation, what if one of the contracting parties wants to terminate this contract, etc.

Key words: surrogate motherhood, contract pregnancy, best interest of a child, Article 8 of the European convention for Human Rights (ECHR).

1. INTRODUCTION

Surrogate motherhood is a method of assisted reproduction, in which the woman – the surrogate mother carries and gives birth to the child with the intent to hand over the child to the persons who have ordered the pregnancy and who will be the parents of the child. The medical procedure of surrogacy is preceded by the contract by which the persons who wish to get a child agree on the details of this procedure with the woman who will give birth to the child for them as the surrogate mother.[1] There are two forms of surrogate motherhood: the genetic, traditional, partial surrogacy (when the egg cell of a surrogate mother is fertilized with the sperm of the intended father or donor, in which case the child is genetically related to the surrogate mother) and *gestational*, full surrogacy (when the genetic material of the intended parents is used or when the genetic material originates from a donor, in which case the child is not genetically related to the surrogate mother). Views of the states on the issue of surrogate motherhood are different bearing in mind that the point at issue is an extremely sensitive topic with which legal, moral, ethical and even religious dilemmas are associated. The states are free when opting for or against surrogate

[1]M. Draškić, "Surrogacy Contract – between legal validity and nullity", *Proceedings of the Third Regional Scientific Conference on Law of Obligations*, Zagreb, 2022. (In the press), 3.

motherhood, bearing in mind that in this area there is no agreement either at the international, or at the European level, or definite standards that would be binding upon them.[2]

2. FACTS OF THE CASE IN THE HYPOTHETICAL CASE

A couple, Marko and Slavica Marković, from Serbia (Belgrade), had planned a family for a long time but, due to inability of Slavica Marković to conceive, they decided to get a child with the help of a surrogate mother. Bearing in mind that the surrogate motherhood is prohibited in Serbia, they decided to undertake this procedure in Ukraine, due to a high protection that Ukraine provides to the intended parents. The contract was concluded by the end of 2021, with the surrogate mother, Olga Chernovsky, 22 years old, who lives in Bucha, in the vicinity of Kyiv and who is not married. The contract was certified by a notary and the same stipulates the requirements that are deemed to be the essential elements of the contract: a pecuniary compensation, as well as that the surrogate mother does not have the right to withdraw from the contract in any case, except if her life or the life of the child is endangered, or if the child has a serious congenital illness. For the fertilization, the contract stipulates that gametes of the father would be used, i.e. Marko Marković, and the egg cell of the female donor. In the beginning of January 2022, the Fertility Clinic in the City of Kyiv notifies the intended parents, Marko and Slavica, that the procedure of fertilization was successful and that the embryo was transferred to Olga's womb. The pregnancy was initiated and it was regular. However, on 24 February 2022, the Russian military forces started the invasion of Ukraine, and fighting broke out and heavy shelling of the environs of Kyiv, including the town of Bucha where Olga lives, due to which she was forced to urgently leave for Kyiv. At the same time, Marko and Slavica, frightened for her life and the life of the unborn child, called her to come to Serbia. After Olga came to Belgrade, Marko and Slavica find a flat for her to rent and provide her with the basic means of subsistence. In the beginning the relations between them were excellent, Olga very quickly found a job, a partner, and she very much liked the life in Serbia due to which she decided to settle in Belgrade for good. However, Olga was notified by the Fertility Clinic that, before the delivery, she must return to Ukraine, in order to fulfil the surrogacy contract, otherwise she would not get the financial compensation that had been envisaged. Neither wanting to return to Ukraine in fear for her life, nor wanting to take care of the child, Olga starts to blackmail Marko and Slavica requesting to be directly paid the money amounting to EUR

[2]Case *Mennesson v. France*, no 65192/11 and *Labassee v. France*, no. 65941/11.

20,000.00 in order to return to Ukraine to deliver the child, which Marko and Slavica refused. In the beginning of April 2022, Olga goes to a clinic in Belgrade asking to get the abortion, which was not possible at that moment due to legal rules in the Republic of Serbia. When Marko and Slavica learnt about this fact, there was a quarrel with Olga and the relationship between them was completely disrupted and severed. On 20 September 2022, Olga gave birth to a healthy baby boy. Not wanting to keep the child, Olga abandoned it at the hospital where she gave birth. The child was immediately handed over to the competent institution for abandoned children and to the competence of the Centre for Social Work, which quickly initiated the procedure of full divesting Olga of the parental right, as well as the procedure to place the child in a foster family. Marko had tried to recognize the child before the competent registry service, but he did not succeed in it because Olga had not given the necessary consent for the registration. Thereafter, Marko and Slavica initiated the judicial proceedings before the High Court in Belgrade: Marko for the establishment of his paternity, and Slavica for contestation of Olga's motherhood. The DNA analysis showed that Marko is the biological father of the minor child with 99.99998% certainty, and that Slavica, with 99.995% certainty, is not the biological mother of the minor child. Based on the results of the DNA analysis, the Court accepted the litigation claim of Marko, established that Marko is the biological father of the child and entrusted to him the child for independent exercising of the parental right, while the litigation claim of Slavica was rejected in full as unfounded. In the meantime, Olga was fully deprived of the parental right concerning the child before the First Basic Court in Belgrade. After all the possible legal instruments had been exhausted in the Republic of Serbia, dissatisfied with the outcome of the judicial proceedings, Marko, Slavica, and the minor child, who got the name Aleksa, as the applicants, address the European Court of Human Rights with the application against the Republic of Serbia, deeming that, by the actions of the competent authorities of the Republic of Serbia, their rights to family and private life, referred to in Article 8 of the ECHR, had been violated.

3. INTERNATIONAL SOURCES THAT ARE RELATED TO SURROGATE MOTHERHOOD

The two most important legal acts that the ECtHR uses on the occasion of rendering decisions when surrogate motherhood is in question are the 1989 Convention on the Rights of the Child and the 1950 European Convention on Human Rights and Fundamental Freedoms. Within

the above Conventions the most important are the provisions of Article 3 of the Convention on the Rights of the Child and Article 8 of the ECHR. The provision of Article 3 proclaims the principle of the *best interest* of the child and although it is established as a principle it may get its expression through a special right of the child, a legal principle or a procedural guarantee.[3] The concept of the best interest of the child is complex and the actual contents of the principle of the *best interest of the child* are established on the case-to-case basis. Consequently, the principle is flexible and adaptable, both on individual basis when rendering decisions in individual situations is in question, and on collective basis when passing of legal acts by the legislator is in question. In a case of surrogate motherhood, *the best interest of the child* should be a balance between different types of interests. The first group of interests is expressed through the term „medical well-being", the second one through „well-being of the family", and the third group of interests are the rights of children, the rights of the surrogate mother, and the rights of the donor of germ cells. In addition to the principle of *the best interest of the child*, on the occasion of ruling in the cases that are related to surrogate motherhood the ECtHR to a great extent draws on, or finds solutions through the interpretation of Article 8 of the ECHR.[4]

For the purpose of better understanding of the hypothetical case, it is necessary to review the comparative law solutions in the Ukrainian and the Serbian legislations. Namely, the Ukrainian legislation stipulates that the intended parents shall be deemed to be the real parents from the moment when the embryo is transferred to the body of the surrogate mother. Thereafter, the surrogate mother does not have the right to withdraw from the contract, may not institute legal proceedings for the purpose of retaining the parental right, and her name is not specified in the registers of births on the occasion of registration of the birth of the child.[5] Bearing in mind that this institute is not fully regulated in the Ukrainian legislation, and that many issues have remained open and that it is left to the contracting parties to regulate their respective rights and obligations in detail through the contract, a series of legal problems may occur.[6] The deficiencies in the Ukrainian legislation have been additionally revealed within the framework of the current developments and the invasion of the Russian military forces of the territory of Ukraine and the

[3]Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para 1)*, para 6. - CRC/C/GC/14.
[4]*European Convention on Human Rights*, Article 8.
[5]Family Code of Ukraine, Article 123.
[6]Oleg M. Reznik, Yuliia M. Yakushchenko, *Legal considerations surrounding surrogacy in Ukraine*, Sumy State University, Sumy, 2020, 1049– 1051.

declaration of the state of war in the state, due to which surrogate mothers have been faced with a big dilemma. Many of them had to flee abroad to the European states that do not recognize the institute of surrogacy. If a child is born in any of such states, by applying their national laws, the surrogate mother will be registered as a parent of the child in the registers of births and it will not be possible to fulfil the surrogacy contract, which will bring mothers into a difficult situation whereby they must take care of the child they did not intend to retain, who becomes a refugee with them in the territory of a foreign state, without the support of their partners who due to the state of war cannot leave the territory of Ukraine. By staying in Ukraine, the lives of surrogate mothers and unborn children have been put in danger because the majority of fertilization clinics are located in Kyiv or Kharkiv, the cities that are currently the scenes of fighting and bombardment.[7] There is also the question, taking also into consideration the fact that the surrogate mother is not considered to be the mother of the child, if the intended parents cannot enter the country to take over the child, what then happens with the child and who are considered to be his/her parents? On the other hand, in the law of the Republic of Serbia, surrogate motherhood is expressly prohibited. Apart from Serbia, in minimum 24 out of 47 member states of the Council of Europe surrogate motherhood is expressly prohibited, due to which the citizens of those states are forced to undergo this procedure in the European states in which surrogacy is legal (so-called surrogacy tourism).[8]

4. ARGUMENTS IN FAVOUR OF THE ACTIONS OF THE LOCAL AUTHORITIES

In the reasoning of the judgment of the High Court in Belgrade, it is stated that the litigation claim of the plaintiff Slavica Marković is unfounded because the results of the DNA analysis indicated nonexistence of a biological bond between her and the child.[9] In addition, the Court found that allegations of the plaintiff regarding the concluded surrogacy contract in Ukraine are not relevant in this legal matter considering that the surrogate motherhood is expressly prohibited by law in the Republic of Serbia and that, therefore, the contract to which the plaintiff refers is null and void and, as such, does not produce a legal effect, and that according to the law of the Republic of Serbia the mother of the child is deemed to be the woman who gave birth to the child. In relation

[7] https://www.dw.com/en/ukraines-surrogate-mothers-trapped-between-the-frontlines/a-61282709, 20 April 2022.
[8] Richard F. Storrow, "International Surrogacy in the European Court of Human Rights", *North Carolina Journal of International Law and Commercial Regulation, Vol. 43, New York, 2018*, 40.
[9] Family Law of the Republic of Serbia, Article 42.

to the grounds for the appeal of the plaintiff that Article 8 of the ECHR had been violated by the decision of the High Court, the Appellate Court in Belgrade pointed out that the states signatories of the above Convention, among them being the Republic of Serbia as well, have a broad margin of appreciation with respect to the regulation of the institute of surrogate motherhood, and that every state signatory is free to prescribe its own rules in line with the principles that prevail in the internal legal system. The specified standpoint has been confirmed by the ECtHR in several decisions rendered in the cases that involved surrogate motherhood.[10] Namely, the ECtHR finds that even if the rights guaranteed by Article 8 of the Convention are encroached upon in the concrete case, violation of this Article will not take place if the legislative and judicial authorities of a state ensure a balance between the interests of their citizens and the interests of the actual state, which is actually reflected in many of the decisions of the Court[11] when it was established that Article 8 of the Convention had not been violated concerning the respect for family life of the applicants, and neither the right of the intended parents to the respect for their private life and that in this respect the states are entitled to prohibit surrogate motherhood. Non-recognition of a formal parental link in these types of cases also falls within the margin of appreciation which is afforded to it in such matters and does not constitute a violation of Article 8 of the Convention with regard to the applicants' right to respect for their family life.[12] In addition, the Court stated that Slavica Marković has an option to establish the parental relationship with the minor child through the adoption in compliance with the provisions of the Family Law.[13] In such a way, the criteria are met that are established in the advisory opinion of the ECtHR No. P – 16 – 2018 – 001 in which it is pointed out that, bearing in mind the best interests of the child and a reduced margin of appreciation, the Court finds that the right to respect for private life of a child born through surrogate motherhood requires that the local legislation provides for the possibility of recognition of the parental relationship between the child and the intended mother, but that the best interests of the child do not imply the obligation to recognize a foreign register of births and registration of data in the local registers, instead it is up to individual states to regulate on their own the procedure for recognition of the bond between the child and the intended mother, including the adoption.[14]

[10] Case *Mennesson v. France*, No. 65192/11, paras 70, 80.
[11] Case *X, Y&Z v. United Kingdom, 24 Eur. H.R.Rep. 143, para 44.*
[12] Case *VALDÍS FJÖLNISDÓTTIR AND OTHERS v. ICELAND*, no. 71552/17
[13] Article 101 paragraph 2 of the Family Code.
[14] Opinion P – 16 – 2018 – 001, 10.04.2019.

Deciding on the review submitted by Slavica Marković, the Supreme Court of Cassation rejected the same as unfounded finding that the lower-instance courts had properly applied the substantive law. In the proceedings before the Constitutional Court, related to the constitutional appeal filed by Slavica Marković, who had deemed that the specified decisions had violated, or curtailed her human rights and freedoms guaranteed by the Constitution, the Constitutional Court found that there was no violation of Article 65 of the Constitution of the Republic of Serbia[15] in view of the fact that Slavica Marković is not deemed to be the parent of the child and, therefore, it rejected the constitutional appeal as unfounded. As regards the decision on removal of the child and placement in a foster family, taken by the Centre for Social Work, which as the authority in the Republic of Serbia exercises public powers in the area of social and the family law protection, it was underlined that the action of the Centre had been in line with its statutory powers referred to in the Family Code of the Republic of Serbia, taking care that the requirements prescribed by Article 9 paragraph 1 of the Convection on the Rights of the Child are also met. Namely, all the decisions of the competent authorities had been rendered for the purpose of the protection of the best interest of the child [16], who had been abandoned by the mother Olga immediately after being born, and concerning whom, at that moment, there was no person who was registered as the father of the child. The child was immediately placed in the Orphanage, and was also soon after referred to an adequate foster family which undertook to take care of him, with the intensified supervision by the Centre for Social Work. Besides, considering that, in the concrete case, the requirements had been met for full deprivation of the parental right of the mother Olga, as well as the requirements for placement of the child in a foster family, the Centre for Social Work promptly initiated those procedures. It is particularly pointed out that Article 81 of the Family Law of the RS, which prescribes the requirements for full deprivation of the parental right, was enacted fully in compliance with the international conventions and the rules that regulate this institute. After the paternity of the father Marko had been established by the legally valid court decision, the child was promptly entrusted to him for independent exercising of the parental right and handed over for taking care of him and upbringing. In such a way, the competent authorities of the Republic of Serbia respected the right of the child to preserve his identity by being enabled to establish the parental relationship with the biological father, taking into account that matters of relevance to

[15] The Constitution of the Republic of Serbia, Article 65.
[16] Case *E.P. v. Italy*, no. 31127/96, para. 62, 16 November 1999

personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents. [17]

5. ARGUMENTS AGAINST THE ACTIONS OF THE COMPETENT AUTHORITIES

As regards the decisions of the judicial bodies of the Republic of Serbia in this hypothetical case, first of all it should be emphasized that, although the margin of appreciation by the states in the area of surrogate motherhood is broad, the ECtHR, through its jurisprudence, has established that such right of the states is not absolute and that there are cases in which Article 8 of the Convention has precedence over the solutions prescribed by local laws. One of the most important judgments in this respect was rendered in the case *Mennesson v. France* in which the ECtHR established violation of the right to respect for private life of the third and the fourth applicant, i.e. of the children born through surrogate motherhood, despite the prohibition of surrogate motherhood in France.[18] In the reasoning of the judgment it is stated that the principle of the respect for private life prescribed that everybody may establish the particulars of his/her identity, which also includes his/her filiation bond. Although their biological father is a French citizen, the third and the fourth applicant are faced with a distressing uncertainty with respect to the possibility to acquire the French citizenship and such indeterminacy may be negatively reflected on the determination of their identity. The Court in particular drew the attention to the fact that, bearing in mind that one of the intended parents is at the same time actually the biological father, it cannot be asserted that it is in line with the interest of a child to be deprived of a legal bond of such a nature. Upon the analysis of the existing jurisprudence of the Court, the attempt of the ECtHR to recognize the biological bond between the parents and the child where it really exists is especially noticeable, within the framework of exercising of the right to biological identity and, therefore, that it is in the best interest of the child to have such biological bonds officially recognized as well.[19] When analysing this case, its important to note that the denial of the right to know one's origin, which includes the right to know the identity of one's parents, violates the right to identity.[20]

[17] Case *Mikulić v. Croatia*, no. 53176/99, para. 54 and 64, ECHR 2002-I
[18] Case *Menneson v. France*, No. 65192/11.
[19] *Ibid*, paras 96 - 101
[20] Case *Jaggi v Switzerland No. 58757/00.*

As to the actual hypothetical case, the decisions of the courts in the Republic of Serbia not allowing the establishing of the parental relationship between the intended mother, Slavica, and the minor child Aleksa, are not only in contravention of Article 8 of the ECHR, but the courts in the concrete case had not been guided by the best interests of the child prescribed in Article 3 paragraph 1 of the Convention on the Rights of the Child, and also acted in contravention of Article 7 paragraph 1 of this Convention. Namely, it is not in the interest of any child to be left without the established parenthood (maternity or paternity), and thereby without the possibility to preserve his/her identity as well.[21] The fact that the surrogacy contract is prohibited in the Republic of Serbia cannot be above the best interest of the child, as well as above his rights to private and family life of which he is deprived in the concrete case only because of the way in which the child was born.[22] It is beyond dispute that the child born through surrogate motherhood also has a special bond with his intended parents, because their will was decisive for him to be conceived and be born into this world.[23] As it could be seen from the hypothetical case, the woman who gave birth to the child and who is, according to the law of the Republic of Serbia in force, deemed to be the mother of the child in line with the maxim *mater semper certa est*, had failed to demonstrate a real willingness to take care of and look after the minor child and establish the parental relationship, which should be based on parental love towards the child, which, on the other hand, the intended mother Slavica had from the very beginning. Therefore, there is the question of legitimacy of the strict application of this maxim on which the legislator blindly insists. In these terms, one could conclude that the above maxim has prevailed over the principle of the best interest of the child although, in the concrete case, the woman who gave birth to the child did it for others, and not in order to feel fulfilled as the mother, which cannot be acceptable either from the legal or from the ethical standpoint. As regards this standpoint, one should particularly take a look at the dissenting opinion of Justice Lazarov at al. In the case *Paradiso and Campanelli v. Italy* in which it is stated that the best interest of the child implies that the bonds between the family and the child should be preserved, except if the family is particularly unfit for that and that it is in the best interest of the child to ensure his/her development in a safe and protected environment. Courts should review whether it is in the interest of the child to be with the persons who would fully assume the roles of

[21] Case *Odièvre v. France*, no. 42326/98.
[22] L. Bracken, "Assessing the Best Interests of the Child in Cases of Cross-Border Surrogacy: Inconsistency in the Strasbourg Approach?", *Journal of Social Welfare and Family Law*, 2017, 3.
[23] Case *A.M. v. Norway*, no. 30254/18, dissenting opinion of Judge Jelic, para. 35-38

parents, as well as take into consideration the interests of the intended parents to develop their relationship with the child whose parents they wished to be.[24] Therefore, should we equalize the relationship between the intended parents and the child got through surrogate motherhood, judging by the quality, with the relationship between biological parents and children, the relationship of the child with the intended parents could be in such a case equalized with the right to family and private life referred to in Article 8 of the Convention, which protection the biological parents and their children already enjoy. This would automatically give rise to the limitation of free will of the states in the cases when the rules are prescribed with respect to the surrogate motherhood and in such a case it would be irrelevant whether there is a biological relationship between the parents and the child.[25] In such a way, the standpoint of the judicial bodies of the Republic of Serbia in the hypothetical case that there is no violation of Article 8 because, *inter alia*, there is a possibility to establish the parental relationship between the intended mother and the child through adoption, which the ECtHR also specified in its jurisprudence[26], would become irrelevant. Namely, disposal of such cases through the institute of adoption produces legal uncertainty primarily for the intended mother, but also for the child because there is a possibility that the child may be left with unestablished origin in relation to the mother. The selection of the mechanism for the recognition of the relationship between the parents and the child still falls under the margin of appreciation of the state which actually prescribes the criteria for the recognition of such bond. Consequently, the states are allowed to determine the very nature of the definition of "the best interest" and to maintain absolute authority in rendering decisions regarding the legal recognition of the intended mother, which results in the danger that the best interests of the child may serve as a smoke-screen in the process of the decision rendering, or that the best interests of the child may be diverted for other purposes.[27] A better solution would be that courts, in the course of the proceedings, establish the parenting of the intended mother because it might happen that the man, who is in the concrete case registered as the biological father, does not give his consent to adoption or gives the consent to some other woman and, therefore, the intended mother who has concluded the surrogacy contract together with that man would be left without an adequate legal protection. Otherwise, this

[24] Case *Paradiso and Campanelli v. Italy*, the dissenting opposing opinion of Justice Lazarov at al., paragraph 6.
[25]A. Mulligan, "Identity rights and sensitive ethical questions: The European Convention on Human Rights and The Regulation of Surrogacy Arrangements", *Med Law Rev*, 2018, 20-25.
[26] Case *D v France*, no. 11288/18.
[27] L. Bracken, "The ECtHR's first advisory opinion: Implications for cross – border surrogacy involving male intended parents", *Medical Law International, Vol. 21(I) 3-18*, 2021, 11and 12.

could create a dangerous and a discriminatory situation where the parent of a child born out of surrogacy, whose biological material was used and therefore can be legaly recognized as the child's parent, can abuse his rights as a parent and deprive the other intented parent, who does not have a biological connection to the child, of his parental rights, such as to maintain contact with the child.[28] A parent who has no biological connection with the child can constitute a legal relationship with him only through adoption, which became the practice in France after the case of Mennesson v. France and where the Court is of the opinion that there is no violation of Article 8 in that case.[29] It is worth pointing out that the Court finds that there is a breach of Article 14 taken in conjunction with Article 8 when a person is forbidden by law to adopt their partner's child because they are in a same-sex relationship, while allowing that possibility to unmarried different-sex couples. The Court finds that the Government has failed to adduce particularly weighty and convincing reasons to show that this was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child and that the distinction is therefore incompatible with the Convention.[30] Can the same reasoning also be applied in cases regarding surrogacy to protect the parental rights of intended parents, especially considering the evolving social concepts that are straying further and further away from the concepts of a traditional, biological family?

The prohibition of surrogate motherhood is becoming conflicting with the reality in which an increasing number of partners are attempting to get a child in such a way and, therefore, such a standpoint of the legislators is not going to be sustainable in the future. Refusal to legally recognize the parental rights of the persons who have gone abroad for the purpose of getting children with the intent to raise them seems to be a rather draconian response to the problems concerning which the state is afraid that may appear as the violation of the prohibition of surrogate motherhood. Such a response neither seems to be intended to discourage international surrogacy, nor does it prescribe any mechanism by which the states express something more than a symbolic care for the well-being of children and surrogate mothers. In the countries where the prohibition of surrogacy is interwoven as the fundamental expression of deeply rooted national values there is a real threat that the response of the state to any attempt to circumvent this prohibition will have the

[28] Case *A.M. v. Norway*, no. 30254/18, dissenting opinion of Judge Jelic, para. 43-50
[29] Case C and E v. France, case no. 1462/18 and no 17348/18.
[30] Case of *X and Others v. Austria*, no. 19010/07, para. 151-153

consequences that go beyond what is necessary to preserve the values and as we saw the response of the judiciary results in the fact that the children born with the assistance of surrogate mothers are assigned a lower status in the way that the ECtHR rejects and which is in contravention of the fundamental norms of the mankind.[31] Unfortunately, together with the European consensus, the margin of appreciation is the other pillar of the Grand Chamber's reasoning in cases related to surrogacy. There exists a certain amount of hesitation as to the correct weight to be given to that concept and to the seriousness of the limitation in question. The end result is that the Court's position is unclear and uncertain, or even opaque. Ultimately, through the combined effect of the European consensus and the margin of appreciation, the Court has chosen a minimum – or even minimalist – approach that is hardly likely to enlighten the national courts.[32] However, these kinds of cases cannot be decided on a simplistic, mechanical basis, namely, that there is no consensus in Europe, therefore the Government have a wide margin of appreciation; the legislation falls within the margin of appreciation; and this margin extends to the rules it lays down in order to achieve a balance between the competing public and private interests. The Court should not use the margin of appreciation as a "pragmatic substitute for a thought-out approach to the problem of proper scope of review".[33]

6. LEGAL AND ETHICAL DILEMMAS

Considering that, in the hypothetical case presented at the beginning of this paper, the surrogate mother had wanted to terminate the pregnancy, there is the question of the protection of the right of the foetus to life in the case when the conception through surrogacy takes place. It is necessary to strike a fair balance between the need to ensure the protection of the rights of the foetus and the rights, interests of the woman who carries and gives birth to the child. The provision of Article 2 of the ECHR prescribes that everyone's right to life shall be protected by law.[34] In this way, the right to life of „everyone" is protected, but the term 'everyone-person' itself is not precisely defined, nor is it mentioned from what moment a human being may be deemed to be a person. The ECtHR, in the judgement *Vo v. France*, took the view that the foetus belongs to the human species and that, as such, it is subject to the protection in the name of human dignity and

[31] R. Storrow, 67.
[32] Case *S.H. and Others v. Austria*, no 57813/00, dissenting opinion of Judge Tulkens et al. , para. 11
[33] Case *Evans v. UK*, no 6339/05, dissenting opinion of Judge Turmen et al. , para. 12
[34] ECHR, Article 2.

with legal consequences in the law of succession, but that it does not actually have the status of an individual who enjoys full protection through the right to life.[35] On the other hand, the right to terminate pregnancy is a logical consequence of the right of the woman to dispose of her own body. There are reasons that are in favour of subsuming the term „foetus" under Article 2 of the ECHR considering that neither the ECtHR, nor the European Human Rights Commission have ever explicitly stated that the term „everybody" is not related to the foetus. Besides, it is emphasized that there is no difference between the foetus and the child who has already been born because they both depend on their mother in a similar way. The very fact that the foetus does not exist independent of its mother does not yield a different result and special protection is needed both for the foetus, and for the mother. In this connection, special laws on abortion that exist in the member states would not be needed had the foetus had not the life that needs to be protected. It should be emphasized that an increasing number of conventions that prohibit cloning of human beings show that the protection of life must be extended to the initial phase of human life, such as, for example, the 1977 (Oviedo) Convention on Human Rights and Biomedicine.[36] This solution does not jeopardize the right to abortion that many states prescribe, moreover, the legislative solutions of some states have shown that it is possible to regulate this issue so that it is still in accordance with Article 2 of the Convention.[37] The next dilemma that imposes itself is the issue of guardianship over the child in case of divorce or termination of relations between the intended parents, considering that the majority of the legislations in which the institute of surrogate motherhood is permitted do not provide for solutions in case of occurrence of such situations. In the case *AM v. Norway*, the couple that had got the child through surrogate motherhood separated after the birth of the child. The intended father was registered as the father of the child since his biological material had been used for conception of the child. In view of the fact that the intended parents separated, the intended mother in the concrete case did not have any legal option to be registered as the mother of the child, bearing in mind that the man who had been registered as the father of the child (her ex partner) had not given her his consent for adoption of the child, or allowed her to see the child. In the concrete case the ECtHR rejected to establish violation of

[35] Case *Vo v. France,* no 53924/00.
[36] J. Pichom, "Does the unborn child have a right to life? The insufficient answer of the ECHR in the judgment Vo v. France", *Cambridge University Press*, Cambridge, 2019, 439-442.
[37] Case *Vo v. France, no 53924/00, dissenting opinion of Judge Kosta, para. 12.*

Article 8 and Article 14 of the ECHR.[38] Also, the issue of guardianship over the child is raised in case of nonexistence of the biological bond between the child and the intended parents, when neither of them is genetically related to the child, which leaves the possibility for the states to take the child away from them. This was the case in *Paradiso and Campagnelli v. Italy* as regards the decision of the Italian authorities on the removal of the child and placement of the child in an adequate social institution, and thereafter also the adoption of the child by third persons, the ECtHR concluded that violation of Article 8 of the Convention had not taken place. The Court did not even review the issue of violation of the right to private life of the child, since only the couple *Paradiso* and *Campanelli* was designated as the applicants, and not the child as well, but reviewed the issue as to whether the measures had been taken in the best interest of the child. The Court found that harmful consequences for the child do exist due to the removal of the child from the applicants, but that they are not grave or irreparable, due to a short duration of the joint life that had existed between them (six months in Italy and two months in Russia with the female applicant).[39]

In the legislations of some states commercial surrogacy is permitted, while in some others it is expressly prohibited and, therefore, there is the question of abuses of such agreements in which a pecuniary compensation is given to the surrogate mother for her services, which exceeds the amount of costs that the same would incur related to pregnancy and delivery. It is necessary to mention the definitions specified in some international conventions, such as the Hague Convention on the Protection of Children[40] and the European Convention on the Adoption of Children[41] which stipulate that the consent of the parents for adoption of children must not be procured through money or any other type of compensation. Also, the Optional Protocol on the Sale of Children expressly defines the same as any act or transaction where a child is transferred by a person or a group of persons to another for remuneration or any other consideration.[42] Such a definition could also be applied to the commercial surrogacy contracts. Certain authors emphasize that it is necessary to establish international rules and regulations with respect to the surrogacy contracts and that there are numerous advantages of this, such as: reduced possibility of exploitation of

[38] See Case *A.M. v. Norway*, no. 30254/18
[39] Case *Paradiso and Campagnelli v. Italy.*
[40] The Hague Convention on the Protection of Children and Co-operation on International Adoption, Article 4.
[41] European Convention on the Adoption of Children, Article 5.
[42] CRC Optional Protocol, 25 May 2002, Art. 2 a)

women in the developing countries, screening of potential parents in order to prohibit conclusion of contracts to those who would pose a potential threat to children, etc.[43]

7. CONCLUSION

In view of all the arguments that are specified against the decisions of the courts of the Republic of Serbia, there is a basis on which the ECtHR could establish violation of the family and private life referred to in Article 8 of the ECHR both on the part of the mother and on the part of the child. Starting from establishing whether in the concrete case the family life exists, it is first of all necessary to establish the existence of close personal relationships.[44] In certain cases the ECtHR accepts the existence of *de facto* family life between the parents and the child even in the absence of legally recognized bond if there are true personal relationships, which can be established in a short period of time, as in the case *D and Others v. Belgium*, where the court determined the existence of family life between the intended parents and the child born from surrogacy in Ukraine, although it lasted only two months.[45] In our hypothetical case, the same definitely do exist between the mother and the child. Namely, the intended mother Slavica fully accepted the minor child Aleksa as her child since he had been given to the father Marko for care and established a particularly strong maternal bond with him. The minor Aleksa has also fully accepted Slavica as his mother, who gives him the necessary maternal love so that the child could properly fully develop. The Court finds that in the concrete case these bonds had been so strong from the very beginning that the criteria of the Court established through the so far jurisprudence have indeed been met.[46] Also, although the biological bond between the parents and the child may be an important indicator of the existence of family life, the absence of the same does not necessarily mean that there is no family life. Moving on to establish the violation of the right to private life, in the so far jurisprudence, the ECtHR also accepted the right to identity as one of the bases of the right to private life.[47] The very respect for private life prescribes that everybody may establish the particulars of his/her identity. However, as opposed to the case Mennesson v. France where it had defined the right to identity as the right to biological identity, we deem that there is

[43] N. Sinanaj, *Surrogacy: Is the European Court of Human Right Pushing States to Lower their Moral Objections?*
[44] *Paradiso and Campagnelli v. Italy*. para. 141
[45] Case *D and Others v. Belgium*, no. 29176/13.
[46] *Paradiso and Campagnelli v. Italy*, dissenting opinion of judge Lazarova, *para 2-5*
[47] *Paradiso and Campagnelli v. Italy*, para 102

room to extend the definition of the right to identity so that it does not contain only the biological component, but also the wanting component. The cause and effect relationship also occurs by the decision of a person to have a child delivered, without any biological and gestational relatedness. Precisely the child was actually born on the initiative of the intended parents, and not on the initiative of the surrogate mother, who had never actually wanted him in the concrete case, except for the personal financial gain.[48] On the other hand, Article 8 of the ECHR has its origins in the belief that a person must know his/her genetic origin in order to be able to form his/her identity. However, this definition becomes obsolete with the appearance of surrogate motherhood. A person born out of surrogate motherhood, without any doubt, has special bonds with the intended parents and is entitled to find out who the persons who initiated his conception and birth are.[49] By applying thus broadened view of the right to identity to our hypothetical case, the violation could be established of the right to private life on the part of the child Aleksa. As regards the mother Slavica, her desire to establish the bond with the child Aleksa in the case where there are no biological or legally recognized bonds could be subsumed under the right to private life[50], and any refusal of the court to definitely, through a court decision, resolve this issue could be deemed to be violation of her right to private life, because in such a way the court interferes with the right of the applicant to personal development, through the development of the bond with the child, which interest should be above the national interests that prevailed when the decision to deny this bond was rendered. We are of the opinion that the institute of surrogate motherhood should be strictly and uniformly regulated at the international level, considering that the existence of different rules of the states results in the existence of a great number of cases in which it is differently decided in the same or similar situations, whereby the consistency and uniformity of the judicial practice of courts are called into question, but also the jurisprudence of the ECtHR. In view of the fact that for the codification at the international level it is necessary to make a great effort, in the absence of generally accepted solutions, the states need to take the initiative and make the first step towards this goal through their respective legislations.

[48]K. Horsey, "Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements", *Child and Family Law Quarterly, Vol. 22, No. 4*, Kent, 2010, 449-474.
CFLQ 449.
[49]A. Mulligan, 23
[50]*Paradiso and Campagnelli v. Italy, para 167*

With regard to the above specified dilemmas, we are of the opinion that considering that the surrogate mother concludes the contract by which she undertakes to carry and give birth to a child for other people, the right to terminate pregnancy should be expressly regulated by the laws of the states and the same should be permitted only in the situations where the life or health of the surrogate mother is endangered or when it can be expected that the child may be born with certain physical handicaps or mental disorders. Also, the term „foetus“ should be subsumed under Article 2 of the ECHR in order to ensure full protection of the same with respect to the surrogate mother and her right to decide on her own body, but also with respect to the intended parents who could change their decision. The life of the fetus must be preserved in cases where there is a dispute between the contracting parties and any exeptions must be strictly regulated by law. As regards the commercial surrogacy contracts, we deem that the same should be prohibited or strictly regulated in such a way that the legislations of the states would provide for a minimum or maximum amount of compensation that would be paid off in such a case. Moreover, abuses could also be prevented by stipulating a limitation on how many times a woman may be a surrogate mother. One of the positive examples is also the Draft Civil Code of the RS which contains numerous solutions with respect to the controversial issues we dealt with in this paper.[51] Namely, the same eliminates the presumption of maternity of the woman who has given birth to a child and contains clear rules on the establishment of the parent-child relationship of the intended parents, expressly regulates the issue of the right to terminate pregnancy by the surrogate mother, as well as in which cases the intended parents are entitled to request termination of pregnancy, then it regulates the issue of guardianship over the child in case of the divorce of the intended parents, and the situation when the child is born with certain disorders. What is also essential is that, according to the Draft, the surrogacy contract is subject to control by the court and enjoys legal protection. We are of the opinion that the approach contained in the Draft is adequate, considering that the contracting parties in various phases of this contract enjoy the protection by the court, which results in reducing a possibility of abuses and violation of the rights of the contracting parties.

At any rate, whatever solution the states opt for in the future, the legal system of each state must reflect keeping pace with the scientific achievements and social changes and must be ready

[51] Draft Civil Code of the RS, articles 2273 - 2281

to respond to the challenges of the modern society, particularly when the protection of the rights of children is in question, and enabling every human being to fulfil his/her wish to become a parent.

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