Modern family arrangements: developments in the EU

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This article will consider the landmark decision given by the CJEU on 14 December 2021 (*VMA v Stolichna obshtina, rayon 'Pancharevo'* C-490/20). Its impact will be considered in the context of prior and subsequent judgments given in the ECtHR as well as the domestic laws of the EU member states. It will also explore the impact of C-490/20 in the context of the relationship between the CJEU and the ECtHR, their respective spheres of influence and how they have shape one another.

The conservative approach of the ECtHR prior to 14 December 2021

Prior to the landmark decision of the CJEU on 14 December 2021, there had been a number of cases brought to the ECtHR since 2014 on the grounds that their family arrangements were not being respected. These claims were all rejected.

The cases of *Mennesson v France* and *Labassee v France*[1], heard in 2014, concerned couples who had had legal parent-child relationships established in the United States following successful surrogacy treatments but upon returning to France, could not obtain legal recognition of that relationship. In its consideration of Art 8 of the European Convention on Human Rights (right to respect for private and family life), the ECtHR determined that the family were living 'family life' in the accepted sense of the term and the children's right to identity was an integral part of private life. This notwithstanding, the Court acknowledged that the refusal of the French authorities to recognise the legal relationship stemmed from a wish to discourage French nationals from surrogacy arrangements (prohibited in France).

The Court observed that there was a wide margin of appreciation which had to be left to Convention States. Given that French domestic case law completely precluded the establishment of a legal relationship between children born from lawful surrogacy treatment abroad and their biological father, despite the contradiction of the children being legally recognised as such in the United States but not France, the Court decided that to rule against that would have overstepped the wide margin of appreciation. Accordingly, the application was dismissed.

In the case of *C and E v France*, the French authorities refused to enter in the French register of births, marriages and deaths the full details of the birth certificates of children born abroad through a surrogacy arrangement, conceived using the gametes of the intended father and a third-party donor, in so far as the birth certificates designated the intended mother as the legal mother. The ECtHR declared the applications as being manifestly ill-founded. It considered in particular that the refusal of the French authorities was not disproportionate as domestic law afforded the possibility of recognising the parent-child relationship between the children and their intended mother by means of adoption.

The facts of *D v France* were very similar. On the birth certificate of a child born following surrogacy in Ukraine, the intended mother was registered as the mother and the intended father was registered as the father. However, the French authorities refused to record in the register of births, marriages and deaths the details of the child's certificate. The ECtHR held that there had been no violation of Art 8 and that France

1 The following cases are available as downloadable PDF files only directly from the ECtHR website. The summaries of these cases are from: www.echr.coe.int/Documents/FS_Surrogacy_ENG.pdf.

had not overstepped its margin of appreciation. It accepted that the difference in treatment of which the applicants complained had an objective and reasonable justification, noting its earlier judgments in *Mennesson* and *Labassee*.

According to its case-law, the existence of a genetic link did not mean that the child's right to respect for their private life required the legal relationship with the intended father to be established by means of the recording of the details of the foreign birth certificate.

In the case of *S-H v Poland*, as recently as 16 November 2021, the parents were a same-sex couple, who in 2010 had children conceived via a surrogacy agreement. The applicants were confirmed as children of their parents by the Superior Court of California. The case concerned the children's application for Polish citizenship (one of their parents was a Polish national) and the Polish authorities' refusal to recognise their relationship with their biological father. The Court held that as the applicants had not suffered any hardship or been left in a legal vacuum as a result of the Polish authorities' decision.

The CJEU's decision on 14 December 2021 – the move to a more liberal approach

The CJEU's judgment arguably fundamentally changed the landscape of modern family arrangements recognition in the EU. The case originated from Bulgaria and was referred to the CJEU for a preliminary ruling in respect of the following:

(1) Article 4(2) of the Treaty of the European Union (TEU) (respecting the equality of Members States, their national identities, fundamental structures and essential state functions);

(2) Articles 20 and 21 of the Treaty on the Functioning of the European Union (TFEU) (Right to move and reside freely within the territory of the Member States); and

(3) Articles 7 (respect for private and family life), 24 (the rights of the child) and 45 (freedom of movement and residence) of the Charter of Fundamental Rights of the European Union.

In brief, VMA, a Bulgarian national, and KDK had resided in Spain since 2015 and were married in 2018. Their child, SDKA, was born in Spain in 2019. The child's birth certificate, drawn up by the Spanish authorities, referred to both mothers as being the parents of the child. VMA applied for a Bulgarian birth certificate for SDKA (evidencing the Spanish civil register of SDKA's Spanish birth certificate) so that she could obtain a Bulgarian identity document.

The Sofia municipality instructed VMA to provide evidence of the parentage of SDKA, with respect to the identity of her biological mother. The model birth certificate applicable in Bulgaria had only one box for the 'mother' and another for the 'father', and only one name could appear in each box.

VMA took the view that she was not required to provide the information requested, whereupon the Sofia municipality refused to issue the requested birth certificate. Furthermore, reference to two female parents on a birth certificate was contrary to Bulgarian public policy, which does not permit marriage between two persons of the same sex.

VMA brought an action against that refusal decision before the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia), who subsequently referred the matter to the CJEU.

In its judgment, the CJEU stated at [49] that the Spanish authorities had lawfully established that there was a parent-child relationship, biological or legal, between SDKA and her two parents, VMA and KDK. Therefore, the Bulgarian authorities were required, as were the authorities of any other Member State, to recognise that parent-child relationship for the purposes of permitting SDKA to exercise without

impediment her right to move and reside freely within the territory of the Member States as guaranteed in Art 21(1) TFEU.

Accordingly, the CJEU held at para [68] of their judgment that a child, being a minor, whose status as a Union citizen is not established and whose birth certificate, issued by the competent authorities of a Member State, designates as her parents two persons of the same sex, one of whom is a Union citizen, must be considered, by all Member States, a direct descendant of that Union citizen within the meaning of Directive 2004/38 for the purposes of the exercise of the rights conferred in Art 21(1) TFEU and the secondary legislation relating thereto.

The CJEU therefore interpreted the provisions referred to above as meaning that, in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged:

(i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities; and

(ii) to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States.[2]

The impact of this judgment has enormous potential. Lauded by the LGBTQ+ community as a long-overdue recognition of rights that they had fought for years to achieve, this judgment was unequivocal, clear and binding.

In this case, although Bulgaria had not legalised same sex marriage and its Family Code states at Art 60(2) that the mother of the child is the woman who gave birth to that child, including in the case of assisted reproduction, these parents were able to seek assisted reproduction in one Member State and have their child legally recognised as theirs in Bulgaria (and indeed across the EU) (with the associated EU right to move and reside freely).

This does suggest that other families may seek assisted reproduction options such as surrogacy in an EU country which permits it and, once that country has designated the intended parents as the legal parents of the child, all other Member States must not only recognise the child as the direct descendant of those parents (and therefore have the rights in Art 21(1) TFEU conferred upon them) but the parents also must be able to obtain an identity card or passport for that child without requiring a further birth certificate.

This is a major step forward for families using assisted reproduction. If families living within the EU know that their relationship to their child could now be legally recognised in this way, it may encourage more families to pursue surrogacy as an option. This may, for example, have provided a successful alternative to the couple in *S-H v Poland* had their case arisen following 14 December 2021.

Furthermore, as a CJEU decision, it is immediately binding upon all EU Member States. This begs the question what change, if any, it could spark in its previously more conservative cousin (at least in this sphere), the ECtHR.

Has the ECtHR followed this liberal trend?

In the case of *DB and Others v Switzerland*[3] (judgment given on 22 November 2022), a same-sex couple who were registered partners had entered into a gestational surrogacy contract in the United States. The

2 At para [69].

3 The following cases are available as downloadable PDF files only directly from the ECtHR website. The summaries of these cases are from: www.echr.coe.int/Documents/FS_Surrogacy_ENG.pdf.

Swiss authorities had recognised the parent child relationship between the genetic father and the child. However, the applicants complained in particular that the Swiss authorities had refused to recognise the parent child relationship established by a US court between the intended father and the child.

The Court held that there had been a violation of Art 8 of the Convention in respect of the applicant child (although no violation of Art 8 in respect of the intended father and the genetic father). Regarding the child, it noted in particular that, at the time he was born, domestic law had afforded the applicants no possibility of recognition of the parent-child relationship between the intended parent and the child.

Not until 1 January 2018 had it become possible to adopt the child of a registered partner. Thus, for nearly seven years and eight months, the applicants had had no possibility of securing definitive recognition of the parent child relationship. The Court therefore held that for the Swiss authorities to withhold recognition had not been in the best interests of the child and an overstep of their margin of appreciation by not making timely legislative provision for this possibility.

In the cases which predate 14 December 2021, especially *Mennesson* and *Labassee*, with very similar facts, the ECtHR chose not to encroach upon the State's wide margin of appreciation. In all these cases, surrogacy arrangements were contrary to those countries' public policy and the parties were experiencing practical difficulties with their family life as a consequence.

What appears to have been the swaying factor in *DB and Others* is that, without this ruling, the parents had no definitive recognition of the parent-child relationship. However, the facts of this case did not suggest that the intended parents and the child were not living 'family life' together and thus this decision was essential in a way in which *Mennesson* and *Labassee* perhaps may not have been (given that the ECtHR held in those cases that the children were being cared for by the applicants in a way that was indistinguishable from 'family life' in the accepted sense of the term).

The case of *KK and Others v Denmark*, with judgment given by the ECtHR on 6 December 2022, signalled further progress from *DB and Others*. This case concerned the refusal to allow the first applicant to adopt the two other applicants, who were twins, as a 'stepmother' in Denmark. The twins were born to a surrogate mother in Ukraine who had been paid for her service. Under Danish law, adoption was not permitted in cases where payment had been made to the person consenting to the adoption.

The Court held that there had been no violation of Art 8 as there had been no damage to the family life of the applicants, who lived together with the children's father without issue. It also held that there had been no violation of Art 8 regarding mother's right to respect for her private life as the domestic authorities had been correct to protect the public interest in controlling paid surrogacy.

However, crucially, the Court held that there had been a violation of Art 8 in respect of the two applicant children, finding that the Danish authorities had failed to strike a balance between the children's interests and the societal interests in limiting the negative effects of commercial surrogacy.

This is significant. Previous decisions such as *D v France* (as recently as 16 July 2020) had held that the existence of a genetic link did not mean that the difference in treatment of which the applicants complained with regard to the means of recognition of the legal relationship between such children and their genetic mother had an objective and reasonable justification.

Although a small shift, it is a shift nonetheless. Whilst EU Member States may restrict commercial (or altruistic) surrogacy, this decision provides an important precedent that a better balance must be struck for the sake of the best interests of the child. That balance could now arguably

be more in favour of recognising the child's relationship with their intended parents in law as seen above. Danish and Swiss law will be under the microscope to ensure compatibility with the ECtHR's fresh reading of the Convention going forward.

It will be interesting to see whether the Swiss and Danish governments change their laws to be compatible with these (more liberal) decisions or whether they will use these respective judgments as precedents in identical facts cases to prevent a violation but no further (more conservative).

It is also important to note that *DB and Others* and *KK and Others*, like *D v France*, considers the impact of non-EU surrogacy arrangements on those who live within the EU. The US and Ukraine (before the current war) are two of the most popular countries for foreigners seeking surrogacy arrangements. Commercial surrogacy is legalised in both countries and the intended parents may be recognised as the legal parents of the child from birth.

The case of *CE and Others v France*[4] (judgment given on 24 March 2022) is also worth noting. CE and CB were living together as a couple. CB gave birth to M.B., who had been conceived 'with the help of a friend and donor in France'. CB was the child's sole legal parent. The couple separated in 2006. Under an agreement reached with CB, CE had contact rights with the child. In 2015 CE applied to the tribunal de grande instance for a full adoption order in respect of M.B. while retaining the legal relationship between the child and CB The court rejected the application, and the appeals lodged by CE were dismissed.

In the second application, AE entered into a civil partnership with KG in 2006. After having recourse to assisted reproductive technology ('ART') abroad, KG gave birth to TG. In 2010 the tribunal de grande instance allowed a request by KG to exercise joint parental responsibility with AE In 2011 AE gave birth to a child. In 2012 the same court ordered the delegation of parental responsibility on a shared basis between AE and KG. AE and KG separated and the civil partnership was dissolved. In 2018 the tribunal de grande instance refused a request by AE for a document attesting to a matter of common knowledge on the basis of de facto enjoyment of status (possession d'état) with regard to TG.

Prior to the applicants' applications to the Court, French law had made no provision for a legal parent-child relationship to be established between a minor and the former partner of his or her biological mother without the latter's legal status being affected. Neither could the individuals concerned have recourse to full or simple adoption.

In both cases the complaint concerned alleged shortcomings in the French legislation which, according to the applicants, refused their requests and violated Art 8. However, the ECtHR held that the persons concerned had led a family life comparable to that led by most families after the parents separated. Furthermore, the applicants made no mention of any difficulties in conducting their family life.

The ECtHR held that there existed legal instruments in France enabling the relationship between a child and an adult to be recognised. For instance, the child's biological mother could obtain a court order for the exercise of joint parental responsibility with her partner or former partner. It would entail the establishment of a legal parent-child relationship but nevertheless allowed the former partner to exercise certain rights and duties associated with parenthood.

Further, since the publication of the Bioethics Act of 2 August 2021, female couples who had had recourse to ART abroad before 4 August 2021 had the possibility, for a three-year period, of jointly recognising a child who had a legal

4 Full judgment in the original French: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–216706%22]}.
4 Case summary here: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002–13654%22]}.

parent-child relationship only with the woman who had given birth; this had the effect of establishing a legal relationship with the other woman. The couple's possible subsequent separation had no implications for the application of this mechanism.

The ECtHR held that there had been no violations of the ECHR. The key theme from this case is that the ECtHR has not turned its back on its conservative fundamentals.

In the case of *CE and Others v France*, given that there were alternative legal options available which would give the same (or similar enough) practical outcome that the applicants desired, the ECtHR did not push France's margin of appreciation further as the applicants' (especially the children's) private and family lives had been shown effective respect.

Impact on the domestic law of EU Member States

Despite the binding judgment of the CJEU and subsequent ECtHR case law, the laws of EU Member States in respect of evolving family arrangements remain broadly conservative.

In Poland, there are no clear laws regulating surrogacy. It is a banned practice. The legal mother of the child is always the woman who gave birth (under their Family Code). As reflected in *S-H v Poland*, Poland continues to maintain a conservative approach towards surrogacy and other modern family arrangements.

Indeed, on 13 December 2022, it was reported (and confirmed by Deputy Justice Minister Sebastian Kaleta) that Poland was likely to veto the new European Commission proposals on this issue. According to Mr Kaleta, the plans would make 'the rights of western Europe binding in Poland' which would not happen under the current government. Kaleta further stated that this law could open the way to further regulations of family law such as recognising same-sex marriages to which he was opposed.[5]

In France, the French Court of Cassation held in 1991 that if any couple makes an agreement or arranges with another person that she is to bear the husband's child and willingly surrender it on birth to the couple, the couple making such an agreement is not allowed to adopt the child. In its judgment the court held that such an agreement is illegal on the basis of Arts 6, 353 and 1128 of the Code Civil. Since 1994, any surrogacy arrangement that is commercial or altruistic is illegal or unlawful (art 16–7 of the Code Civil). This has not changed, nor is there any indication that this will change.

In Switzerland, the law is similarly prohibitive. Surrogacy is regulated in the 'Bundesgesetz über die medizinisch unterstützte Fortpflanzung (Fortpflanzungsmedizingesetz, FMedG) vom 18. Dezember 1998' and illegal in Switzerland. Article 4 forbids surrogacy and Art 31 regulates the punishment of clinicians who apply in vitro fertilisation for surrogacy or persons who arrange surrogacy. That said, on 24 August 2014, the Administrative Court of the Canton of St. Gallen granted parentship to two men of a child born in the USA, indicating that things may change slightly in the future.

Denmark has one of the highest rates of IVF in the world (8–10% of all babies born in the country)[6] and was the first country in the world to authorise civil partnerships between same-sex couples (in 1989). However, like the UK, Denmark only permits altruistic surrogacy (commercial surrogacy is banned). Therefore, prospective parents are more likely to seek a surrogate in countries like the US and Ukraine, where commercial surrogacy is permitted. However, the situation remains challenging

5 'Poland to veto EU proposal to harmonise surrogacy and LGBT families' (cne.news) (https://cne.news/article/2201-poland-to-veto-eu-proposal-to-harmonise-surrogacy-and-lgbt-families).

6 www.fertilityclinicsabroad.com/ivf-abroad/ivf-denmark/#:~:text=Denmark%20is%20regarded%20as%20being,proportional%20rate%20of%20any%20country.

as, under Danish law, commercial international surrogacy arrangements are prohibited. Furthermore, only the genetic father and the surrogate are recognised as the legal parents of the child if the parents are not declared as the legal parents of the child in the country they were born in and registered properly there.

Conclusion

Navigating modern family arrangements within the EU remains complex. The judgment of 14 December 2021 was a defining moment for many LGBTQ+ couples for their legal parentage of their children and it has impacted the ECtHR's decisions, within the one year following. However, its impact currently is more of a door opened ajar rather than flinging it wide open for change.

The domestic laws of the EU Member States largely remain conservative and their governments do not currently indicate that they will be changed. Even if the European Commission's proposal is passed, its impact could be limited by countries such as Poland vetoing it.

Nonetheless, it remains significant that families may now seek assisted reproduction options such as surrogacy in an EU country which permits it and, once that country has designated the intended parents as the legal parents of the resultant child, all other Member States must not only recognise the child as the direct descendant of those parents (and therefore have the rights in Art 21(1) TFEU conferred upon them) but the parents also must be able to obtain an identity card or passport for that child without requiring a further birth certificate. Although there may still be some legal difficulties for the parents in respect of that country's domestic laws, this reflects a seismic shift.

Consideration of the ECtHR and CJEU case law of the past 10 years does indicate a shift towards a more liberal approach. Prior to 14 December 2021, no applications of this nature had succeeded in the ECtHR. After the CJEU's decision, there have been two positive judgments and the European Commission has made a proposal. Changes in society are likely to continue to drive this change in direction.