

Legal parentage of children born of a surrogate mother: what about the intended mother?

On October 5th, The *Cour de Cassation*, the highest court in France for private law matters, requested an advisory opinion of the ECtHR (Ass. plén. 5 octobre 2018, n°10-19053). It is the first time a Contracting State applies to the ECtHR for an advisory opinion on the basis of Protocol n° 16 which entered into force on August 1st, 2018. The request relates to the legal parentage of children born to a surrogate mother. More specifically, it concerns the intended mother's legal relationship with the child.

The *Mennesson* case is again under the spotlight, after 18 years of judicial proceedings. Previous developments will be briefly recalled, before the Advisory opinion request is summarized.

Previous developments in the *Mennesson* case:

A French couple, Mr and Mrs Mennesson, went to California to conclude a surrogacy agreement. Thanks to the surrogate mother, twins were born in 2000. They were conceived with genetic material from the intended father and eggs from a friend of the couple. The Californian Supreme Court issued a judgment referring to the couple as genetic father and legal mother of the children. Birth certificates were issued and the couple asked for their transcription into the French civil status register.

French authorities refused the transcription, arguing that it would be contrary to public policy. Surrogate motherhood, in particular, is forbidden under article 16-7 of the Civil Code. Such agreements are then considered void and resulting foreign birth certificates establishing parentage are considered contrary to public policy (Cass. Civ. 1^{ère}, 6 avril 2011, n°10-19053).

As a last resort, The Mennesson family brought a claim before the ECtHR. They claimed that the refusal to transcribe the birth certificate violated their right to respect for private and family life. While the Court considered that the parent's

right to family life was not infringed, it ruled that the refusal to transcribe the birth certificates violated the children's right to identity and was not in their best interest. As a consequence, it ruled that the refusal to establish the legal parentage of the intended parents was a violation of the children's right to private life, particularly so if the intended father was also the biological father.

After the ECtHR ruling: the French landscape

After the ECtHR ruling, the *Cour de Cassation* softened its position. In 2015, sitting in *Assemblée plénière*, it ruled that the mere fact that a child was born of a surrogate mother did not in itself justify the refusal to transcribe the birth certificate, as long as that certificate was neither unlawful nor forged, nor did it contain facts that did not correspond to reality (Ass. plén., 3 juillet 2015, n° 14-21323 et n°15-50002).

As a consequence, the Court only accepted the transcription of foreign birth certificate when the intended father is also the biological father. When it came to the other intended parent, the *Cour de Cassation* refused the transcription. By so doing, the *Cour de Cassation* reiterates its commitment to the *Mater semper certa* principle as the sole basis of its conception of motherhood. Meanwhile, in 2017, the *Cour de Cassation* signalled that the genetic father's spouse could adopt the child if all the requirements for adoption were met and if it was in the best interest of the child (Cass. Civ. 1ère, 5 juillet, 2017, n°15-28597, n°16-16455, and n°16-16901 ; 16-50025 and the press release)

However, the Mennessons' fight was not over yet. Although according to the latest decisions, it looked like both Mr and Mrs Mennesson could finally establish their kinship with the twins, they still had to overcome procedural obstacles. As the *Cour de Cassation* had refused the transcription in its 2011 judgment which had become final, the parents were barred from applying for it again. As pointed out by the ECtHR in the *Foulon and Bouvet v. France* case (21/07/2016, Application n°9063/14 and 10410/14), French authorities failed to provide an avenue for the parties involved in cases adjudicated before 2014 to have them re-examined in the light of the subsequent changes in the law. Thus, France was again held to be in violation of its obligations under the Convention. (See also *Laborie v. France*, 19/01/2017, Application n°44024/13).

In 2016, the legislator adopted a new procedure to allow for the review of final

decisions in matter of personal status in cases where the ECtHR had ruled that a violation of the ECHR had occurred. The review is possible when it appears that the consequences of the violation of the Convention are serious and that the just satisfaction awarded on the basis of article 41 ECHR cannot put an end to the violation (see articles L.452-1 to L.452-6 of the *Code de l'organisation judiciaire*).

Current situation:

Taking advantage of this new procedure, the Mennesson family asked for a review of their situation. They claimed that the refusal to transcribe the birth certificates was contrary to the best interest of the children. They also argued that, as it obstructed the establishment of parentage, it amounted to a violation of article 8 ECHR. Moreover, they argued that the refusal to transcribe the birth certificates on the ground that the children were born of a surrogate mother was discriminatory and infringed article 14 ECHR.

Sitting again in *Assemblée plénière*, the *Cour de Cassation* summarized its previous case law. It concluded that while the issue of the transcription of the father biological parentage is settled, the answer is less certain regarding the intended mother. The Court wondered if its refusal to transcribe the birth certificate as far as the intended mother is concerned is consistent with the State margin of appreciation under article 8. It also wondered whether it should distinguish between cases where the child is conceived with the genetic material of the intended mother and cases where it is not. Finally, it raised the issue of whether its approach of allowing the intended mother to adopt her husband's biological child was compatible with article 8 ECHR.

After pointing out the uncertain compatibility of its reasoning with ECtHR case law, the Court chose to request an advisory opinion from the ECtHR. Protocol 16 allows Contracting States to apply to the ECtHR for its advisory opinion "on questions of principles relating to the interpretation or application of the rights and freedom defined in the Convention or the protocols thereto" (Protocol 16 art.1).

Thus, the *Cour de Cassation* asked the ECtHR the two following questions:

- By refusing to transcribe into civil status registers the birth certificate of a child born abroad from a surrogate mother inasmuch as it refers to the intended mother as the "legal mother", while the transcription has been

accepted when the intended father is the biological father of the child, does a State Party exceed its margin of appreciation under article 8 ECHR? In this respect, is it necessary to distinguish between whether or not the child is conceived with the gametes of the intended mother?

- If the answer to one of the two preceding questions is in the affirmative, does the possibility for the intended mother to adopt her husband's biological child, which constitutes a mean of establishing parentage open to her, comply with the requirements of article 8 of the Convention?

As the *Cour de Cassation* indicates on the press release accompanying the request of an advisory opinion, it seized the opportunity of initiating a judicial dialogue between national jurisdictions and the ECtHR. However, it looks more like a sign of caution on the part of the French court, in a particularly sensitive case. Depending on the answer it receives, the *Cour de Cassation* will adapt its case law.

Although Protocol n°16 does not refer to a specific deadline, the Explanatory report indicates that it would be appropriate for the ECtHR to give high priority to advisory opinion proceedings.

Thus, it looks like the Mennesson saga will be continued soon...