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Surrogacy: general interest can prevail upon the desire to become parents –about the *Paradiso and Campanelli v. Italy* Grand Chamber judgment of 24th January 2017

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The Grand Chamber judgment of 24th January 2017, in the case *Paradiso and Campanelli v. Italy*, returns to the sensitive subject of the conformity of the permanent removal of a child who was born abroad through surrogacy, in violation of the domestic law, with the respect of private and family life.

ECHR, GC, 24 Jan. 2017, Application no. 25358/12, *Paradiso and Campanelli v. Italy*

On the 24th January 2017, the Grand Chamber of the European Court of Human Rights (ECHR) published, in the *Paradiso and Campanelli v. Italy* case, a judgment overruling that of a chamber of the second section on the 27th January 2015¹.

This case concerned an Italian couple who had contacted a Russian surrogacy clinic. It found gamete donors and a surrogate mother, then delivered the child with a birth certificate indicating the applicants were the parents, for a total of 50.000 euros. The applicants had taken the child back to Italy and demanded the registration of the birth certificate. The DNA test ordered by the Court had shown that the applicant was not the biological father of the child.

The Italian authorities, noting that the applicants had not only violated the Italian law – prohibiting heterologous assisted reproductive technology (ART) and surrogacy – but also the rules relating to international adoption, had withdrawn the child from their custody. His real parents being unknown, the child was considered in a state of abandonment for the purposes of the law, *ie* deprived of all support from his parents or members of his family. He had then been placed in a foster home and then placed in a family with a view to his adoption.

Before the ECHR, the applicants invoked the violation of their and the child's right to respect for private and family life, guaranteed by Article 8 of the Convention. In its judgment of 27th January 2015, the Court declared the complaint raised by the applicants on behalf of the child inadmissible, for they could not represent him. Yet it had admitted there had existed a *de facto* family life, taking into account the fact that the applicants had lived in Italy with the child for six months, and that they had "acted as parents" towards the child. The Court had found a violation of the right to private and family life because of the irreversible removal of the child. This judgment had strongly been criticised by two dissenting judges and by the legal doctrine.

¹ ECHR, 2nd Section, 27 Jan. 2015, Application no. [25358/12](#), *Paradiso and Campanelli v. Italy*; Grégor Puppink and Claire de La Hougue, "La CEDH entérine une "vente d'enfant par GPA"", RLDC 2015/126, no. 5841

The judgment of the Second Section consecrated the *fait accompli*: the Court recognized the existence of a *de facto* family life, as soon as it was wished and that a cohabitation, even succinct, was established, whatever the circumstances at the origin of said cohabitation. As underlined by Frédéric Sudre, this judgment “amounts, more or less, to place the State which prohibits surrogacy within its territory under an obligation to recognise the existence of a ‘family life’ derived from surrogacy practiced abroad”². The Court was dismantling the authorities facing child trafficking. Finally, as was outlined by judges Raimondi and Spano in their dissenting opinion, it amounted to denying the legitimacy of the State’s choice not to recognise gestational surrogacy. This would have led to the systematic condemnation of refusals to register illegally created abroad *de facto* situations³.

The request by the Italian government that the case be referred to the Grand Chamber was accepted on 1st June 2015. Before the Grand Chamber, the applicants maintained their initial position, denouncing the violation of their private and family life due to the refusal of Italian authorities to register the Russian birth certificate of the child and the removal of the child from their home, to be placed for adoption by another couple.

The Grand Chamber noted the Chamber’s decision to declare the complaint concerning the refusal to register the child’s Russian birth certificate in Italy inadmissible, for non-exhaustion of domestic remedies. It also judged that the applicants did not have the standing to act before the Court on behalf of the child and dismissed the complaints raised on his behalf as being incompatible *ratione personae* with the provisions of the Convention. From then, in accordance to its constant case-law, it concluded that these questions, already declared inadmissible, fell outside the scope of the examination by the Grand Chamber.

The Court focuses on the applicability of Article 8 of the Convention guaranteeing the right to respect for private and family life, and on the conformity of the removal of the child to this provision. While the case-law had led to an apparently endless extension of the ambit of the right to family life, the Grand Chamber is more nuanced in this judgment, taking into account the circumstances (I). The other noteworthy outcome of this judgment is, while the question of surrogacy is not directly discussed, the opening of a debate on this subject through the examination of the arguments of the government (II).

I – DEBATE ON THE SCOPE OF ARTICLE 8

According to the case-law of the Court, the notion of “‘private life’ incorporates the right to respect for both the decisions to become and not to become a parent”⁴, but also “the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose”⁵. It considers that access to medically assisted procreation techniques, whether legal⁶ or illegal⁷, falls under the scope of Article 8 of the European Convention on Human Rights, as “an expression of private and family life”⁸.

For the Court, family life aims at preserving a family unit which already exists, it presupposes the existence of a family, which is what is debated upon in this case. The right to family life does not safeguard the mere desire to found a family.⁹ The existence of a family life is essentially a question of fact.

The right to respect for private life covers many areas. Here it is the applicant’s “right to personal development through their relationship with the child” (§ 198) and identity, which includes the question of the paternity of the applicant (§ 163). However, the domestic proceeding did not concern the issue of the paternity of the applicant, even if the DNA test proving that, contrary to what he asserted, he was not the biological father of the child was ordered by the Court during these proceedings.

² F. Sudre, “La GPA, non mais...”, *JCP G* 2015, n° 7, 194, free translation

³ J.-P Marguénaud, “L’exagération du droit au respect de la vie familiale des parents d’intention de l’enfant né à l’étranger d’une gestation pour autrui”, *RTD civil* 2015, p. 325

⁴ ECHR, GC, 27 Aug. 2015, application no. 46470/11, *Parrillo v. Italy*, § 153

⁵ ECHR, GC, 3 Nov. 2011, application no. 57813/00, *S.H. v. Austria*, § 82

⁶ ECHR, GC, 4 Dec. 2007, application no. [44362/04](#), *Dikson v. The United-Kingdom*, § 66

⁷ ECHR, 3 Nov. 2011, application no. 57813/00, *S.H. v. Austria*, § 82, op. cit.

⁸ ECHR, 3 Nov. 2011, application no. 57813/00, *S.H. v. Austria*, § 82, op. cit.

⁹ ECHR, GC, 24 Jan. 2017, Application no. 25358/12, *Paradiso and Campanelli v. Italy*, § 141, op. cit.

A –“Family life”: a more restrictive definition

Even if family life is less extensive than private life, recent case-law had widened its outlines to the point of draining it from its substance.¹⁰ The Second Section had continued on that path, but the Grand Chamber curtails this careless development.

1• *extensive interpretation of family life by the Chamber judgment*

The Chamber of the Second Section, by five votes to two, concluded that there had existed a *de facto* family life within the meaning of Article 8 of the European Convention on Human Rights, because the applicants had shared with the child the first important stages of his young life, and that they had acted as parents towards the child. This appreciation was based on several precedents, in which the Court had recognised a *de facto* family life between an adult or adults and a child in the absence of biological ties or a recognised legal tie, provided that there were “genuine personal ties”.¹¹ The Court had thus found that there existed family life between the foster parents and a child who had lived with them for nineteen and forty-six months respectively.¹²

In this case, the shortness of the cohabitation was not an impediment, for the Court had already admitted the existence of an “*intended family life*”.¹³

Likewise, the illegality at the origin of the family life is not in itself insurmountable, the Court having admitted and protected the family life between an adult and the child illegally adopted ten years prior.¹⁴ Hence, the absence of biological and legal link was not an obstacle to the recognition of a family life, provided that there are “*genuine personal ties*”.¹⁵

Once the applicability of Article 8 was established, the Chamber admitted that the national court could reasonably conclude to the “*state of abandonment*” of the child, and that the impugned measures had been taken under the provisions of the law and aimed at the protection and defence of order, more precisely at the respect of the rules on international adoption and on medically assisted reproduction. Yet it considered that such an extreme measure as the removal of a child from the family setting was not justified in this case, the applicants having had a positive evaluation by the social services. The Chamber also judged that the respect of public interest did not justify the impugned measure either.

The Court hence concluded that there had been a violation of the private and family life of the couple who, under the pretext of the best interest of the child, drew a right from a situation they illegally created.

2• *Grand Chamber: family life cannot be just subjective*

After the usual reminder of the absence of a right to become a parent and of a right to adopt, the Court concluded, by eleven votes to six, that the existence of a parental project as well as the quality and strength of the emotional bonds of the applicants, who “*assumed their role as parents vis-à-vis the child*”,¹⁶ did not meet the conditions enabling it to conclude that there existed a *de facto* family life within the meaning of the Convention, in the light of the lack of any biological link between the child and the intended parents, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective (§ 157).

This conclusion clearly restricts the extent of the notion of *family life* compared to the precedents of the Court. Throughout its reasoning, the Grand Chamber specifies its motives.

As for the legal ties between the applicants and the child, the Court notes the existence of a doubt as regards the conformity of the birth certificate with the Russian law, and then judges that the parental

¹⁰ G. Puppink, “L’affaire *Vallianatos et autres c/ Grèce* et la dilution progressive de la notion de vie familiale”, *RLDC* 2014/111, no. 5289

¹¹ ECHR, GC, 24 Jan. 2017, Application no. 25358/12, *Paradiso and Campanelli v. Italy*, § 148, op. cit.

¹² ECHR, 27 April 2010, *Moretti and Benedetti v. Italy*, no. 16318/07, § 48; ECHR, 17 Jan. 2012, *Kopf and Liberda v. Austria*, no. 1598/06, § 37

¹³ ECHR, 8 July 2014, dec. no. [29176/13](#), *D. and Others v. Belgium*, § 49

¹⁴ ECHR, 28 June 2007, appl. 76240/01, *Wagner and J. M. W. L. v. Luxembourg*.

¹⁵ ECHR, GC, 24 Jan. 2017, Application no. 25358/12, *Paradiso and Campanelli v. Italy*, § 148, op. cit.

¹⁶ *Ib.* § 151

authority of the applicants on the child was uncertain as it was in conflict with national and international law. As for the duration of the relationship with the child, the Court noted its short duration and specifies that such a factor is “*a key factor in the Court’s recognition of the existence of a family life*” (§ 153). The Grand Chamber thus estimates that the conditions leading to conclude that family life existed *de facto* were not met and concluded that there was no family life.

3° Concurring opinion of four judges: family life is an objective reality

Contrary to the five minority judges who in their dissenting opinion held the will of the adults as the decisive criterion of the existence of a family life, judges de Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov published a concurring opinion reaffirming the original and objective sense of family, that they deem has become “*both too vague and too broad*” (§ 2). Taking the opposing view to the voluntarist and extensive conception of family, they declare in the light of international law that “*emotional bonds per se cannot create family life*” (§ 2) and that “*a family is to be understood a natural and fundamental group unit of society, founded primarily by the marriage between a man and a woman*” (§ 3). Hence the notion of family within the scope of the Convention “*is based primarily on interpersonal relationships formalised in law as well as relationships of biological kinship*” (§ 3). So the Convention cannot be interpreted as requiring the States to extend the protection of Article 8 to other interpersonal relationships.

These four judges also underline that the existence of a parental project shall not be credited to the benefit of the applicants, for it is in reality an aggravating circumstance: they deliberately acted with premeditation in order to circumvent domestic and international legislations as regards medically assisted reproduction techniques and adoption. This rejection on principle of the parental project as a criterion for family life testifies of the permanence within the Court of a realistic conception of law: the family ties, with the legal consequences resulting from them, cannot stem only from the subjective will of adults, with the insecurity that it creates especially in case of a change of project, but from a situation legally recognised, like marriage, birth or legal adoption.

B – “Private life”: the general interest takes precedence over the desire to become parents

1° private life, an extensive content

The European Court of Human Rights considers that the emotional bonds between an adult and a child outside the classical situations of parenthood come under the life and social identity of individuals, and may hence enter the ambit of private life, even in the absence of a biological or legal link.¹⁷

In the commented judgment, the Court notes that “*the applicants had a genuine intention to become parents*”¹⁸ and deduced that what is at issue is the right to respect for the applicants’ decision to become parents, as well as their right to “*personal development*”. It furthermore considers that the paternity test “*had an impact*” on the second applicant’s identity and on the relationship between him and his wife, and thus affected his private life. On this, the Court ruled that the facts of the case fall within the scope of the applicants’ private life.

While Judge Raimondi agreed with the conclusions reached by the Grand Chamber, after he hesitated in 2015, the four concurring judges also criticise this point. According to them, the “*application of Article 8 requires a careful definition of that provision’s scope of application*” (§ 2). Indeed, Article 8 “*is not intended to protect against any acts which affect a person, but against specific types of acts which amount to an interference within the meaning of this provision. In order to establish the existence of an interference with a right, it is necessary to establish first the content of the right and the types of interference it protects against*” (§ 5). Moreover, it is not enough that the applicants were *affected* by a decision to submit whole the facts of the case to the Court: the “*Court is required to assess not the compatibility of the facts of the case with the Convention, but rather the compatibility with the*

¹⁷ ECHR, *X. v. Switzerland*, no. [8257/78](#), Commission decision of 10 July 1978

¹⁸ ECHR, GC, 24 Jan. 2017, Application no. 25358/12, *Paradiso and Campanelli v. Italy*, § 163, op. cit.

Convention of the specific interference complained of, (§ 5). The four judges wish the Court to be stricter in its method.¹⁹

2• A legitimate interference in light of the importance of the public interests at stake

The Court confirms that this interference lies on a legal basis allowing to conclude to the state of abandonment of the child. On the contrary, the dissenting judges, having the respect of feelings prevail on that of legality, concentrate their criticism on that aspect, considering, against the Grand Chamber and the Chamber, that the Italian courts should not have declared the child in a state of abandonment, as he lived with the applicants. To rule that way, the Court should have behaved as a fourth instance.

The Grand Chamber then judges that the measures adopted towards the child aimed not only at the prevention of disorder, namely the respect of laws, but also the protection of the rights and freedoms of the child, through the protection of the State's exclusive competence to recognise legal parentage in the case of a biological tie or lawful adoption.

The five dissenting judges contest these general interests, considering them mere "*abstract and general considerations*", "*purely legal grounds*" which should yield against the concrete reality of family life which is "*essentially a question of fact depending upon the real existence in practice of close personal ties*" (§ 3). They fear that the Court may make a distinction between a legitimate and a natural family. Yet it is neither a legitimate family, for the child is not born in wedlock and has not been adopted, nor a natural family, for there is no biological connection.

What remained to be determined was whether these measures were necessary in a democratic society. In this case, the Court reckoned that the facts covered ethically sensitive issues, conferring a wide margin of appreciation on Italy.

Recalling that only the respect for the applicants' private life was affected by the disputed measure, it was on the basis of respect for "*their right to personal development through their relationship with the child*"²⁰ and not from the perspective of preserving a family unit that the Court judged the motives relied on by the Italian authorities. Here the consequences of the alternative private life / family life appear.

As to determining whether the motives were proportionate, the Court reckons that the Italian authorities were seeking to protect very weighty public interests (§ 204) and dissuade their nationals to resort, abroad, to highly sensitive ethical practices (§ 203).

As to the interests of the child and of the applicants, the Court reckoned they were of less importance. As to the child, it took into account the lack of biological connection, his young age and the short duration of the cohabitation to conclude that the trauma caused by the separation would not be irreparable. As to the applicants' interest in continuing their relationship with the child, the Court assessed it through the prism of the interest of the child, contrary to the *Menesson v. France* case, where the interest of the children had not been taken into account in the evaluation of the right of the adults.²¹ Yet the Court reminds at this stage that the child is neither an applicant nor a member of the family of the applicants within the meaning of the European Convention on Human Rights. In no way does this lessen the necessary consideration of his interest, but it changes the centre of gravity of the analysis. Had the child been a member of the family, even only *de facto*, then motives of utmost gravity would have been necessary to justify his being separated from his family. The absence of such family life, notably resulting from the behaviour of the applicants, allows the Grand Chamber to estimate that the national jurisdictions were not obliged to give priority to the preservation of the relationship between the applicants and the child and that "*rather, they had to make a difficult choice between allowing the applicants to continue their relationship with the child, thereby legalising the unlawful situation created by them as a fait accompli, or taking measures with a view to providing the child with a family in accordance with the legislation on adoption*".²²

The majority of the Court then agreed with the Italian authorities and admitted that the general interest takes precedence over the interests of the applicants, for "*agreeing to let the child stay with the applicants (...) would have been tantamount to legalising the situation created by them in breach of*

¹⁹ see for instance ECHR, 19 July 2012, application 497/09, *Koch v. Germany*

²⁰ ECHR, GC, 24 Jan. 2017, Application no. 25358/12, *Paradiso and Campanelli v. Italy*, § 198, op. cit.

²¹ ECHR, 26 June 2014, application no. 65192/11, *Menesson v. France*

²² ECHR, GC, 24 Jan. 2017, Application no. 25358/12, *Paradiso and Campanelli v. Italy*, § 209, op. cit.

important rules of Italian law” (§ 215), namely bow to the *fait accompli*. As for the child, he did not suffer grave or irreparable harm from the separation. From then, the Court can conclude that the authorities have managed a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them.

Finally, several factors appear to have been determining in this case: first the illegality in which the applicants put themselves, which contributed to preclude the existence of a family life and strongly supported the legitimacy of the contested measures; then the absence of biological connection, which distinguishes this case from the series of French cases;²³ and finally the shortness of the relationship.

Besides, the reactivity of the Italian authorities was to their advantage, by limiting the length of the cohabitation and excusing, because of the emergency, the lesser consideration given to the interest of the applicants to keep the child. Thanks to the swiftness and radicalism of the measure, the Italian authorities showed their determination to refuse such a practise, determination that was also shown through the request for referral of the case to the Grand Chamber.

II – THIS CASE PROVES THERE IS A DEBATE WITHIN THE COURT ON THE COMPATIBILITY OF SURROGACY WITH THE HUMAN RIGHTS

A – The beginning of a moral consideration of surrogacy

While the Chamber judgment believed it had to ignore the moral considerations at the origin of the decision of the Italian authorities, these considerations have, on the contrary, been central for the Grand Chamber, which has to be underlined compared to the former case-law.

In the Chamber judgment of the case *S. H. v. Austria*, the Court had already explained about heterologous forms of medically assisted procreation that: “*concerns based on moral considerations or on social acceptability are not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique*”.²⁴ It then also stated that States should not be reluctant to allowing new types of “*unusual family relations*” which “*do not follow the typical parent-child relationship based on a direct biological link*” and that have “*the purpose of supplementing or replacing biological family relations*” (§ 81). The Grand Chamber had then been more moderate in the same case, when it indicated that these moral considerations, while insufficient, “*must be taken seriously*”.²⁵

In the *Menesson v. France* case, the Court had also refrained from questioning surrogacy, only admitting that governments may make a “*decision on ethical grounds*”²⁶ according to their “*perception of the issue*” (§ 62).

In the present case, the judgment of 27 January 2015 had also reduced the role of morals, underlining that the reference to public order could not be considered as “*giving carte blanche for any measure*”²⁷ The Chamber explained that its reasoning was “*irrespective of any ethical considerations*”.²⁸ On the contrary, the Grand Chamber gives a central place to public interests: it recognises as “*complex and sensitive*” the question of the relationship between intended parents and a child born abroad as a result of commercial surrogacy arrangements and using gametes from donors; moreover, it integrates within its appreciation and recognises as legitimate the will of a State to discourage its nationals from having recourse abroad to such practices (even legal abroad) which are forbidden on its own territory and which it regards as highly problematic from an ethical point of view.²⁹ There is thus a great difference with the *Menesson v. France* case, in which the Court could only “*accept that France may wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory*”.³⁰

²³ ECHR, *Menesson v. France*, op. cit.; 19 Jan. 2017, application 44024/13, *Laborie v. France*

²⁴ ECHR, 1st Section, 1st April 2010, application 57813/00, *S. H. v. Austria*, § 74, op. cit.

²⁵ ECHR, GC, 3 Nov. 2011, application 57813/00, *S. H. v. Austria*, § 100, op. cit.

²⁶ ECHR, 26 June 2014, application 65192/11, *Menesson v. France*, § 83, op. cit.

²⁷ ECHR, 2nd Section, 27 Jan. 2015, Application no. [25358/12](#), *Paradiso and Campanelli v. Italy*, § 80, op. cit.

²⁸ *Ib.* § 76

²⁹ ECHR, GC, 24 Jan. 2017, Application no. 25358/12, *Paradiso and Campanelli v. Italy*, § 203, op. cit.

³⁰ ECHR, *Menesson v. France*, § 99, op. cit.

The Grand Chamber also recognises that surrogacy creates a risk of child trafficking,³¹ after a former decision which had already established a link between surrogacy and human trafficking.³²

Finally, while the chamber judgment ratified a situation achieved in illegality to protect the interest of the child issued from this illegality, the Grand Chamber accepts that motives of general interest can legitimately oppose the satisfaction of individual desires and justify (to some extent) measures affecting a particular child.

The Court recognises the pertinence of such measures beyond the current case, for they aim at protecting children in general, namely “*are directly linked to the legitimate aim of preventing disorder, and also that of protecting children – not merely the child in the present case but also children more generally – having regard to the prerogative of the State to establish descent through adoption and through the prohibition of certain techniques of medically assisted reproduction*”.³³

B – Values of the Convention versus moral and economic liberalism

A sign of the intense internal debate at the Court, the four “concurring” judges express their regret that the Court did not take “*a clear stance against such practices*”. Noting that surrogacy treats people “*not as ends in themselves, but as means to satisfy the desires of other persons*”, this practice, “*whether remunerated or not, is incompatible with human dignity. It constitutes degrading treatment, not only for the child but also for the surrogate mother*” and thus is opposed to “*values underlying the Convention*” (§ 7). As for remunerated gestational surrogacy, they declare it is “*illegal under international law*”³⁴ and add that in the present case the child “*has been indeed a victim of human trafficking. He was commissioned and purchased by the applicants*” (§ 6). Judge Dedov (Russian) also underlines that surrogacy creates “*a serious problem with regard to State-authorized human trafficking*”.³⁵

On the contrary, the five minority judges reckon that it is not to them to pronounce on surrogacy and, above all, that the Italian authorities ought to have limited their appreciation of the case to the sole withdrawal of the child regardless of the circumstances of his acquisition. They support the idea that “*where a couple has managed to enter into a surrogacy agreement abroad and to obtain from a mother living abroad a baby, which subsequently is brought legally into Italy, it is the factual situation in Italy stemming from these earlier events in another country that should guide the relevant Italian authorities in their reaction to that situation*” (§ 11). The fact of obtaining a child from a mother is no problem to them, on the contrary, they even explained proudly that the couple “*managed*” that transaction. It shows quite a positivist and unethical conception of Human Rights. Ratifying the *fait accompli* would amount to applying the idea that might makes right. On the contrary, as underlined by Judge Dedov, Human Rights rest upon values, the first of which are dignity and freedom of the human being, which are the very essence of the Convention.³⁶ The mission of the Court is to spread the respect of these values, and not to see in national borders a way to violate them with impunity.

So far, the approach of the Court often amounted to enhance liberal legislations, going so far as to force such a choice upon the State when it believed it could prove a European consensus on the subject. The Court thus forced Ireland not to prohibit Irish women from having an abortion abroad³⁷ and reckoned that the possibility of resorting to an illegal ART abroad alleviated the interference with the private and family life of a couple.³⁸

³¹ ECHR, GC, 24 Jan. 2017, Application no. 25358/12, *Paradiso and Campanelli v. Italy*, § 202, op. cit.

³² ECHR, 8 July 2014, application no. 29176/13, *D. and Others v. Belgium*

³³ ECHR, GC, 24 Jan. 2017, Application no. 25358/12, *Paradiso and Campanelli v. Italy*, § 197, op. cit.; see A. Mirkovic, “Gestation pour autrui et intérêt de l’enfant”, *RLDC* 2016/133, n° 6087 ; M. Fabre-Magnan, “Les trois niveaux d’interprétation de l’intérêt de l’enfant”, *Dalloz* 2015, p. 224

³⁴ see C. de La Hougue, “La qualification juridique de la gestation pour le compte d’autrui au regard du droit international et du droit pénal français”, *Doit de la famille* 2015, étude 15

³⁵ C. Brunetti-Pons, “Le développement du “tourisme procréatif”, porte ouverte au trafic d’enfants et à l’exploitation de la misère ?”, *Cahiers de la justice* 2016, n° 2, p. 249

³⁶ ECHR, 29 April 2002, application no. 2346/02, *Pretty v. the United Kingdom*, § 65

³⁷ ECHR, 29 Oct. 1992, application 14234/88, *Open Door and Dublin Well Woman v. Ireland*

³⁸ ECHR, 3 Nov. 2011, application no. 57813/00, *S.H. v. Austria*, op. cit.

In this case, the choice of the Court was radically different, probably because the majority is no longer convinced that surrogacy would be advisable, even in the name of moral and economic liberalism. The Court recognises that Italy defends its legislation, and thereby its own moral choices. Though not ruling directly on surrogacy, it admits that it is ethically questionable and that it leads to risks of child trafficking. Yet, at no moment does the Court show the slightest interest for the surrogate mother. In view of the serious violations to international law and human dignity caused by surrogate motherhood, the Court should have condemned expressly this practise, as urgently invited Judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov in a concurring opinion which will go down in history.

One can rejoice that the Court did not try to do without a moral reflection, essential for Human Rights to be able to continue to answer new realities which threaten human dignity and freedom.