

ECtHR and cross-border surrogacy arrangements: *K.K. and others v. Denmark* Legal memorandum¹

In the case of *K.K. and others v. Denmark*², the European Court of Human Rights (ECtHR) found by a very narrow margin (4:3) that Danish authorities, when refusing to let twin children born as a result of commercial surrogacy in Ukraine be adopted by their non-genetically related intending mother, violated the children's right to respect for private life guaranteed under Article 8 of the European Convention on Human Rights (ECHR).³ The majority judgment held that the domestic authorities 'failed to strike a fair balance between, on the one hand, the specific children's interest in obtaining a legal parent-child relationship with the intended mother, and, on the other, the rights of others, namely those who, in general and the abstract, risked being negatively affected by commercial surrogacy arrangement.'⁴

The facts of the case are not disputed. In paragraph 14, it is stated that "from the outset, the Supreme Court found it established that a payment of 32,265 euros by the first applicant and her husband to a clinic in Ukraine had included remuneration to the surrogate mother for giving birth to the children, and for her consenting to the first applicant and her husband being the legal parents of the children, including adopting the children. Thus, the Supreme Court found the adoption to be contrary to section 15 of the Adoption Act." In the judgement, it is noted that this provision was enacted to be compliant with the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (HCCH 1993 Adoption Convention) given that "agreements on the 'delivery of a child' against remuneration seem to conflict with the fundamental principles of our society. It ought to be impossible to buy or sell children, and this also applies to unborn children. Infertility problems should not become actual 'trading' in children."⁵

Given the obligations of Denmark to international conventions including the United Nations Convention on the Rights of the Child (UNCRC, Art. 35), its Optional Protocols and the HCCH 1993 Adoption Convention, the Danish Adoption Act should not be modified. In order to respond to the *K.K. and others v. Denmark* decision, the Danish authorities could provide for potential inheritance rights, in all joint custody matters. This was the only substantive difference for the children beyond the formal recognition of filiation as the ECtHR recognised the right to family life was respected through the joint custodial order.⁶ For the reasons explained in the analysis below, the Danish authorities should not change their filiation laws to allow for consent in surrogacy to be purchased, as this would contravene their other treaty obligations.

A. Misinterpretation of the best interests of the child principle by the majority

The majority in *K.K. and others v. Denmark* misinterprets the principle of the best interests of the child embodied in international human rights law, in particular the UNCRC, which could lead to States especially those that are part of the Council of Europe in the direction that violates their obligations under the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC) and the HCCH 1993 Adoption Convention.

The majority fails to acknowledge that the concept of best interests is not meant as a vague untethered concept but refers to the specific rights of the child, in this context, the right not to be sold,⁷ and the right to have one's identity preserved.⁸ Using the 'best interests of the child' to undermine the right of the child NOT

¹ This memo was prepared by Katarina Trimmings with input from David Smolin and Mia Dambach as Special Advisors. It should be noted that Olga Khazova and Michael Wells-Greco, as Special Advisors agree with the majority judgement. <https://www.child-identity.org/en/about-us/who-we-are.html>

² *K.K. and Others v. Denmark*, no. 25212/21, 06 December 2022.

³ *Ibid* [77].

⁴ *Ibid* [76].

⁵ *Ibid* [15].

⁶ *Ibid* [8], [49] and [62].

⁷ Article 35 of the UNCRC, Article 1 of the OPSC. See also Article 2a of the OPSC and Reports of the UN Special Rapporteur on the sale and sexual exploitation of children, available at <https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy>.

⁸ On the right to identity, the UNCRC Committee recommendation to Ukraine (2022) states: '21. While noting that the State party is undertaking legislative initiatives to regulate surrogacy arrangements, the Committee recommends that the State party ensure that children born through

to be sold, as tacitly effectuated by the majority, is non-sensical, for best interests consists in large part in respecting rather than undermining fundamental children's rights. Allowing legal parenthood to trump all other rights contravenes the recommendation of the UN Committee on the Rights of the Child that:

'In weighing the various elements, one needs to bear in mind that the purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the Convention and its Optional Protocols, and the holistic development of the child.'⁹

Instead, paradoxically, the majority decision in fact undermines the best interests of the child by using that standard to erode the child's right not to be sold.

The interpretation of the best interests of the child principle by the dissent¹⁰ and Danish authorities is better aligned with obligations imposed on Contracting Parties by the UNCRC, the OPSC and the HCCH 1993 Adoption Convention. It is therefore more appropriate and should guide the interpretation of the right to private life by children in cross-border surrogacy cases under the ECHR. The dissent rightly points out that there are other family constellation situations where a child has a *de facto* parent-child relationship and family life, which the law of many States does not allow to be recognized through adoption.¹¹ The dissent's example relates to a child living in a shared custodial situation between two households, each household with a genetic parent and partner exercising a *de facto* parenthood role. In that situation, there has been no sale of a child, and yet the ECtHR has not (and should not, given the margin of appreciation) require States to allow the child to have in essence four recognized legal parents (two genetic and two adopted) across two households, via multiple adoptions occurring without accompanying terminations of parental rights. Hence, the majority is mistaken to view an adoption as necessary to avoid a deprivation of the child's right to private life even more so in the present case, which does involve the sale of a child.

In essence, Denmark is fined for keeping its legal commitments - international and domestic - to effectively prohibit the sale of children. The decision practically requires the Danish State to violate the UNCRC, the OPSC, and by implication the HCCH 1993 Adoption Convention, while improperly turning the ECHR against this fundamental principle of international law.

B. Disharmony in the interpretation of the ECHR and international human rights law

Through inappropriate analysis of the best interests of the child as one of the core principles of children's rights, the majority creates disharmony between the interpretation of Article 8 of the ECHR (right to respect for private and family life) and the UNCRC and the OPSC. This undermines the ECtHR's own undertaking to interpret the ECHR 'in harmony with the general principles of international law'. Through inappropriate analysis of the best interests of the child as one of the core principles of children's rights, the majority creates disharmony between the interpretation of Article 8 of the ECHR (right to respect for private and family life) and the UNCRC and the OPSC. This undermines the ECtHR's own undertaking to interpret the ECHR 'in harmony with the general principles of international law'. It should be recalled that the mandate of the ECtHR is to rule on 'individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.'¹² To the degree that the ECtHR, in assessing a Contracting State's compliance with the ECHR, also interprets international human rights law, it must do so in a way that reinforces rather than undermines those international rights norms.

medically assisted reproduction, in particular with the involvement of surrogate mothers, have their best interests taken as a primary consideration and have access to information about their origins. In doing so, the State party should consider providing surrogate mothers and prospective parents with appropriate counselling and support.' UN Committee on the Rights of the Child, 'Concluding observations on the combined fifth and sixth periodic reports of Ukraine', 27 October 2022, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CRC%2FCR%2FUKR%2FCO%2F5-6&Lang=en.

⁹ UN 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)' [82], 29 May 2013. Cf European Union Agency for Fundamental Rights and Council of Europe, 'Handbook on European law relating to the rights of the child', 2022, pp 28-29, available at [Handbook on European law relating to the rights of the child - 2022 edition \(coe.int\)](#), stating: 'The UN Committee on the Rights of the Child, which monitors the implementation of the convention and its optional protocols and provides guidance on the interpretation of the CRC through its general comments, is of great importance for the EU and the CoE.'

¹⁰ *K.K. and Others v. Denmark*, no. 25212/21, 06 December 2022, joint dissenting opinion of judges Kjølbrot, Koskelo and Yüksel [84-109].

¹¹ *K.K. and Others v. Denmark*, no. 25212/21, 06 December 2022 [108].

¹² ECtHR, 'The Court in Brief', available at https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf.