SURROGACY ARRANGEMENT ABROAD

European Court of Human Rights, Second Section, Paradiso and Campanelli v. Italy, 27 January 2015, (Application no. 25358/12)

The case concerns the placement in a social-service care of a nine-month-old child who had been born in Russia following a gestational surrogacy contract entered into by a couple; it subsequently transpired that they had no biological relationship with the child Relying on Article 8 (right to respect for private and family life), the applicants complain, in particular, about the child's removal from them, and about the refusal to acknowledge the parent-child relationship established abroad by registering the child's birth certificate in Italy. In its Chamber judgment of 27 January 2015, the Court held, by five votes to two, that there had been a violation of Article 8 of the Convention. It found in particular that the public-policy considerations underlying Italian authorities' decisions – finding that the applicants had attempted to circumvent the prohibition in Italy on using surrogacy arrangements and the rules governing international adoption – could not take precedence over the best interests of the child, in spite of the absence of any biological relationship and the short period during which the applicants had cared for him. Reiterating that the removal of a child from the family setting was an extreme measure that could be justified only in the event of immediate danger to that child, the Chamber considered that, in the present case, the conditions justifying a removal had not been met.

SECOND SECTION

CASE OF PARADISO AND CAMPANELLI v. ITALY

(Application no. 25358/12)

JUDGMENT

STRASBOURG

27 January 2015

Referred to the Grand Chamber

01/06/2015

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

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In the case of Paradiso and Campanelli v. Italy,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of

Işıl Karakaş, *President,*
Guido Raimondi,
András Sajó,
Nebojša Vučinić,
Helen Keller,
Egidijus Kūris,
Robert Spano, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 9 December 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 25358/12) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Italian nationals, Ms Donatina Paradiso and Mr Giovanni Campanelli ("the applicants"), on 27 April 2012. The applicants also lodged an application on behalf of the child who, according to the birth certificate issued by the Russian authorities on 1 March 2011, was their son, born on 27 February 2011, and was named Teodoro Campanelli.

2. The applicants were represented by Mr K. Svitnev, a lawyer practicing in Moscow and employed by the company Rosjurconsulting. The Italian Government ("the Government") were represented by their Agent, Ms E. Spatafora.

3. The applicants alleged, in particular, that the refusal to enter the particulars of the child's birth certificate in the Italian register of births, marriages and deaths, and the underage child's removal, were incompatible with Article 8 of the Convention.

4. On 9 May 2012 the application was communicated to the Government. The respondent Government and the applicants each filed written observations. On 20 February 2014 an additional question was submitted to the parties on whether there existed an

effective remedy to challenge the Campobasso Court of Appeal's decision of 13 April 2013 confirming the refusal to transcribe the birth certificate, and to challenge the Campobasso Youth Court's decision of 5 June 2013 finding that the applicants no longer had standing to take part in the proceedings. The Government were invited to submit the relevant case-law concerning the effectiveness of any alleged remedies.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1967 and 1955 respectively and live in Colletorto.

6. The applicants are a married couple. In the application form, they indicated that, after unsuccessful attempts at *in vitro* fertilisation, they decided to resort to gestational surrogacy in order to become parents. To that end, they contacted a Moscow-based clinic which specialised in assisted reproduction technology. They entered into a gestational surrogacy agreement with the company Rosjurconsulting. After a successful *in vitro* fertilisation on 19 May 2010, two embryos "belonging to them" were implanted in the womb of a surrogate mother on 19 June 2010. There was no genetic link between this woman and the embryos.

7. The baby was born on 27 February 2011. The surrogate mother gave her written consent to the child being registered as the applicants' son. Her written declaration, dated the same day, and read aloud at the hospital in the presence of her doctor, the head doctor and the head of the (hospital) department, is worded as follows (English translation of the original Russian version):

"I, the undersigned... gave birth to a boy in the ... maternity hospital in Moscow. The child's parents are an Italian married couple, Giovanni Campanelli, born on ... and Donatina Paradiso, born on..., who expressed in writing their wish to have their embryos implanted in my womb.

On the basis of the foregoing and in accordance with section 16(5) of the Federal Law on Civil Status and Article 51 (4) of the Family Code, I hereby give my consent for the above couple's entry in the birth record and the birth certificate as parents of the child to whom I gave birth..."

This statement, in the Italian translation appended to the original, reads as follows (in English):

"I, the undersigned... gave birth to a boy in the ... maternity hospital in Moscow. The child's genetic parents are an Italian married couple, Giovanni Campanelli, born on ... and Donatina Paradiso, born on..., who expressed in writing their wish to have their embryos implanted in my womb.

On the basis of the foregoing and in accordance with section 16(5) of the Federal Law on Civil Status and Article 51 (4) of the Family Code, I hereby give my consent for the above couple's entry in the birth record and the birth certificate as parents of the child to whom I gave birth..."

8. On 10 March 2011, in accordance with Russian law, the applicants were registered as the baby's parents. The Russian birth certificate, which contained no reference to the gestational surrogacy, was certified in accordance with the provisions of the Hague Convention of 5 October 1961 (hereafter, "the Hague Convention") Abolishing the Requirement of Legalisation for Foreign Public Documents.

9. On 29 April 2011 the first applicant went to the Italian Consulate in Moscow to obtain the documents that would allow the baby to leave for Italy with her. The applicant answered questions and submitted the paperwork concerning the child's birth. The Italian Consulate issued the documents enabling the boy to leave for Italy with the first applicant.

10. On 30 April 2011 the first applicant and the child arrived in Italy. A few days later the second applicant contacted the Colletorto municipality, requesting that the particulars of the birth certificate be entered in the register.

11. In a note of 2 May 2011 – which is not included in the Court's case-file – the Italian Consulate in Moscow indicated to the Campobasso Youth Court, the Ministry of Foreign Affairs and the Colletorto Prefecture and municipality that the paperwork in respect of the child's birth contained false information.

12. On 5 May 2011 the applicants were placed under formal investigation for "altering civil status" within the meaning of Article 567 of the Criminal Code and forgery within the meaning of Articles 489 and 479 of the Criminal Code; and also for breaching section 72 of the Adoption Act (Law no. 183/1984), since they had brought the child into the country in breach of the law and had circumvented the condition set out in the adoption authorisation obtained by them on 7 December 2006, which prohibited them from adopting such a young child.

13. On 5 May 2011 the State Counsel's Office attached to the Campobasso Youth Court asked that proceedings to free the child for adoption be opened, since the child ought to be considered, for legal purposes, as having been abandoned. On the same date the Youth Court appointed a guardian *ad litem* (*curatore special*) within the meaning of section 8 of Law no. 184/1983 and opened proceedings to free the child for adoption. On 16 May 2011 the State Counsel asked for a court-appointed adviser (*curatore*) to be named within the meaning of sections 8 and 10 of Law no. 184/83. A court-appointed adviser was named. It appears from the case file that the applicants protested against the measures in respect of the child and had asked to be able to adopt him.

14. On 25 May 2011 the first applicant, assisted by a lawyer of her own choosing, was questioned by the Larino carabinieri. She stated that she had travelled to Russia alone in September 2008, carrying with her seminal fluid that had previously been collected from her husband. She had concluded a contract with the company Rosjurconsulting, which had undertaken to find a surrogate mother willing to have implanted in her womb genetic material from the first applicant and her husband, through the Vitanova Clinic in Moscow. This practice was perfectly legal in Russia, and made it possible to obtain a birth certificate which identified the applicants as parents. In June/July 2010 the first applicant had been contacted by the Russian company, which stated that a surrogate mother had been found and had agreed to the medical procedure. On 10 March 2011 the first applicant had travelled to Moscow. In April 2011, with a birth certificate issued on 10 March 2011 by the Russian authorities, she had gone to the Italian Consulate in Moscow to obtain the documents that would enable the child to leave Russia and travel to Italy. The birth certificate showed the applicants' names and identified them as the parents.

15. On 27 June 2011 the applicants were heard by the Youth Court. The first applicant stated that, after eight unsuccessful attempts at *in vitro* fertilisation, which had endangered her health, she had resorted to the Russian clinic, since it had been possible in Russia to use ova from a donor, which were subsequently implanted in the surrogate mother's womb.

16. At the same time, the child's court-appointed adviser asked the court to suspend the applicants' parental responsibility within the meaning of section 10 § 3 of Law no. 184/1983.

17. On 7 July 2011 the court ordered that DNA testing be carried out in order to establish whether the second applicant was the child's biological father.

18. On 11 July 2011 the Ministry of the Interior asked the Registry Office to refuse to enter the particulars of the birth certificate in the civil-status register.

19. On 1 August 2011 the second applicant and the child underwent DNA testing. The result of those tests showed that there was no genetic link between them.

20. On 4 August 2011 the Registry Office refused to register the birth certificate. The applicants lodged an appeal with the Larino Court against this refusal. The State Counsel's Office asked the court to give the child a new identity and to issue a new birth certificate.

21. The Larino Court having ruled on 29 September 2011 that it did not have jurisdiction, the proceedings resumed before the Campobasso Court of Appeal. The applicants demanded that the particulars of the Russian birth certificate be entered in the Italian register.

22. On 20 October 2011, on the basis of the genetic testing and the submissions of the parties, including those of the child's court-appointed adviser, the Youth Court decided to remove the child from the applicants. This decision was immediately enforceable. In reaching its decision, the court took account of the following factors: the first applicant had stated that she was not the genetic mother; the ova came from an unknown woman; the DNA test carried out on the second applicant and the child had shown that there was no genetic link between them; the applicants had paid a large sum of money (49,000 euros (EUR)); contrary to his allegations, there was nothing to prove that the second applicant's genetic material had indeed been transported to Russia. The only thing that was certain in this story was the identity of the surrogate mother, who was not the biological mother and who had relinquished the child just after his birth. The biological parents remained unknown. That being the case, the situation was not one of subrogated maternity, since the child had no biological link with the applicants. The latter were steeped in illegality: they had brought a child into Italy by passing him off as their son. In so doing, they had, in the first place, breached the provisions on international adoption (Law no. 184 of 4 May 1983), section 72 of which made

such breaches a criminal offence, the assessment of which was not, however, a matter for the youth court. Secondly, the agreement entered into by the applicants with the company Rosjurconsulting was contrary to the Medically Assisted Reproduction Act (Law no. 40 of 19 February 2004), section 4 of which prohibited heterologous assisted fertilisation. This illegal situation had to be brought to an end, and the only way to do so was to remove the child from the applicants. The child would admittedly suffer harm as a consequence of the separation but, given the short period spent with the applicants and his young age, the child would be able to surmount this. Steps would be taken immediately to find a couple of adoptive parents. In addition, given that the applicants had preferred to circumvent the adoption legislation, notwithstanding the authorisation they had received, it could be thought that the child resulted from a narcissistic desire on the part of the couple or indeed that he was intended to resolve problems in their relationship. In consequence, the court cast doubt on whether they were genuinely capable of providing emotional and educational support. As the child had neither a biological family nor his surrogate mother, since she had relinquished him, the court considered that the Italian legislation on adoption was applicable to this case (within the meaning of section 37*bis* of Law no. 184/1983), entrusted the child to the social services and appointed a guardian (*tutore*) for his defence.

23. The child was placed in a children's home (*casa famiglia*) in a locality that was unknown to the applicants. They were forbidden from having contact with the child.

24. The applicants lodged an appeal (*reclamo*) with the Campobasso Court of Appeal. They argued, *inter alia*, that the Italian courts could not call into question the birth certificate. They further requested that no measures be taken concerning the child while the criminal proceedings brought against them and the proceedings challenging the refusal to enter the birth certificate in the Italian register were pending.

25. By a decision of 28 February 2012, the Campobasso Court of Appeal dismissed the appeal. It transpires from this decision, among other points, that section 33 of Law no. 218/95 (Private International Law Act) did not prevent the Italian courts from refusing to comply with certified information from a foreign State. There was no issue of lack of jurisdiction, since section 37*bis* of the International Adoption Act (Law no. 184/1983) provided that Italian law was applicable if the alien minor had been

abandoned, and that was the situation in this case. Moreover, it was unnecessary to await the outcome of the criminal proceedings, since the applicants' criminal liability was irrelevant. On the contrary, it was necessary to take an urgent measure in respect of the child, in order to put an end to the illegal situation in which the applicants existed. It was not possible to lodge an appeal on points of law against this decision.

26. It appears from a memorandum dated 22 May 2012, sent by the youth court to the Ministry of Justice, that the child had not yet been declared available for adoption, since the proceedings with regard to the transcription of the child's birth certificate were pending before the Campobasso Court of Appeal.

27. In the meantime, on 30 October 2011 the State Counsel attached to the Larino Court had ordered the interim attachment of the Russian birth certificate, on the ground that it was an essential piece of evidence. It appeared from the case file that not only had the applicants probably committed the offences with which they were charged, but that they had attempted to conceal them. Among other things, they had stated that they were the biological parents, and had corrected their versions of the events over time as those versions had been proved inaccurate.

28. The applicants appealed against the interim attachment order.

29. By a decision of 20 November 2012, the Campobasso Court dismissed the applicants' appeal. The decision indicates that there existed serious suspicions that the offences in question had been committed. In particular, the first applicant had put about a rumour that she was pregnant; she had gone to the Consulate and implied that she was the natural mother; she had then admitted that the child had been born to a surrogate mother; she had stated to the carabinieri on 25 May 2011 that the second applicant was the biological father, although the DNA tests had disproved this, and had therefore made false statements; she had been very vague as to the identity of the genetic mother; the documents concerning the surrogate motherhood stated that the two applicants had been seen by the Russian doctors, which did not accord with the fact that the second applicant had not been in Russia; the documents about the birth did not have a precise date. All that was known was that the child had been born and that he had been handed over to the first applicant against payment of almost EUR 50,000. Accordingly, the hypothesis that the applicants had conducted themselves illegally

with a view to having the particulars of the birth certificate entered in the register of births, marriages and deaths and to circumventing the Italian legislation appeared sound.

30. In November 2012 the decision regarding the interim attachment was transmitted to the youth court by State Counsel, since it had the following implications. The charges under section 72 of Law no. 184/1983 deprived the applicants of the possibility of fostering (*affido)* the child and of adopting him or other minors. There was therefore no other solution but to proceed with the adoption procedure for the child. The temporary placement with a foster family had been requested by virtue of sections 8 and 10 of Law no. 184/83. The State Counsel repeated his request and emphasised that the child had been removed more than a year previously, and that he had since been living in a children's home (*casa famiglia*), where he had developed meaningful relationships with the persons responsible for looking after him. Thus, the child had not yet found a replacement family environment for the home that had been illegally provided by those who had brought him to Italy. He seemed destined for yet another separation, even more painful than that from the mother who had given birth to him and from the woman who was claiming to be his mother.

31. It appears from the file that the child was placed in a foster family on 26 January 2013.

32. In March 2013, at the guardian's request, an expert examination was carried out to determine the child's age. It found that the child was probably aged 30 months, with a margin of error of three months.

33. In addition, at the beginning of April 2013 the guardian asked the juvenile court to give the child a formal identity, so that he could be registered for school without difficulty. He stated that the child had been placed in a family on 26 January 2013, but that he did not have an official identity. This "lack of existence" had a significant impact on administrative matters: it was unclear under what name the child was to be registered for school, for vaccination records, or for residence. Admittedly, this situation corresponded to the aim of preventing the original family, that is, the applicants, from discovering the child's whereabouts, for his own protection. However, a temporary formal identity would enable the secrecy surrounding the child's real identity to be maintained, while simultaneously enabling him to have access to public services; for

the time being, he was entitled only to use emergency medical services.

34. By an immediately enforceable decision of 3 April 2013, the Campobasso Court of Appeal ruled in respect of the birth certificate and on whether an order should be made for it to be entered in the register of births, marriages and deaths (within the meaning of Article 95 of Presidential Decree ("DPR") no. 396/00). It dismissed the objection raised by the guardian to the effect that the applicants did not have standing before the court; it acknowledged that the applicants had capacity to act in legal proceedings, in so far as they were indicated as the "parents" in the birth certificate that they wished to have transcribed. However, it was clear that the applicants were not the biological parents. There had not therefore been a gestational surrogacy, although the applicants had referred in their pleadings to heterologous artificial fertilisation; the parties agreed that the Russian legislation presupposed a biological link between the child and at least one of the potential parents before the term surrogate motherhood could be used. The birth certificate was therefore fraudulent (*ideologicamente falso*). Further, given that there was nothing to show that the child had Russian citizenship, the applicants' argument that Italian law was inapplicable ran counter to section 33 of Law no. 218/95, which stated that the legal parent-child relationship was determined by the national law governing the child at the time of his or her birth. In addition, it was contrary to public order to enter the particulars of the disputed birth certificate in the register of births, marriages and deaths, since it was fraudulent. The applicants had pleaded their good faith, alleging that they were unable to explain why the second applicant's seminal fluid had not been used in the Russian clinic; however, this did not alter the situation, and did not rectify the fact that the second applicant was not the biological father. In conclusion, it was legitimate to refuse to enter the particulars of the Russian birth certificate in the register of births, marriages and deaths, and to grant the State Council's request that a new birth certificate be issued. The court therefore ordered that a new birth certificate be issued, indicating that the child was the son of persons unknown, born in Moscow on 27 February 2011, and that he be given a new name (determined within the meaning of DPR no. 396/00).

35. The proceedings relating to the child's adoption were resumed before the Youth Court. The applicants confirmed their opposition to the child's placement with third persons. The guardian asked the court to rule that the applicants no longer had

locus standi. The State Council asked the court not to rule on its request to declare that the child was available for adoption using the child's original name, on the ground that, in the meantime, he had opened a second set of proceedings requesting that the child be declared available for adoption using his new identity as a child of unknown parents. On 5 June 2013, in the light of the material in the file, the Youth Court held that the applicants no longer had capacity to act in the adoption proceedings brought by them, given that they were neither the child's parents nor members of his family, within the meaning of section 10 of Law no. 184/1983. The court stated that it would decide on the question of the child's adoption in the context of the other adoption proceedings, referred to by State Council.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Private International Law Act

36. Under section 33 of the Private International Law Act 1995 (Law no. 218), the legal parent-child relationship is determined by the national law governing the child at the time of his or her birth.

B. Simplification of Civil Status Act

37. Presidential Decree no. 396 of 3 November 2000 (Simplification of Civil Status Act) provides that declarations of birth concerning Italian nationals which have been drawn up abroad must be transmitted to the consular authorities (section 15). The consular authorities transmit a copy of the documents, for the purpose of their entry in the register, to the civil status registrars of the municipality in which the individual concerned intends to take up residence (section 17). Documents drawn up abroad cannot be entered in the register of births, marriages and deaths if they are contrary to public order (section 18). In order to have full legal force in Italy, foreign decisions (*provvedimenti)* in respect of persons' capacity or the existence of family relationships... must not be contrary to public order (section 65).

C. Medically Assisted Reproduction Act

38. Section 4 of Law no. 40 of 19 February 2004 (the Medically Assisted Reproduction Act) prohibited the use of medically assisted reproduction. Breach of this provision entailed a financial penalty ranging from EUR 300,000 to EUR 600,000.

By a judgment of 9 April 2014, the Constitutional Court declared those provisions unconstitutional.

D. The relevant provisions in respect of adoption

39. The provisions concerning the procedure for adoption are set out in Law no. 184/1983.

Section 2 provides that a minor who has temporarily been deprived of a satisfactory family environment may be placed with another family, if possible including other minors, or with a single person, or with a family-type community, for the purposes of providing him or her with support, an upbringing and education. If it is not possible to provide him with a satisfactory family environment, a minor may be placed in a public or private children's home, preferably in the area in which he has been living.

Section 5 provides that the family or person with whom the minor has been placed must provide him or her with support, an upbringing and education... based on instructions from the guardian and in compliance with the judicial authority's directions. In any event, the foster family exercises parental responsibility with regard to relations with the school and the national health service. The foster family must be heard in the proceedings on placement and the proceedings for a freeing for adoption order.

Furthermore, section 7 provides that minors who have been declared available for adoption may be adopted.

Section 8 provides that "the Youth Court may, even of its own motion, declare ... a minor available for adoption if he or she has been abandoned in the sense of being deprived of all emotional or material support from the parents or the members of his or her family responsible for providing such support (other than in temporary cases of *force majeure*)". Section 8 continues: "A minor shall continue to be considered abandoned ... even if he or she is in a children's home or has been placed in a foster home." Lastly, section 8 provides that a case of *force majeure* shall be deemed to have ceased where the parents or other members of the minor's family responsible for providing support refuse assistance from the authorities and the court considers their refusal unjustified. The fact that a minor has been abandoned may be reported to the authorities by any member of the public or noted by a court of its own motion. Furthermore, any public official and any member of the minor's family who is aware that a child has been abandoned must report the situation to the authorities. Children's homes must keep the judicial authorities regularly informed of the situation of minors whom they take into their care (section 9).

Section 10 then provides that, pending a minor's placement in a foster home before adoption, the court may order any temporary measure which is in the minor's interests, including, if necessary, the suspension of parental responsibility.

Sections 11 to 14 provide that enquiries shall be made so as to clarify the minor's situation and determine whether he or she has been abandoned. In particular, section 11 provides that where, in the course of these enquiries, it transpires that the child does not have contact with any member of his or her family up to the fourth degree, the court may issue a declaration that he or she if available for adoption, unless an adoption application has been made within the meaning of section 44.

If, at the end of the procedure provided for in the above sections, the minor is still abandoned within the meaning of section 8, the Youth Court shall declare him or her available for adoption if: (a) the parents or other members of the family have not appeared in the course of the proceedings; (b) it is clear from interviews with them that they are still failing to provide the child with emotional and material support and are unable or unwilling to remedy the situation; and (c) measures ordered under section 12 have not been implemented through the parents' fault (section 15). Section 15 also provides that a declaration that a minor is available for adoption shall be made in a reasoned decision of the Youth Court sitting in chambers, after it has heard State Counsel, the representative of the children's home in which the minor has been placed or any foster parent, the guardian, and the minor if aged over twelve or, if under twelve, where necessary.

Section 17 provides that an objection to a decision declaring a child available for adoption must be lodged within thirty days of the date of notification to the requesting party.

Under section 19 parental responsibility is suspended while a minor is available for adoption.

Lastly, section 20 provides that a minor shall no longer be available for adoption once he has been adopted or has come of age. Moreover, a declaration that a child is available for adoption may be annulled, either by the court of its own motion or at the request of the parents or State Counsel's Office, if the conditions laid down in section 8 have in the meantime ceased to apply. However, if the minor has been placed with a family with a view to adoption (*affidamento preadottivo*) within the meaning of sections 22–24, the

declaration that he or she is available for adoption cannot be annulled.

Section 44 provides for certain cases of special adoption: adoption is possible for minors who have not yet been declared available for adoption. In particular, section 44 (d) provides for adoption when it is impossible to place the child [in alternative care] pending adoption.

40. Section 37*bis* of this law provides that Italian law applies to foreign minors who are in Italy with regard to adoption, placement and urgent measures.

Within the meaning of section 72 of the International Adoption Act, any person who brings into the territory of the State a foreign minor in violation of the provisions of the said law, in order to obtain money or other benefits, and in order that the minor be entrusted permanently to Italian citizens, is committing a criminal offence punishable by a prison term of between one and three years. This sentence is also applicable to those who, in exchange for money or other benefits, accept the "placement" of foreign minors on a permanent basis. Conviction for this offence entails disqualification from fostering children on placement (*affidi*) and from becoming a guardian.

E. Appeal on points of law/ under Article 111 of the Constitution

41. Under Article 111 § 7 of the Italian Constitution, appeals to the Court of Cassation to allege violations of the law are always admissible against judgments or measures affecting personal freedom. The Court of Cassation extended the scope of this remedy to civil proceedings where the decision to be challenged has a substantial impact on situations (*decisoria*) and it cannot be varied or revoked by the same judge/court which delivered it (*definitiva*).

Decisions concerning urgent measures with regard to an abandoned child, taken by the youth court on the basis of section 10 of the Adoption Act (Articles 330 et seq. of the Civil Code, Article 742 of the Code of Civil Procedure) may be varied and/or revoked. They may be the subject of a complaint before the court of appeal. No appeal on points of law can be made in respect of decisions that can be varied and revoked at any time (Court of Cassation, Civil Division, Sec. I, judgment of 18 October 2012, no. 17916).

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents

42. The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents was concluded on 5 October 1961. It applies to public documents – as defined in Article 1 – which have been drawn up in the territory of one Contracting State and which have to be produced in the territory of another Contracting State.

Article 2

"Each Contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears."

Article 3

"The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates."

Article 5

"The certificate shall be issued at the request of the person who has signed the document or of any bearer. When properly filled in, it will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears. The signature, seal and stamp on the certificate are exempt from all certification."

The explanatory report on this Convention indicates that the certificate does not attest to the truthfulness of the content of the original document. This limitation on the legal effects deriving from the Hague Convention is intended to preserve the right of the signatory States to apply their own choice-of-law rules when they are required to determine the probatory force to be attached to the content of the certified document.

B. The relevant provisions of Russian law

43. Section 55 of the Basic Law on the Protection of Citizens' Health includes surrogate motherhood among the techniques for assisted reproduction. Both married and unmarried couples may have access to this type of technique, as may single persons. Surrogate motherhood is the fact of bearing and handing over a child on the basis of a contract concluded between the surrogate mother and the "potential" parents. The surrogate mother must be aged between 20 and 35, have already borne a healthy child and have given her written consent to the procedure, which may only be carried out in authorised clinics. Ministry of Health Decree no. 67 (2003) governs the procedures and conditions.

If the relevant provisions have been complied with, the outcome of the surrogate motherhood is that a married couple is recognised as the parent couple of a child born to a surrogate mother. The latter must give her written consent in order for the couple to be recognised as parents (Article 51 § 4 of the Family Code of 29 December 1995).

C. Principles adopted by the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences of the Council of Europe

44. The Council of Europe Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI), which preceded the present Steering Committee on Bioethics, published in 1989 a series of Principles. Principle 15, on "Surrogate Motherhood", is worded as follows:

"1. No physician or establishment may use the techniques of artificial procreation for the conception of a child carried by a surrogate mother.

2. Any contract or agreement between [the] surrogate mother and the person or couple for whom she carried the child shall be unenforceable.

3. Any action by an intermediary for the benefit of persons concerned with surrogate motherhood as well as any advertising relating thereto shall be prohibited.

4. However, States may, in exceptional cases fixed by their national law, provide, while duly respecting paragraph 2 of this principle, that a physician or an establishment may proceed to the fertilisation of a surrogate mother by artificial procreation techniques, provided that:

a. the surrogate mother obtains no material benefit from the operation;

b. the surrogate mother has the choice at birth of keeping the child."

THE LAW

I. ALLEGED VIOLATIONS, RAISED ON BEHALF OF THE CHILD

45. The applicants complained on behalf of the child that it had been impossible to obtain recognition of the legal parent-child relationship established abroad and about the removal and placement measures decided by the Italian courts. They alleged that there had been a violation of Articles 6, 8 and 14 of the Convention, and also of the Hague Convention and of the Convention on the Rights of the Child of 20 November 1989.

46. According to the Government, the applicants could not represent the child before the Court, on the ground that he was already represented at domestic level by a guardian who had intervened in the proceedings before the domestic courts. Appointed on 20 October 2011 by the Campobasso Youth Court and confirmed by the Campobasso Court of Appeal on 21 February 2012, the guardian represented the child and administered his property. In conclusion, the part of the application lodged on behalf of the child by the applicants, who were defending their own interests and not those of the child, was incompatible *ratione personae*.

47. The applicants contested the Government's submission.

48. The Court reiterates that it is necessary to avoid a restrictive and purely technical approach with regard to the representation of children before the Convention institutions; in particular, consideration must be given to the links between the child in question and his or her "representatives", to the subject-matter and the purpose of the application and to the possibility of a conflict of interests (see *Moretti and Benedetti v. Italy*, no. 16318/07, § 32, 27 April 2010; see also *S.D., D.P., and T. v. the United Kingdom*, no. 23714/94, Commission decision of 20 May 1996, unpublished).

49. In the present case, the Court notes at the outset that the applicants have no biological ties with the child. Irrespective of the question of whether the birth certificate drawn up in Russia had legal effect in Italy, and if so, what effect, the child had been placed under guardianship since 20 October 2011 and had been represented by the guardian in the domestic proceedings. The proceedings to have the parent-child relationship recognised in Italy were unsuccessful and the child has a new identity and a new birth certificate. The applicants were also unsuccessful in the proceedings

to adopt the child. The procedure to have the child adopted by another family is underway and the child has already been placed in a foster family. No signed form of authority has been submitted authorising the applicants to represent the child's interests before the Court. This implies that, from a legal point of view, the applicants do not have standing to represent the minor's interests in the context of judicial proceedings.

50. In those circumstances, the Court considers that the applicants do not have standing to act before the Court on behalf of the child (see *Moretti and Benedetti*, cited above, § 35). This part of the application must therefore be dismissed as incompatible *ratione personae* with the Convention's provisions, in accordance with Article 35 §§ 3 and 4 thereof.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION, RAISED BY THE APPLICANTS ON THEIR OWN BEHALF

51. The applicants alleged that the Italian authorities' refusal to register the birth certificate issued in Russia and the domestic courts' decisions to remove the child were in breach of the Hague Convention of 5 October 1961 and infringed their private and family life as guaranteed by Article 8 of the Convention. They also alleged that there had been a violation of Article 6, on the ground that the proceedings relating to the minor's removal had not been fair.

52. The Government contested that argument.

53. According to settled case-law, a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention. The Court reiterates that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 1969, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see, *inter alia*, *Nada v. Switzerland* [GC], no. 10593/08, §§ 168-169, ECHR 2012). Thus,

although the right to have the particulars of a foreign birth certificate entered in the register of births, marriages and deaths is not, as such, included among the rights guaranteed by the Convention, the Court will examine the application under the Convention in the context of the other relevant international treaties.

54. The Court, being master of the characterisation to be given in law to the facts of the case, considers it appropriate to examine this part of the application solely under Article 8 of the Convention, which requires the decision-making process leading to measures of interference to be fair and to afford due respect for the interests safeguarded by that Article (see *Moretti and Benedetti*, cited above, § 49; *Havelka and Others v. the Czech Republic*, no. 23499/06, §§ 34-35, 21 June 2007; *Kutzner v. Germany*, no. 46544/99, § 56, ECHR 2002-I; *Wallová and Walla v. the Czech Republic*, no. 23848/04, § 47, 26 October 2006). The relevant parts of Article 8 of the Convention provide:

"1. Everyone has the right to respect for his... family life...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society... for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Objection under Article 34 of the Convention

55. The Government raised a preliminary objection, arguing that the applicants could not act before the Court for the purposes of Article 34 of the Convention, since the child had been placed under guardianship.

56. The applicants challenged that submission.

57. The Court must examine whether the applicants can take part in the proceedings and whether they can claim to be victims, within the meaning of Article 34, of the alleged violations of the Convention. It notes in this regard that the Italian courts acknowledged the applicants' standing to act in the proceedings, given that – according to the Russian birth certificate – they were the child's parents and that, at least initially, the applicants had parental responsibility for the child. It follows that the applicants may raise their complaints before the Court within the meaning of Article 34 of the Convention. The Government's objection must therefore be dismissed.

2. Objection of failure to exhaust domestic remedies

58. The Government observed that the proceedings before the domestic courts were still pending. They referred, in particular, to the criminal proceedings brought against the applicants and to the proceedings before the Campobasso Youth Court. Having subsequently been invited (see paragraph 4 above) to specify whether there existed an effective remedy to challenge the Campobasso Court of Appeal's decision upholding the refusal to enter the particulars of the birth certificate in the official register, and whether there existed an effective remedy to challenge the youth court's decision to exclude [the applicants] from the proceedings, the Government replied in the affirmative. However, they did not submit any relevant case-law.

59. The applicants rejected the Government's argument.

60. The Court reiterates that under Article 35 § 1 it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law (see *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-69, *Reports of Judgments and Decision* 1996-IV). It must determine whether the applicants satisfied that condition.

61. The Court notes firstly that the criminal proceedings brought against the applicants were pending at the time of submission of their application. However, it notes, on the one hand, that the civil courts adopted their decisions without waiting for the outcome of those proceedings, and, secondly, that the applicants' complaints do not concern the criminal proceedings as such. In consequence, the issue of non-exhaustion of domestic remedies does not arise on this point and the Court considers that the Government's preliminary objection is irrelevant and must be rejected.

62. With regard to the proceedings brought by the applicants with a view to having the particulars of the child's birth certificate entered in the register of births, marriage and deaths, the Court notes that the applicants did not appeal on points of law against the Campobasso Court of Appeal's decision dismissing their appeal, dated 3 April 2013. The Government have confirmed the existence and effectiveness of such an appeal on points of law, without submitting relevant case-law.

Thus, the Court does not have at its disposal decisions delivered by the Court of Cassation in similar cases where the matter

at stake was also recognition of a foreign document which was in breach of domestic law. However, it is satisfied that the situation complained of by the applicants ought to have been submitted for assessment by the Court of Cassation, which is the national court with jurisdiction to interpret the law. It follows that, on this point, the applicants have not satisfied the requirement of exhaustion of domestic remedies.

The complaint concerning the impossibility of having the particulars of the child's birth certificate entered in the civil status registers must therefore be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

63. With regard to the complaint about the measures to remove the child and place him under guardianship, the Court notes that the Campobasso Youth Court's decision of 20 October 2011 was challenged before the Campobasso Court of Appeal. That court dismissed the applicants' appeal and confirmed the measures on 28 February 2012. Given the non-final nature of this type of decision, it was impossible to appeal on points of law (see paragraph 41 above).

Accordingly, the Court considers that the applicants have exhausted the domestic remedies on this point. It notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

64. As to the Campobasso Youth Court's decision of 5 June 2013 indicating that the applicants could not continue the proceedings concerning the child named Teodoro Campanelli since they no longer had standing to act, the Court notes that the applicants did not lodge an appeal against that decision before the court of appeal and then before the Court of Cassation. However, in view of the circumstances of the present case, the Court has doubts as to the effectiveness of those remedies in this case. The relevant decision by the Youth Court was delivered about twenty months after the child had been removed. The latter, who was considered to have been abandoned in the absence of biological ties to at least one of the applicants, had been placed, with a view to his adoption, with a family since at least January 2013. The youth court was called up on to rule on the child's adoption in the context of another set of proceedings, which had been opened in the meantime under his new identity, and the applicants were unable to take part

in those proceedings. In addition, the Government have submitted no decision shoeing that in such a case the remedies available would have had a reasonable chance of success. The Court therefore considers that, although remedies existed against the Youth Court's decision of 5 April 2013, the applicants were not required to exhaust them (see *Akdivar and Others*, cited above, §§ 66-67, and *Scordino v. Italy* (dec.), no. 36813/97, ECHR 2003-IV).

B. Merits

1. The parties' submissions

65. The applicants noted that the problem raised by the application did not concern surrogate motherhood, or assisted reproduction, or the genetic links between parents and children, or, lastly, adoption. The problem in issue was the refusal to recognise a birth certificate delivered by the relevant Russian authorities and the Italian authorities' decision to remove the child. In spite of the fact that it had been impossible to have the legal parent-child relationship recognised, and in spite of the child's removal, the applicants had parental responsibility for him, even if they were not his biological parents, on the basis of the birth certificate issued by the relevant authorities.

The disputed certificate was authentic, as proved by the "*apostille*" certificate, and, for the sake of legal certainty, it ought to have been registered in accordance with the "Apostille" Hague Convention, concluded on 5 October 1961. It had been issued in accordance with Russian law, under which it was not necessary to have a genetic link in order to establish a parent-child relationship. The child's origins had been established by the relevant Russian authorities, who had taken account of all of the circumstances of his birth. In this connection, the applicants' lawyer submitted an article written by him and published in "Open Access Scientific Reports". This article indicated that the donation of gametes and embryos was permitted in Russia, including for commercial purposes. Nor was surrogate motherhood for commercial purposes forbidden. It was therefore possible in Russia to purchase gametes from a database (*IVF clinic's database*); in this way, the gametes purchased by the potential parents became "their" gametes, which enabled them to be considered as parents.

The applicants had never committed offences in Russia. Nor had they committed any in Italy. They were free to cross the border and to travel to a place where the legislation allowed for heterologous *in vitro* fertilisation. By claiming, wrongly and without valid grounds, that the birth certificate was fraudulent, the Italian

authorities had acted unlawfully. The only criterion which ought to have guided the Italian authorities in their decision-making was the child's interest, namely that of remaining with the applicants.

66. The Government submitted that, in issuing the travel documents enabling the child to leave for Italy, the Italian Consulate in Moscow had complied with its international obligations. However, the certificate ("*apostille*") attached to the Russian birth certificate did not prevent the Italian authorities from verifying the truthfulness of the contents of the file on the child's birth. Italian law was applicable in this case. Section 18 of DPR no. 396/2000 required the Italian authorities to verify whether or not the birth certificate was contrary to domestic public policy and therefore whether or not it was fit to be entered in the civil status register. The legal parent-child relationship was determined on the basis of section 33 of the Private International Law Act. The domestic courts had established the absence of any biological link between the applicants and the child. This was therefore a birth certificate with inaccurate content. Even supposing that there had been interference with the applicants' right to respect for their private and family life, it had been compatible with Article 8 of the Convention, since it had been in accordance with the law and corresponded to the aim of protecting the child, and was necessary in a democratic society. Given the authorisation to adopt that they had obtained, the applicants had been in a position to adopt a child, especially since the bilateral agreement concluded between Italy and Russia on 6 November 2008 had opened the way for 781 legal adoptions in 2011 alone. Lastly, the Government noted that there was no European consensus in the area of gestational surrogacy.

2. The Court's assessment

(a) Applicability of Article 8 of the Convention

67. In accordance with its previous case-law, the Court notes that the existence or non-existence of family life is essentially a question of fact depending upon the real existence in practice of close personal ties (see *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31, and *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001-VII). The notion of "family" in Article 8 is not confined solely to marriage-based relationships and may encompass other *de facto* "family ties" where the parties are living together outside marriage and a relationship has sufficient constancy (see *Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297-C; *Johnston and Others v. Ireland*, 18 December 1986, § 55, Series A no. 112; *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290; and *X, Y and Z v. the United Kingdom*, 22 April 1997, § 36, *Reports* 1997-II). Moreover, the

provisions of Article 8 do not guarantee either the right to found a family or the right to adopt (see *E.B. v. France* [GC], no. 43546/02, § 41, 22 January 2008). The right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family (see *Marckx*, cited above, § 31), or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father (see *Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI), or the relationship that arises from a genuine marriage, even if family life has not yet been fully established (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 62, Series A no. 94,), or the relationship that arises from a lawful and genuine adoption (see *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, § 148, ECHR 2004-V).

68. The Court notes that the present case has similarities to that of *Wagner and J.M.W.L. v. Luxembourg* (no. 76240/01, 28 June 2007). The Luxembourg case concerned the fact that it was impossible to obtain recognition in Luxembourg of the Peruvian judicial decision pronouncing the full adoption of the second applicant by the first applicant. The Court found that family life existed, in spite of the lack of recognition of the adoption, and took into account the fact that *de facto* family ties had existed for more than ten years between the applicants, and that the first applicant had acted as the child's mother in every respect.

Another case (*Moretti and Benedetti,* cited above, §§ 50-52) concerned a married couple (the applicants) who had had accepted a one-year-old child into their family. They had spent nineteen months with her, before the Italian courts decided to place the child with another family with a view to adoption. The Court also concluded that there existed a *de facto* family life, confirmed, *inter alia*, by expert reports on the family, in spite of any legal relationship of kinship(§§ 50-52).

69. In the present case, the applicants were unable to have the particulars of the Russian birth certificate establishing the legal parent-child relationship entered in the civil status registers. As this certificate had not been recognised under Italian law, it had not given rise to a legal relationship of kinship strictly speaking, although the applicants had had, at least initially, parental responsibility for the child, as shown by the request for suspension of parental responsibility, brought by the court-appointed adviser. Accordingly, the Court must take the *de facto* family ties into account. In this connection, it notes that the applicants had shared with the child the first important stages of his young life: six months in Italy,

from the child's third month of life. Prior to that period, the first applicant had already spent some weeks with him in Russia. Although that period was in itself relatively short, the Court considers that the applicants had acted as parents towards the child and concludes that there existed a *de facto* family life between the applicants and the child. It follows that Article 8 of the Convention is applicable in the present case.

70. As a subsidiary consideration, the Court observes that in the context of the proceedings brought to obtain recognition of the parent-child relationship, the second applicant underwent a DNA test. It is true that no genetic link was established between the second applicant and the child (see, *a contrario*, *Keegan,* cited above, § 45). The Court reiterates, however, that Article 8 protects not only "family" but also "private" life. This includes, to a certain degree, the right to establish relationships with others (see, *mutatis mutandis*, *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B). There seems, furthermore, to be no reason of principle why the notion of "private life" should be taken to exclude the determination of a legal or biological relationship between a child born out of wedlock and his natural father (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I). The Court has already held that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality (see *Gaskin v. the United Kingdom*, 7 July 1989, § 39, Series A no. 160). In the present case, the second applicant sought to establish, by judicial means, whether he was the natural father. His request for recognition of the paternity that had been legally established abroad was thus coupled with a search for the biological truth, seeking to determine his links with the child. Consequently, there was a direct link between the establishment of paternity and the second applicant's private life. The facts of the case accordingly fall within the ambit of Article 8 of the Convention (see *Mikulić,* cited above, § 55).

(b) Compliance with Article 8 of the Convention

71. In the present case, the applicants were unable to obtain, from the Campobasso Youth Court and the Campobasso Court of Appeal, recognition of the paternity that had been established abroad, and were affected by the judicial decisions which resulted in the child's removal and placement in care. In the Court's opinion, this situation amounts to interference with the exercise of the rights enshrined in Article 8 of the Convention (see *Wagner and J.M.W.L.*,

cited above, § 123). Such interference will be in breach of Article 8 unless it meets the cumulative conditions of having been in accordance with the law, pursued a legitimate aim and been necessary in a democratic society. The notion of "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see *Gnahoré v. France*, no. 40031/98, § 50, ECHR 2000-IX, and *Pontes v. Portugal*, no. 19554/09, § 74, 10 April 2012).

72. As to whether this interference was "in accordance with the law", the Court reiterates that under Article 5 of the 1961 Hague Convention, the only effect of the certifying document (the "*apostille*") is to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which that document bears. The explanatory note to the above Convention indicates that the apostille does not attest to the truthfulness of the content of the original document. This limitation on the legal effects deriving from the Hague Convention is intended to preserve the signatory States' right to apply their own choice-of-law rules where they are required to determine the probatory force to be attached to the content of the certified document. In the present case, the Italian courts did not base their decisions on the foreign birth certificate, but chose to apply the Italian legislation on the legal parent-child relationship. The Youth Court's application of Italian law in the present case derives from the choice-of-law rule according to which paternity is determined by the national law of the country in which the child was born. In the present case, given that the child was born from gametes of unknown donors, the child's nationality was not established. In this situation, the Court considers that the domestic courts' application of Italian law resulting in the finding that the child had been abandoned could not be viewed as arbitrary. Lastly, the Court notes that the measures in respect of the child, taken by the Youth Court and confirmed by the Campobasso Court of Appeal, were based on the provisions of domestic law.

It follows that the interference – based, in particular on the relevant sections of the Private International Law Act and the International Adoption Act – was "in accordance with the law".

73. With regard to the legitimate aim, the Court considers that it is not open to doubt that the measures taken with regard to the child pursued the aim of "prevention of disorder", in so far as the applicants' conduct was contrary to the legislation on international adoption and on the use of heterologous artificial

procreation techniques was, at the relevant time, forbidden. In addition, the measures in question were aimed at protecting the "rights and freedoms" of the child.

74. The Court reiterates that in order to determine whether the impugned measures were "necessary in a democratic society", it has to consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient for the purposes of paragraph 2 of Article 8. In sensitive and complex cases, the margin of appreciation to be accorded to the competent national authorities varies in the light of the nature of the issues and the seriousness of the interests at stake. While the authorities enjoy a wide margin of appreciation in the area of adoption (see *Wagner and J.M.W.L.*, cited above, § 127) or in assessing the necessity of taking a child into care, in particular where an emergency situation arises, the Court must still be satisfied in the particular case that there existed circumstances justifying the removal of the child. It is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to taking the child into public care, was carried out prior to implementation of such a measure (see *K. and T. v. Finland* [GC], no. 25702/94, § 166, ECHR 2001-VII, and *Kutzner*, cited above, § 67).

75. In the present case, the issue is whether the legislative provisions as applied in the present case struck a fair balance between the competing public and private interests involved, based on the right to respect for private and family life. In doing so, it must have regard to the essential principle according to which whenever the situation of a child is in issue, the best interests of that child are paramount (see *Wagner and J.M.W.L.*, cited above, §§ 133-134; *Mennesson v. France*, no. 65192/11, § 81, ECHR 2014 (extracts); *Labassee v. France*, no. 65941/11, § 60, 26 June 2014).

76. The Court notes that in this case it has been established that there is no genetic relationship between the child and the applicants. Further, Russian law does not specify whether there must be a biological link between the future parents and the child who is to be born. In addition, the applicants did not argue before the domestic courts that it was unnecessary under Russian law to have a genetic link with at least one of the future parents in order to be able to refer to gestational surrogacy. In the light of these elements, the Court considers that it is not necessary to compare the legislation of the Member States in order to establish whether, in the area of gestational surrogacy, there exists extensive

harmonisation in Europe. The Court is called upon to examine a case in which a Russian company – which employs the lawyer representing the applicants in Strasbourg – accepted a sum of money from the applicants; it purchased gametes form unknown donors; it found a surrogate mother and implanted the embryos in her; it handed the child over to the applicants; it assisted them in obtaining the birth certificate. To explain this process more clearly, the lawyer in question indicated that it was entirely possible to circumvent the requirement to have a genetic link with one of the future parents by purchasing the embryos, which thus became "one's own" embryos. Irrespective of any ethical considerations as to the actions of Rosjurconsulting, the consequences of those actions have been very serious for the applicants, especially if it is borne in mind that the second applicant was certain that he was the child's biological father and that, to date, it has not been shown that he was not acting in good faith.

77. The application of national law resulted in non-recognition of the legal parent–child relationship established abroad, on the ground that the applicants had no genetic relationship to the child. The Court does not overlook the emotional aspects of this case, in which the applicants were required to face their inability to procreate; to apply for the authorisation to adopt; having obtained that authorisation in December 2006, to wait for years in order to be able to adopt, given the shortage of children eligible for adoption; to nurture hope until 2010, when they decided to conclude a contract with Rosjurconsulting and when they learned about the child's birth; and to experience despair when they learned that the second applicant was not the child's biological father.

The national courts examined the second applicant's argument that an error had occurred in the Russian clinic in that his seminal fluid had not been used. They considered, however, that his good faith could not give rise to the missing biological link.

In the Court's view, the national courts did not act unreasonably in applying the national law strictly to determine paternity and in ignoring the legal status established abroad (see, *a contrario, Wagner and J.M.W.L.* cited above, § 135).

78. Nonetheless, it remains to be ascertained whether, in such a situation, the measures taken in respect of the child – in particular, his removal and placement under guardianship – can be regarded as proportionate, namely whether the child's interests were taken into account sufficiently by the Italian authorities.

79. The Court notes in this connection that the Campobasso Youth Court considered that the child was without a satisfactory family environment for the purposes of the International Adoption Act. In reaching that conclusion, the domestic courts took into consideration the fact that the child had been born to unknown biological parents and that the surrogate mother had relinquished him. They further attached great importance to the unlawful situation in which the applicants found themselves: the latter had brought the child to Italy by passing him off as their son and had thus breached Italian law, in particular the International Adoption Act and the Assisted Procreation Act. They also inferred from the fact that the applicants had contacted Rosjurconsulting a wish on their part to circumvent the adoption legislation, in spite of the fact that they had obtained an authorisation to adopt, and considered that this situation resulted from a narcissistic desire on the part of the parents, or that the child was intended to resolve problems in the couple's relationship. In consequence, doubt could be cast on their emotional and child-raising capacities. It was therefore necessary to end this situation by removing the child from the applicants' home and ending any possibility of contact with him. The approach followed by the domestic courts clearly met the need to end the illegal situation.

80. In the Court's opinion, the reference to public order could not, however, be considered as giving *carte blanche* for any measure, since the State had an obligation to take the child's best interests into account irrespective of the nature of the parental link, genetic or otherwise. In this connection, the Court reiterates that in the above-cited case of *Wagner and J.M.W.L.*, the Luxembourg authorities did not recognise the legal parent-child relationship established abroad on the ground that it was contrary to public order; however, they did not take any measure aimed at removing the child or interrupting family life. The removal of a child from the family setting is an extreme measure which should only be resorted to as a very last resort. Such a measure can only be justified if it corresponds to the aim of protecting a child who is faced with immediate danger (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 148, ECHR 2000-VIII; *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 136, ECHR 2010; *Y.C. v. the United Kingdom*, no. 4547/10, §§ 133-138, 13 March 2012; and *Pontes v. Portugal*, no. 19554/09, §§ 74-80, 10 April 2012). The threshold set in the case-law is very high, and the Court considers it useful to refer to the following passages from the above-cited *Pontes* judgment:

"§ 74. The Court reiterates that the enjoyment by parent and child of each other's company constitutes a fundamental element of family life (see *Kutzner*, cited above, § 58) and that domestic measures which hinder such enjoyment amount to an interference with the right protected by Article 8 of the Convention (see *K. and T. v. Finland* [GC], no. 25702/94, § 151, ECHR 2001-VII). Such interference violates Article 8, unless it is 'in accordance with the law', pursues one or more of the legitimate aims referred to in paragraph 2, and is 'necessary in a democratic society' to achieve the aim or aims concerned. The notion of 'necessity' implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see *Couillard Maugery v. France*, no. 64796/01, § 237, 1 July 2004).

§ 75. Although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life. Thus, where a family tie was established, the State must in principle act in such a way as to allow the relationship to develop and take any measures that might be appropriate to reunite the parent and child concerned (see, for example, *Eriksson v. Sweden*, 22 June 1989, § 71, Series A no. 156; *Olsson v. Sweden (no. 2)*, 27 November 1992, § 90, Series A no. 250; *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I; *Gnahoré v. France*, no. 40031/98, § 51, ECHR 2000-IX, and, most recently, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 140, ECHR 2010). The boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition; the applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests - those of the child, of the two parents, and of public order - (see *Maumousseau and Washington v. France*, no. 93388/05, § 62, ECHR 2007-XIII), bearing in mind, however, that the child's best interests must be the primary consideration (see to this effect *Gnahoré*, cited above, § 59, ECHR 2000-IX), and may, depending on their nature and seriousness, override those of the parents (see *Sahin v. Germany* [GC], no. 30943/96, § 66, ECHR 2003-VIII). The parents' interests, especially in having regular contact with their child, nevertheless remain a factor when balancing the various interests at stake (see *Haase v. Germany*, no. 11057/02, § 89, ECHR 2004-III (extracts), or *Kutzner v. Germany*, cited above, § 58). In both contexts the State enjoys a certain margin of appreciation (see, for example, *W., B. and R. v. the United Kingdom*, 8 July 1987, Series A no. 121, §§ 60 and 61, and *Gnahoré*, cited above, § 52). The Court's task is not to substitute itself for the domestic authorities in the exercise of their

responsibilities for the regulation of the public care of children and the rights of parents whose children have been taken into care, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A).

§ 76. The Court reiterates that, while Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and must ensure due respect for the interests safeguarded by that Article. It must therefore be determined whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents were able to play a part in the decision-making process, seen as a whole, to a sufficient degree to provide them with the requisite protection of their interests. If not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8 (see *W. v. the United Kingdom*, 8 July 1987, § 64, Series A no. 121).

§ 77. In order to determine whether the impugned measures were 'necessary in a democratic society' the Court has to consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient for the purposes of Article 8 § 2 of the Convention. In so doing, it takes into consideration the fact that it is an interference of a very serious order to split up a family; such a step must be supported by sufficiently sound and weighty considerations in the interests of the child (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 148, ECHR 2000-VIII).

§ 78. While the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, a stricter scrutiny is nonetheless called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child would be curtailed (see *Gnahoré*, cited above, § 54, and *Sahin v. Germany* [GC], no. 30943/96, § 65, ECHR 2003-VIII).

§ 79. On the one hand, the interest clearly entails ensuring that the child develops in a sound environment and that under no circumstances can a parent be entitled under Article 8 to have measures taken that would harm the child's health and development (see *Sahin*, cited above, § 66). On the other hand, it is clear that it is equally in the child's interest for its ties with its family to be

maintained, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots. It follows that the interest of the child dictates that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to 'rebuild' the family (see *Gnahoré*, cited above, § 59).

§ 80. Furthermore, the Court reiterates that, in cases concerning family life, the passage of time can have irremediable consequences for relations between the child and the parent with whom he or she does not live. The breaking-off of contact with a very young child may result in the progressive deterioration of the child's relationship with his or her parent (see *Ignaccolo-Zenide v. Romania*, cited above, § 102, and *Maire v. Portugal*, no. 48206/99, § 74, ECHR 2003-VI)."

The Court deems it useful to refer also to the following passages from the judgment in *Zhou v. Italy* (no. 33773/11, §§ 55-56, 21 January 2014):

"§ 55. The Court reiterates that in such sensitive and complex cases, the margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake. While the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, in particular where an emergency situation arises, the Court must still be satisfied in the particular case that there existed circumstances justifying the removal of the child. It is for the respondent State to establish that a careful assessment of the impact of the adoption measure on the parents and the child, as well as of the possible alternatives to taking the child into public care, was carried out prior to implementation of such a measure (see *K. and T. v. Finland* [GC], cited above, § 166, and *Kutzner v. Germany*, cited above, § 67, ECHR 2002-I).

§ 56. In contrast to other cases which the Court has been called upon to examine, the applicant's child in the present case had not been subjected to violence or to physical or psychological ill-treatment (see, conversely, *Dewinne v. Belgium* (dec.), no. 56024/00, 10 March 2005, and *Zakharova v. France* (dec.), no. 57306/00, 13 December 2005), or to sexual abuse (see, conversely, *Covezzi and Morselli v. Italy*, no. 52763/99, § 104, 9 May 2003). The Court notes that it found a violation in the case of *Kutzner v. Germany* (§ 68, cited above), in which the courts withdrew parental responsibility from the applicants after having noted a lack of emotional development on their part, and found no violation of Article 8 in the case of *Aune v. Norway*, (no. 52502/07, 28 October 2010), in which the Court

noted that the minor's adoption did not in fact prevent the applicant from continuing to have a personal relationship with the child and did not result in cutting the child off from his roots. It also found a violation of Article 8 in a case (*Saviny v. Ukraine*, no. 39948/06, 18 December 2008) in which the placement of the applicants' children had been justified on account of the parents' inability to provide them with an adequate standard of living (the applicants' lack of financial means and personal qualities endangered their children's life, health and moral upbringing). Moreover, in a case in which the children's placement had been ordered on account of psychological instability on the part of the parents, the Court concluded that there had been no violation of Article 8, and also took into account the fact that the ties between the parents and children had not been severed (see *Couillard Maugery v. France*, cited above)."

81. The Court acknowledges that the situation facing the national authorities in the present case was a sensitive one. There were serious suspicions hanging over the applicants. When the youth court decided to remove the child from the applicants, it took into account the harm that he would undoubtedly sustain but, given the short period that he had spent with them and his young age, it considered that the child would surmount this difficult stage in his life. The Court considers, however, that the conditions justifying the use of the impugned measures were not met, for the following reasons.

82. Firstly, the mere fact that the child would have developed closer emotional ties with his intended parents had he stayed with them for longer is not sufficient to justify his removal.

83. Further, with regard to the criminal proceedings brought against the applicants, the Court notes at the outset that the Campobasso Court of Appeal had held that it was unnecessary to await their outcome, since the applicants' criminal liability was irrelevant (see paragraph 25 above), with the result that the suspicions hanging over the applicants were also insufficient to justify the impugned measures. In the Court's opinion, it is in any event impossible to speculate as to the outcome of the criminal proceedings. In addition, the applicants would have become legally disqualified from adopting the child or accepting him on placement only in the event of their conviction for the offence set out in section 72 of the Adoption Act.

84. In this latter connection, the Court notes that the applicants, who had been assessed as fit to adopt in December 2006 when they received the authorisation to adopt (see paragraph 12

above), were found to be incapable of bringing up and loving the child on the sole ground that they had circumvented the adoption legislation, without any expert report having been ordered by the courts.

85. Lastly, the Court notes that the child received a new identity only in April 2013, which means that he had no official identity for more than two years. It is necessary, however, to ensure that a child is not disadvantaged on account of the fact that he or she was born to a surrogate mother, especially in terms of citizenship or identity, which are of crucial importance (see Article 7 of the United Nations Convention on the Rights of the Child of 20 November 1989, which entered into force on 2 September 1990, 1577 Treaty Series 3).

86. Having regard to the above factors, the Court is not convinced of the adequacy of the elements on which the authorities relied in concluding that the child ought to be taken into the care of the social services. It follows that the Italian authorities failed to strike the fair balance that has to be maintained between the interests at stake.

87. In conclusion, the Court considers that there has been a violation of Article 8 of the Convention.

88. Given that the child has undoubtedly developed emotional ties with the foster family with whom he was placed at the beginning of 2013, this finding of a violation in the applicants' case cannot therefore be understood as obliging the State to return the child to them.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

89. Lastly, the applicants alleged that the refusal to recognise the legal parent-child relationship established abroad amounted to a violation of Article 14 of the Convention taken together with Article 8, and of Article 1 of Protocol No. 12.

The Court notes at the outset that, to date, Italy has not ratified Protocol No. 12, so that this complaint is incompatible *ratione personae* and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention. This part of the application must therefore be examined under Article 14 taken together with Article 8 of the Convention. Article 14 provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

90. In so far as this part of the application concerns the refusal to record the particulars of the birth certificate in the register of births, marriages and deaths, the Court considers that – in the same way as the complaint under Article 8 of the Convention taken separately (see paragraph 62 above) – it must be rejected for failure to exhaust domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

91. In so far as this part of the application concerns the measures taken in respect of the child, the Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see *Mazurek v. France*, no. 34406/97, § 46, ECHR 2000-II). A difference in treatment is discriminatory if it "lacks objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see *Mazurek*, cited above, § 48). Having examined the case file, the Court finds no appearance of a breach of the provisions relied upon. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

93. The applicants sought payment of 100,000 euros (EUR) in respect of non-pecuniary damage.

94. The Government objected to the payment of any amount and insisted that the application should be rejected. In any event, no

damage had been demonstrated and the child was entitled to live in a "legitimate and calm" family environment.

95. Ruling on an equitable basis, the Court awards the applicants, jointly, EUR 20,000.

B. Costs and expenses

96. The applicants claimed EUR 29,095 for reimbursement of the costs incurred before the domestic courts and in the Strasbourg proceedings.

97. The Government objected to the payment of any amount.

98. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicants jointly the sum of 10,000 euros (EUR) covering costs under all heads.

C. Default interest

99. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible as regards the applicants' complaint raised under Article 8 on their own behalf concerning the measures taken with regard to the child, and the remainder of the application inadmissible;

2. *Holds*, by five votes to two, that there has been a violation of Article 8 of the Convention;

3. *Holds*, by five votes to two,

(a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes

final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in French, and notified in writing on 27 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Işıl Karakaş
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint separate opinion of Judges Raimondi and Spano is annexed to this judgment.

A.I.K.
S.H.N.

JOINT PARTLY DISSENTING OPINION OF JUDGES RAIMONDI AND SPANO

1. With due respect to our colleagues in the majority, we are unable to share their opinion that there has been a violation of Article 8 of the Convention in this case.

2. We can accept, albeit with some hesitation and subject to the comments set out below, the majority's conclusions that Article 8 of the Convention is applicable in this case (see paragraph 69 of the judgment) and that there has been interference in the applicants' rights.

3. In reality, the applicants' *de facto* family life (or private life) with the child was based on a tenuous link, especially if one takes into consideration the very short period during which he resided with them. We consider that the Court, in situations such as that before it in the present case, ought to take account of the circumstances in which the child was placed in the custody of the individuals concerned when examining whether or not a *de facto* family life had been developed. We would emphasise that Article 8 § 1 cannot, in our opinion, be interpreted as enshrining "family life" between a child and persons who have no biological relationship with him or her, where the facts, reasonably clarified, suggest that the origin of the custody is based on an illegal act, in breach of public order. In any event, we consider that the factors related to possible illegal conduct at the origin of the establishment of a *de facto* family life must be taken into account in the analysis of proportionality required in the context of Article 8.

4. That being stated, it must be noted that the applicants were prevented, both by the Campobasso Youth Court and by the civil-status registry office and the Campobasso Court of Appeal, from obtaining recognition of the birth certificate issued by the competent Russian authorities, and were affected by the judicial decisions which resulted in the child's removal and his placement in care. This situation amounts to an interference in the rights guaranteed by Article 8 of the Convention (see *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, 28 June 2007, § 123).

5. In our opinion, this interference was in accordance with the law, pursued a legitimate aim and was necessary in a democratic society.

6. As to whether this interference was "in accordance with the law" and pursued a "legitimate aim", we agree with the majority's analysis (see paragraphs 72-73 of the judgment).

7. In addition, in our opinion, the application of the legislative provisions in this case struck a fair balance between the competing public and private interests at stake, based on the right to respect for private and family life.

8. In this case, there is, firstly, the established lack of genetic links between the child and the applicants. Further, the Russian legislation does not specify whether a biological link must exist between the future parents and the child to be born. In addition, the applicants did not argue before the domestic courts that it was unnecessary under Russian law to have a genetic link with at least one of the future parents in order to be able to refer to gestational surrogacy. In the light of these elements, we consider that it is not necessary to compare the legislation of the Member States in order to establish whether, in the area of gestational surrogacy, there exists extensive harmonisation in Europe. In fact, we are faced with a case in which a Russian company – which employs the lawyer representing the applicants in Strasbourg – accepted a sum of money from the applicants; it purchased gametes form unknown donors; it found a surrogate mother and implanted the embryos in her; it handed the child over to the applicants; it assisted them in obtaining the birth certificate. To explain this process more clearly, the lawyer in question indicated that it was entirely possible to circumvent the requirement to have a genetic link with one of the future parents by purchasing the embryos, which thus became "their own" embryos.

9. The application of national law resulted in non-recognition of the legal parent–child relationship established abroad, on the ground that the applicants had no genetic relationship to the child. We do not overlook the emotional aspects of this case, in which the applicants were required to face their inability to procreate; to apply for the authorisation to adopt; having obtained that authorisation in December 2006, to wait for years in order to be able to adopt, given the shortage of children eligible for adoption; to nurture hope until 2010, when they decided to conclude a contract with Rosjurconsulting and when they learned about the child's birth; and, lastly, to experience despair when they learned that the second applicant was not the child's biological father.

10. The national courts examined the second applicant's argument that an error had occurred in the Russian clinic in that his seminal fluid had not been used. They considered, however, that his good faith could not give rise to the missing biological link. In our opinion, the national courts did not act unreasonably in applying the national law strictly in order to determine paternity and in ignoring the legal status established abroad (see, *a contrario, Wagner and J.M.W.L.* cited above, § 135).

11. The Campobasso Youth Court considered that the child was without a satisfactory family environment for the purposes of the International Adoption Act. The domestic courts took into consideration the fact that the child had been born to unknown biological parents and that the surrogate mother had relinquished him. They further attached great importance to the unlawful situation in which the applicants found themselves: the latter had brought the child to Italy by passing him off as their son and had thus breached Italian law, in particular the International Adoption Act and the Assisted Procreation Act. They also inferred from the fact that the applicants had contacted Rosjurconsulting a wish on their part to circumvent the adoption legislation, in spite of the fact that they had obtained an authorisation to adopt, and considered that this situation resulted from a narcissistic desire on the part of the parents, or that the child was intended to resolve problems in their relationship. In consequence, doubt could be cast on their emotional and child-raising capacities, and it was therefore necessary to end this situation by removing the child from the applicants' home and ending any possibility of contact with him.

12. We note at the outset that the applicants, who had been assessed as fit to adopt in December 2006 when they received the authorisation to adopt, were found to be incapable of bringing up and loving the child on the basis of presumptions and inferences, without any expert report having been ordered by the courts. Nonetheless, we recognise that the situation facing the national courts was sensitive and urgent. We do not have grounds for considering arbitrary the position of the domestic courts, which held that the suspicions hanging over the applicants were serious and that it was essential to remove the child and to ensure his safety, without allowing the applicants to contact him. When the youth court decided to remove the child from the applicants, it took into account the harm that he would undoubtedly sustain but, given the short period that he had spent with them and his young age, it considered that the child would surmount this difficult stage in his life. Having regard to those factors, we have no grounds to doubt the adequacy of the elements on which the authorities relied in concluding that the child ought to be taken into the care of the social services. It follows that the Italian authorities acted in accordance with the law, with a view to preventing disorder and protecting the rights and health of the child, and maintained the fair balance that should be struck between the interests at stake.

13. In our opinion, there are no grounds for calling into question the assessment made by the Italian courts. The majority is substituting its own assessment for that of the domestic authorities, and thus overruling the principle of subsidiarity and the "fourth-instance" doctrine.

14. In this type of case, in which the national courts are faced with difficult questions whereby they must balance, on the one hand, the child's interests, and, on other, the requirements of public order, the Court ought, in our opinion, to show restraint and confine itself to ensuring that the domestic courts' assessment is not flawed by arbitrariness. The arguments developed by the majority (see paragraphs 82-84 of the judgment) are not convincing. In particular, we consider that the issue of establishing the child's identity did not have an impact on the 2011 decision to separate him from the applicants, and could, at a pinch, be the subject-matter of a complaint by the child himself.

15. In addition, the majority's position amounts, in substance, to denying the legitimacy of the State's choice not to recognise gestational surrogacy. If it suffices to create, illegally, a link with the child abroad in order for the national authorities to be obliged to recognise the existence of "family life", then it is clear that the States' freedom not to give legal effect to gestational surrogacy, a freedom that has nonetheless been acknowledged by the Court's case-law (see *Mennesson v. France*, no. 65192/11, 26 June 2014, § 79, and *Labassee v. France*, (no. 65941/11), 2 June 2014, § 58), is reduced to nought.