Cross-Border Surrogacy Before the European Court of Human Rights: Analysis of Valdís Fjölnisdóttir And Others v Iceland

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Abstract

The recent case of Valdís Fjölnisdóttir and Others v Iceland adds to the emerging ECtHR jurisprudence on cross-border surrogacy. It reinforces principles established in previous cases and, in doing so, clarifies the scope of the child’s rights under Article 8 ECHR, and hence clarifies the scope of the obligations placed on Member States in cases of cross-border surrogacy. At the same time, consideration of Valdís Fjölnisdóttir reveals significant omissions in the approach adopted by the ECtHR as regards consideration of the rights of the child. In this way, aspects of Valdís Fjölnisdóttir confuse, rather than clarify, the scope of the child’s Article 8 ECHR rights in cases of cross-border surrogacy. This article examines the Valdís Fjölnisdóttir judgment with a view to identifying emerging principles, as well as contradictions, in the developing body of jurisprudence relating to cross-border surrogacy.

Keywords

cross-border surrogacy – ECHR – Article 8, private and family life – children’s rights

1 Introduction

In recent years, the European Court of Human Rights (ECtHR) has considered a number of cases involving the non-recognition of legal parent-child
relationships in cases of cross-border surrogacy. Cross-border surrogacy was also the subject of a 2019 Advisory Opinion issued by the ECtHR to France. This growing body of jurisprudence is shaping Europe’s response to cross-border surrogacy as it has established, among other things, that the child’s best interests and right to respect for private life under Article 8 ECHR demand that certain parent-child relationships are legally recognised following cross-border surrogacy, even in cases where the ‘home’ Member State expressly prohibits surrogacy in its domestic law. Thus, in some cases, it is possible to identify avenues that may enable intended parents to circumvent local prohibitions on surrogacy. However, it must also be noted that the case law now provides something of a roadmap for prohibitive surrogacy states to double-down on restrictive measures so as to avoid a violation of Article 8 ECHR.

The recent case of Valdís Fjölnisdóttir and Others v Iceland adds to the emerging ECtHR jurisprudence on cross-border surrogacy. It reinforces principles established in previous cases and, in doing so, clarifies the scope of the child’s rights under Article 8 ECHR, and hence clarifies the scope of the obligations placed on Member States in cases of cross-border surrogacy. At the same time, consideration of Valdís Fjölnisdóttir reveals significant omissions in the approach adopted by the ECtHR as regards consideration of the rights of the child. Moreover, some of the principles established in previous cases that are endorsed in Valdís Fjölnisdóttir arguably do not support a children’s rights perspective. In this way, aspects of Valdís Fjölnisdóttir confuse, rather than clarify, the scope of the child’s Article 8 ECHR rights in cases of cross-border surrogacy.

This article analyses the Valdís Fjölnisdóttir judgment with a view to highlighting and unpacking the omissions in the judgment as regards the protection of the rights and best interests of surrogate-born children. The article

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1 See, for example, Mennesson v France, Application No. 65192/11, 26 June 2014; Labassee v France, Application No. 65941/11, 26 June 2014; D and Others v. Belgium, Application No. 29176/13, 8 July 2014; C and E v France, Application Nos 1462/18 and 17348/18, 19 November 2019; D v France, Application No. 11288/18), 16 July 2020.
3 Fenton-Glynn notes that the ECtHR case law has established that ‘while domestic arrangements are still prohibited and unrecognized, parenthood achieved through international surrogacy arrangements must be respected – at least where there is a genetic connection.’ C. Fenton-Glynn, ‘International surrogacy before the European Court of Human Rights,’ Journal of Private International Law 13(3) (2017) 546–567, 564.
4 For the purpose of this article, a prohibitive surrogacy state is one that prohibits or significantly restricts all forms of surrogacy under its domestic law.
5 Valdís Fjölnisdóttir and Others v Iceland, Application No. 71552/17, 18 May 2021.
begins by setting out the facts of *Valdís Fjölnisdóttir* and the reasoning and conclusions of the ECtHR in that case, before turning to consider two notable omissions in the judgment: consideration of the arguments based on the child’s right to respect for private life; and the applicant’s complaint based on non-discrimination. Other aspects of the case are compared with the ECtHR’s approach to the same issues in the previous cases of *Paradiso and Campanelli v Italy* and *Mennesson v France* in order to identify emerging principles, as well as contradictions, in the developing body of jurisprudence in this field.

2 **Facts of Valdís Fjölnisdóttir**

*Valdís Fjölnisdóttir* concerned a married female couple (the first and second applicants) who had engaged in gestational surrogacy in the United States, resulting in the birth of a son (the third applicant). The female couple are the child’s intended parents and are listed as the child’s legal parents on the US birth certificate, but neither of them has a biological connection to the child.

Three weeks after the child’s birth in the United States, the three applicants travelled to the intended parents’ home State of Iceland and the women sought to register the birth of the child on the national register using the form designated for Icelandic nationals born abroad. Surrogacy is illegal in Iceland and so the request was refused by Registers Iceland on the basis that the child had been born in the United States to a surrogate mother, which meant that the Icelandic legal provisions on parentage and citizenship were not applicable. The child was instead considered to be a foreign national and an unaccompanied minor in Iceland. He was taken into State custody before being placed back in the care of the intended parents under a foster agreement.

The intended parents appealed against the refusal to register the birth of the child on the national register to the Ministry of the Interior. They also applied to adopt the child at this time but were informed that this request could not be considered while the application for registration of parentage was still pending.

The appeal to the Ministry against the Registers Iceland decision was unsuccessful. The Ministry decision stated that, under Icelandic law, the woman who

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6 *Paradiso and Campanelli v Italy*, Application No. 25358/12, 24 January 2017.
8 It should be noted that while the ECtHR does not operate a doctrine of precedent, it typically follows its own jurisprudence in order to maintain legal certainty and predictability. See further M. Iliadou, ‘Surrogacy and the ECtHR: Reflections on Paradiso and Campanelli v. Italy’, *Medical Law Review* 27(1) 144–154, 151.
gives birth to a child is always considered to be the legal mother, regardless of whether or not the child was conceived using her gametes. Therefore, as the child in the instant case had been born in the United States to a surrogate who was a US citizen and there was no evidence to suggest that the child's genetic father was an Icelandic citizen, the Ministry found that the child was not entitled to Icelandic citizenship.

The intended parents sought judicial review of the Ministry decision. While the proceedings before the District Court of Reykjavik were pending, the child was granted Icelandic citizenship following the adoption of Act No. 128/2015 on the Granting of Citizenship, which came into force on 31 December 2015. He was subsequently entered in the national register as an Icelandic citizen, but the intended parents were still not registered as his parents. The intended parents also divorced while the District Court proceedings were pending. This meant that the permanent agreement for their foster care of the child became invalid and so a new foster care arrangement was subsequently made under which the child shared time with the first applicant and her new spouse and the second applicant and her new spouse.

Following their divorce, the intended parents withdrew their earlier application for adoption as they were no longer permitted to adopt jointly under Icelandic law. They also both decided not to apply to adopt as individuals as this would have had the effect of severing the child's legal ties with the 'other' (i.e., non-adopting) parent.

On 2 March 2016, the District Court rejected the applicants' claims for the Ministry's decision to be annulled. The applicants appealed against the District Court judgment to the Supreme Court of Iceland but the Supreme Court upheld the District Court's rejection of the applicants' claims. The applicants subsequently submitted a complaint to the ECtHR.

3 The ECtHR Judgment

In their application to the ECtHR, the intended parents claimed that the refusal by the Icelandic authorities to register them as the child's parents had amounted to an interference with their right to respect for private and family life and prevented them from enjoying a stable legal parent-child relationship. Among other things, the applicants submitted that the child's relationship with the intended parents was not sufficiently well protected by the foster system as this meant that the child did not have inheritance rights in respect of the intended parents. Further, it was submitted that the family 'lived in a state
of uncertainty which had caused them anguish and distress’ as they could not secure a permanent family relationship beyond foster care.9

The application was heard by a Chamber of the Third Section of the ECtHR. The first consideration for the Chamber was whether ‘family life’ existed between the parties in this case. It was not contested that there was no biological link between the three applicants. As such, the situation was comparable to the case of Paradiso where a surrogate-born child was removed from the care of the intended parents in circumstances where there was no biological relationship between them. In Paradiso, the Court found that family life did not exist between the intended parents and the child due to the short duration of the relationship (approximately eight months) which the intended parents had had with the child.

In determining whether family life existed in the instant case, the Chamber had regard to the quality of the personal ties between the three applicants, the role played by the intended parents vis-à-vis the child and the duration of both their cohabitation all together and the child’s subsequent cohabitation with the intended parents individually. The Court noted that the child has been in the ‘uninterrupted care’ of the intended parents since he was born in February 2013.10 The Court noted that the relationship between the intended parents and child ‘was thus clearly strengthened by the passage of time, reinforced by the legally established foster care arrangement.’11 Taking into account the ‘long duration of the first two applicants’ uninterrupted relationship’ with the child, ‘the quality of the ties already formed and the close emotional bonds forged with the [child] during the first stages of his life,’ and the existence of the foster care arrangement, ‘family life’ for the purpose of Article 8 ECHR was found to exist between the three applicants.12

Having established that the applicants’ complaint concerned their ‘family life’ within the meaning of Article 8 ECHR, the Court found that the refusal to recognise the intended parents as the legal parents of the child, despite the Californian birth certificate to that effect, amounted to an interference with the three applicants’ right to respect for that family life. The Court was satisfied that this interference was ‘in accordance with law’ under section 5 of Act No. 55/1996 on Artificial Fertilisation and the Use of Human Gametes and Embryos for Stem Cell Research and section 6 of Children Act No. 76/2003.

9 Supra note 5, para. 47.
10 Ibid., para. 61.
11 Ibid., para. 61.
12 Ibid., para. 62.
The Court was also satisfied that the interference pursued the legitimate aim of protecting the rights and freedoms of others.

The next consideration was whether the interference was ‘necessary in a democratic society.’ It was noted that, in order for an interference to be ‘necessary’, it must correspond to a ‘pressing social need’ and must be ‘proportionate to the legitimate aim pursued.’ The Court will also take into account the margin of appreciation that is afforded to the State and ‘[t]here will usually be a wide margin of appreciation accorded if the State is required to strike a balance between competing private and public interests or Convention rights.’ The margin of appreciation is also generally wide ‘regarding matters which raise delicate moral and ethical questions on which there is no consensus at European level.’

In considering these principles in the context of the present case, the Court noted that the applicants’ ‘actual enjoyment of their family life’ was not interrupted by an intervention by the Icelandic authorities. On the contrary, the authorities took measures to have the child fostered by the intended parents and joint adoption was a possibility until their divorce. After the divorce, the State took steps to ensure that family life could continue through the conclusion of a revised foster agreement, which was subsequently rendered permanent. According to the Court, this had to be considered ‘to substantially alleviate the uncertainty and anguish cited by the applicants.’ In addition, the child was granted Icelandic citizenship and permanent residence. In this way, ‘[a]ctual, practical obstacles to the enjoyment of family life created by the non-recognition of a family link therefore seem to have been limited.’

The Court noted that the applicants had withdrawn their application for adoption of the child prior to the Icelandic Supreme Court hearing and so the Supreme Court judgment did not address the matter of adoption. It was noted that it was still possible for either the first or the second applicant as individuals or together with their new spouses to apply to adopt the child. Although the Court was mindful of the practical problems that this would create for the family, it considered it a relevant matter to be taken into account ‘in its holis-

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13 Ibid., para. 68.
14 Ibid., para. 69.
15 Ibid., para. 70.
16 Ibid., para. 71.
17 Ibid., para. 71.
18 Ibid., para. 72.
19 Adoption by one of the intended parents in this situation would allow the child to have a legal relationship with that intended parent but not with the other, non-adoptive intended parent.
tic examination of the necessity of the interference, in particular as regards the Article 8 rights of the child.20

Ultimately, the Court found that there was no violation of the applicants’ right to respect for their family life under Article 8 ECHR. The Court was satisfied that the non-recognition of a formal parental link between the intended parents and the child struck a fair balance between the applicants’ right to respect for their family life and the general interests which the State sought to protect by the ban on surrogacy. In so finding, the Court paid particular attention to the fact that there was an absence of ‘actual, practical hindrances’ in the enjoyment of family life and noted the steps taken by the Icelandic authorities to regularise and secure the bond between the applicants.21 In these circumstances, the Court found that the State had acted within the margin of appreciation afforded to it. In respect of the claims made by the applicants concerning their right to ‘private life’ under Article 8 ECHR, the Court considered that these were in principle the same as those submitted in relation to ‘family life’ and saw no reason to reach a different conclusion as to the ‘private life’ complaint. Accordingly, there was also no violation of Article 8 ECHR with regard to the applicants’ right to respect for their private life.

The applicants had also submitted a complaint under Article 14 ECHR (the principle of non-discrimination) taken in conjunction with Article 8 ECHR on the basis that there were known instances where other children born via a surrogate mother had been allowed to have the parentage of their intended parents registered in Iceland. This aspect of the claim was dismissed by the ECtHR as manifestly ill-founded.22

4 Analysis

Valdís Fjölnisdóttir adds to the existing jurisprudence on cross-border surrogacy. The case does not establish any new principles but serves to entrench and reinforce perspectives adopted in previous cases. It maintains the ECtHR’s cautious approach to cases concerning cross-border surrogacy and underlines the reluctance of the Court to interfere in matters of domestic family law policy.

The judgment also confirms that cross-border surrogacy cases where the intended parents do not have a genetic link to the child continue to be treated differently to cases where there is such a genetic link. In this way, the judgment

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20 Supra note 5, para. 74.
21 Ibid., para. 75.
22 Ibid., para. 79.
reinforces the Court's established position of prioritising the biological tie as a marker of legal parentage in cases of cross-border surrogacy. The existing case law establishes that biological ties between intended parents and their children that are legally recognised in the surrogacy State must be recognised or established by the home State in order to uphold the child's rights. By contrast, there is no equivalent obligation for recognition in cases where there is no genetic link between the intended parent and the child, as seen first in Paradiso and again in Valdís Fjölnisdóttir. At the same time, it is important to note that Valdís Fjölnisdóttir does not shut the door completely to such an obligation being found in a future case. Moreover, as argued below, there is a significant failure in the judgment to adequately consider the rights of the child. It is submitted that adequate consideration of the child's rights may demand that recognition of the parent-child relationship is facilitated even in the absence of a genetic link.

The following sections examine two notable omissions in the Valdís Fjölnisdóttir judgment concerning consideration of the child's right to private life and the child's (and the parents') right to non-discrimination. This analysis serves to highlight that a different conclusion may have been available to the Chamber had the rights of the child been fully considered. Aspects of the judgment that endorse principles established in earlier cases are also examined. This analysis reveals significant issues in the principles that emerge from the earlier judgments, particularly those emanating from the case of Paradiso.

4.1 The Right to Private Life

A striking omission in the Valdís Fjölnisdóttir judgment is the failure to consider the complaint based on the child's right to private life in any meaningful manner. Examination of that complaint is confined to a single paragraph, which simply states that the private life complaint is the same as the family life complaint and so the same conclusion applies to both. This is significant since the concepts of ‘family life’ and ‘private life’ are separate and distinct under Article 8 ECHR. Whereas ‘family life’ is typically concerned with relationships and recognition of family ties, ‘private life’ is a broader concept encompassing, among other things the right to establish and develop relationships, the right to personal development, the right to self-determination, name and identity,

24 Mennesson, supra note 1; D v. France, supra note 1.
25 For criticism of the Paradiso judgment, see, for example, Bracken, supra note 23; Iliadou, supra note 8.
gender identification, sexual orientation and sexual life. Given that the concepts differ considerably, it is notable that the Court in Valdís Fjölnisdóttir did not separately address the complaint based on the broader private life concept. The child’s right to private life was a central consideration in the seminal cross-border surrogacy case of Mennesson v France. In that case, the ECtHR noted that ‘respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship.’ As discussed further below, the child’s right to identity in Valdís Fjölnisdóttir was substantially affected by the non-recognition of the parent-child relationship. Moreover, the Icelandic Government had conceded that the non-recognition of the parent-child relationship between the applicants had amounted to an interference with the child’s right to private life. In these circumstances, it is difficult to understand why there is no separate examination of the right to private life.

The failure of the Chamber to separately assess the arguments based on the child’s right to private life was highlighted in the concurring opinion of Judge Lemmens. Judge Lemmens was critical of the approach adopted by the majority, noting that ‘private life and family life are conceptually different’. According to the judge, ‘the stability of the mutual enjoyment by parent and child of each other’s company’ is a fundamental element of family life. By contrast, ‘private life’ under Article 8 ECHR in cases of cross-border surrogacy is usually concerned with ‘another aspect of the situation arising from a gestational surrogacy agreement, namely the right of the child to the recognition of the legal parent-child relationship with the intended father ... as well as with the intended mother.’ According to Judge Lemmens, ‘[t]hat right is deemed to be part of the child’s right to establish details of its identity as an individual human being.’ The Judge noted that the case law to date has limited the child’s right to recognition of the legal parent-child relationship to cases involving a biological link with at least one of the intended parents. However, the Judge observed that the Court itself has acknowledged that ‘it may be called upon in the future to further develop its case-law in this field, in particular in view of the evolution of the issue of surrogacy.’

26 EB v France, Application No. 43546/02, 22 January 2008, para. 43.
27 Mennesson, supra note 1, para. 96.
28 Supra note 5, para. 48.
29 Ibid., Concurring Opinion of Judge Lemmens, para. 2.
30 Ibid., para. 3.
31 Ibid., para. 4.
32 Ibid., para. 4.
33 Supra note 2, para. 36, cited in Concurring Opinion of Judge Lemmens, ibid, para. 4.
In previous decisions, the ECtHR has found that failure to recognise parent-child relationships in cases of surrogacy negatively impacts ‘several aspects of the child’s right to private life.’ Judge Lemmens expressed the view that these negative impacts are felt by all children born through cross-border surrogacy arrangements, regardless of whether they have a biological link with the intended parents or not. Judge Lemmens questioned whether the ‘legal limbo’ experienced by surrogate-born children ‘can be justified on the basis of the conduct of its intended parents or with reference to the moral views prevailing in society.’

Judge Lemmens does not reference the United Nations Convention on the Rights of the Child (UNCRC) in the Concurring Opinion but there are echoes of Article 2 UNCRC in the judge’s remarks. The judge notes the differential treatment experienced by surrogate-born children, which reminds us that Article 2 UNCRC prohibits any form of discrimination against children, including that based on the ‘social origin’ or ‘status’ of the child or their parents or legal guardians. The UNCRC does not define the term ‘parent’ and so it can be taken to mean either a genetically related or a non-genetically related parent. Judge Lemmens recognises that discrimination against children is extremely difficult to justify, especially where it is based on an action taken by the parents that is completely outside of the child’s control.

Yet, notwithstanding the reservations expressed in Judge Lemmens’ opinion, it is ultimately a concurring, rather than a dissenting, opinion. The judge formed the view that the instant case was ‘not the right one to deal specifically with the [child’s] right to respect for private life.’ This was because the applicants ‘relied explicitly’ on the right to family life in their claims, rather than focusing on the right to private life and so the judge agreed that there was ‘no reason to reach a different conclusion with regard to private life than in respect of family life.’ Consequently, the Judge opined that ‘the scope of the child’s right to the establishment of a legal parent-child relationship, an element of its right to respect for private life, must be left for further consideration in another case.’

While it is encouraging to see a more-child centred approach adopted in Judge Lemmens’ concurring opinion, the concluding dicta dilute the impact.

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34 Supra note 2, para. 40.
35 Supra note 5, Concurring Opinion of Judge Lemmens, para. 4.
36 Ibid., para. 4.
37 Ibid., para. 5.
38 Ibid., para. 5.
39 Ibid., para. 5.
of adopting such a perspective. The conclusion fails to appreciate the role and status of the UNCRC, particularly the Article 3 best interests principle, in ECtHR cases concerning children.\footnote{For discussion of the application of the UNCRC in the context of the ECHR see, U. Kilkelly, ‘The Best of Both Worlds for Children’s Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child’, Human Rights Quarterly 23(2) (2001) 308–326; A. Daly, ‘The right of children to be heard in civil proceedings and the emerging law of the European Court of Human Rights’, The International Journal of Human Rights 15(3) (2011) 441–461.} Article 3(1) of the UNCRC provides that ‘[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’ In previous surrogacy cases, the ECtHR has relied on Article 3 UNCRC when considering the child’s position. Indeed, in \textit{Mennesson}, the ECtHR found that the child’s best interests should be taken as ‘paramount’,\footnote{\textit{Mennesson}, supra note 1, para. 81.} indicating that those interests enjoy an enhanced status in the ECtHR’s deliberations. Yet, there is no substantive consideration of Article 3 UNCRC in Judge Lemmens’ concurring opinion, nor is it examined in the majority judgment of the Chamber.

The failure to expressly consider Article 3 UNCRC is significant. First, one cannot ignore that Article 3 UNCRC mandates that the best interests principle is to be applied in all actions concerning children but there is no explicit reference to the principle in \textit{Valdís Fjölnisdóttir}. While we might assume that Article 3 UNCRC was implicitly considered by the ECtHR Chamber, this is not sufficient: the Committee on the Rights of the Child has explained that the assessment of the child’s best interests must be explicit and transparent so that it is clear ‘what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations.’\footnote{Committee on the Rights of the Child, \textit{General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) CRC/C/GC/14}, para. 6.}

Second, it must be noted that consideration of the best interests principle would have opened the door to consideration of other rights, including the right to private life, thereby negating Judge Lemmens’ claim that the case was ‘not the right one’ to examine that aspect. The Committee on the Rights of the Child has indicated that assessment of the best interests principle is to be guided by the other rights contained in the UNCRC.\footnote{\textit{Ibid.}, para. 32.} Thus, one must consider...

In previous cases of cross-border surrogacy, the ECtHR has placed emphasis on the child’s right to identity and has found that this right forms part of the child’s right to private life under Article 8 ECHR. As stated in Mennesson, ‘respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship.’\footnote{Mennesson, supra note 1, para. 96.} Therefore, had the ECtHR considered the best interests of the child in Valdís Fjölnisdóttir, it would have necessitated consideration of the child’s right to identity and hence initiated an individualised discussion of the child’s right to respect for their private life under Article 8 ECHR. The fact that the arguments presented by the applicants in Valdís Fjölnisdóttir were primarily based on their right to family life should not have prevented the ECtHR from assessing the right to private life, and within that the right to identity, due to the importance of the examination as a component in determining the best interests of the child.\footnote{In Paradiso, supra note 6, para. 208, the ECtHR found that, while the child in that case was not an applicant to the proceedings, [t]his does not mean however, that the child’s best interests and the way in which these were addressed by the domestic courts are of no relevance ... the Court observes that Article 3 of the Convention on the Rights of the Child requires that “in all actions concerning children ... the best interests of the child shall be a primary consideration”.

The facts of the case point to significant issues regarding the child’s right to identity: the child was not able to secure a legal relationship (beyond the foster care relationship) with the intended parents who have exclusively cared for the child since birth. The intended parents are listed as the legal parents on the US birth certificate, but this document is not recognised under Icelandic law. There is no indication of whether the child was issued with a new Icelandic birth certificate listing the surrogate as the legal mother (in conformity with the Icelandic provisions on maternity) and so it seems that the child simply does not have a recognised birth certificate for the purpose of Icelandic law. Although the child was granted a residence permit and Icelandic citizenship, the fact that he does not have a valid birth certificate under Icelandic law raises serious issues regarding his right to identity and arguably impedes his right to
‘to know and be cared for’ by his parents, as well as his right ‘to preserve’ his identity under Articles 7 and 8 of the UNCRC.

Finally, it must be noted that a child protection committee found that it was in the best interests of the child for him to be cared for by the intended parents, and it was noted that the joint adoption application would ‘probably’ have been granted if it had not been withdrawn. This suggests that it would also have been in the best interests of the child to have a permanent, legal relationship with the two mothers. Because the ECtHR does not explicitly consider the child’s best interests, it is unclear how it weighed the best interests of the child at the centre of the case against the best interests of children in general. The Icelandic Government claimed that the prohibition of surrogacy, among other things, served to protect ‘children’s right to know about their origins, as children born by way of surrogacy would face difficulties in seeking information about their biological parentage.’ Yet, the ECtHR does not consider how this aim should be balanced against the interests of the individual child in Valdís Fjölnisdóttir who does not have a recognised birth certificate under Icelandic law. It is certainly arguable that depriving the child in Valdís Fjölnisdóttir of a legal parental relationship with the intended parents does not secure this protection for other children, nor does it enable the child in Valdís Fjölnisdóttir to know his origins. If anything, non-registration of the foreign birth certificate seems likely to confuse the child’s knowledge of his origins because if this legal document is not recognised, how is the child to have faith in the legitimacy of other legal documents? These factors have a serious impact on the child’s right to identity but do not feature in the ECtHR’s analysis in Valdís Fjölnisdóttir.

Had the child’s right to identity been considered, it would have reduced the margin of appreciation available to the Icelandic State, and would have provoked a more nuanced balancing exercise as regards the legitimacy of the State response. Such an examination would have provided clarity on a number of matters pertaining to cross-border surrogacy, which would assist Member States in framing their future legal responses to the practice. Moreover, it is

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47 UNCRC, Article 7.
48 Ibid., Article 8.
49 Supra note 5, para. 13.
50 Ibid., para. 20.
51 Ibid., para. 51.
52 It is well established in the case law of the ECtHR that where a particularly important facet of an individual’s existence or identity is at stake, the margin of appreciation allowed to the State will normally be restricted. See, for example, Evans v the United Kingdom, application No. 6339/05, 10 April 2007.
certainly arguably that, had the right to private life been fully considered by the ECtHR, it would have led to a finding of a violation of that right under Article 8 ECHR. As such, the failure of the Chamber to engage in analysis of this right is most unfortunate.

4.2 Non-Discrimination

Another significant aspect of the Valdís Fjölnisdóttir judgment to be considered is the Court’s treatment of the complaint of discrimination made under Article 14 ECHR, taken in conjunction with Article 8 ECHR. The applicants claimed that they had experienced discrimination in the enjoyment of their right to respect for private and family life as there were ‘known instances where other children born via a surrogate mother had been allowed to have the parentage of their intended parents registered.’\(^5\) The ECtHR dealt with this claim almost as swiftly as it dealt with the claim concerning the right to private life, dismissing the complaint in one paragraph:

An examination by the Court of the material submitted to it does not disclose any appearance of a violation. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 paras 3 (a) and 4 of the Convention.\(^5\)

It is disappointing that this aspect of the complaint did not receive more attention from the Court. In a previous case heard by the Icelandic Supreme Court\(^5\) concerning two children born via gestational surrogacy in the United States using the gametes of their intended father, Registers Iceland had registered the intended father as the children’s father. It did so on the basis that the judgment of an Idaho court had established the intended father’s biological parentage in a manner that was deemed to be consistent with Icelandic law. Registers Iceland initially refused to register the intended mother as the children’s mother as such registration was deemed to be contrary to Icelandic law. However, the District Court of Reykjavik subsequently ruled that the refusal to register the intended mother as the mother had unlawfully interfered with the family’s right to respect for private and family life. As a result, Registers Iceland subsequently registered the intended mother as the children’s mother.\(^5\)

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53 Supra note 5, para. 77.
54 Ibid., para. 79.
55 Icelandic Supreme Court case No. 661/2015.
56 Supra note 5 para. 36.
In this previous case, the intended father had a biological connection to the surrogate-born children. By contrast, in Valdís Fjölnisdóttir, neither intended parent was biologically connected to the child. Thus, a significant difference between the instant case and the previous case was the existence of the biological connection. However, it is notable that in the previous Icelandic case, the intended mother was also registered as the legal mother. It is unclear whether that intended mother had a biological connection to her children, but this aspect is largely irrelevant for the purpose of the current discussion. The significant point is that Icelandic law defines the ‘mother’ as the woman who gives birth to the child and yet the intended mother in the previous Icelandic case was registered as the legal mother even though she did not fit this definition. Thus, one intended mother was permitted to circumvent the domestic law on legal parentage, whereas the intended mothers in Valdís Fjölnisdóttir were not. On its face, this would certainly appear to constitute differential treatment between the women. Moreover, as the children are the individuals most affected by the recognition or non-recognition of the legal mother-child relationship, it could be argued that the child in Valdís Fjölnisdóttir had experienced differential treatment when compared to the child in the previous case who was permitted to benefit from a legal relationship with the intended mother.

Under Article 14 ECHR, discrimination will occur where there is a difference in the treatment of persons in relevantly similar situations and that difference in treatment has no objective and reasonable justification. Hence, it is necessary to consider first whether the women in Valdís Fjölnisdóttir were in a comparable position to the mother in the previous case for the purpose of Article 14 ECHR and second whether the child in Valdís Fjölnisdóttir was in a comparable position to the child in the previous case.

In the previous Icelandic case, the intended father had a biological connection to the child and was registered in Iceland as the child’s legal father. Subsequently, the intended mother was registered as the legal mother. The Valdís Fjölnisdóttir judgment does not explain the reasons justifying the intended mother’s registration in the previous case, but this approach follows an established line of ECtHR jurisprudence. In the case of Mennesson, the ECtHR found that the child’s right to respect for private life and best interests required the State to legally-recognise the genetic relationship between the intended father and the child in a case of cross-border surrogacy. Then, in the Court’s 2019 Advisory Opinion on Gestational Surrogacy, it was stated that

57 Chapter i-A of Children Act No. 76/2003.
58 Supra note 2.
the right to respect for private life of a child born abroad through gestational surrogacy demanded that a mechanism should exist to allow the child's relationship with their intended mother to be recognised under domestic law in circumstances where the legal relationship with the genetically related intended father was already recognised. This line of case law may have provided the impetus for the registration of the intended mother in the previous case.

If this is the case, it would seem that the intended parents in *Valdís Fjölnisdóttir* were not in a relevantly similar situation to the intended parents in the previous case due to the absence of any biological connection between them and the child. Similarly, the children in both cases are in different positions in terms of their biological connection to the parents. However, while the absence of a biological relationship may justify differential treatment in respect of the adults, a different picture emerges when the rights of the child are considered. As noted above, children have no control over the circumstances of their conception and should not experience discrimination that is based on the actions of the parents in line with Article 2 UNCRC.59 The child in *Valdís Fjölnisdóttir* has the same right as any other child to know and be cared for by his parents and to establish details of his identity. Had the claim based on Article 14 ECHR been examined by the ECtHR in *Valdís Fjölnisdóttir*, it would have allowed detailed consideration of these points, which would help to further define the parameters of the child's rights in cases of cross-border surrogacy. It may also have led to a finding of a violation of Article 14 ECHR, taken in conjunction with Article 8 ECHR when considered from the perspective of the child's rights.

4.3  **Endorsement of Principles Established in Earlier Cases**

In addition to the omissions in the *Valdís Fjölnisdóttir* judgment, it is necessary to consider the extent to which the decision endorses principles that have been established in previous cases of cross-border surrogacy that have come before the ECtHR. It is arguable that many of the principles that are relied on have questionable foundations when assessed from a children's rights perspective, particularly those emanating from the case of *Paradiso*. Thus, analysis of the established principles that are relied on highlights significant disparities in

the earlier judgments as regards protection of the rights and best interests of surrogate-born children.

4.3.1 Assessment of the Existence of Family Life
In Valdís Fjölnisdóttir, the Chamber found that family life for the purpose of Article 8 ECHR existed between the intended parents and the child. In doing so, the Chamber explained that it was applying the ‘test’ for family life as laid down in Paradiso.60 This is significant since family life was not found to exist in Paradiso. In both cases, surrogacy was prohibited in the intended parents’ home State and neither intended parent had a genetic connection to the surrogate-born child. It is instructive, therefore, to review the elements of the ‘Paradiso test’ for the determination of family life.

In Paradiso, the intended parents had engaged in surrogacy in Russia. Upon the intended parents’ return to their home state of Italy, the Italian authorities responded to the cross-border surrogacy by removing the child from the care of the intended parents and placing the child first in a children’s home and later with a foster family. The Paradiso family had lived together for a relatively short period (approximately eight months) prior to the intervention of the State. Although the ECtHR noted that the intended parents had ‘forged close emotional bonds’ with the child,61 the duration of the relationship with the child was said to be ‘a key factor in the Court’s recognition of the existence of a family life.’62 Ultimately, the ECtHR found that ‘the absence of any biological tie between the child and the intended parents, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective’ meant that the conditions for a finding of de facto family life between the intended parents and the child did not exist in the case.63

By contrast, family life was found to exist between the three applicants in Valdís Fjölnisdóttir in circumstances where the child had been in the ‘uninterrupted care’ of the intended parents for nearly four years at the time that the final domestic judgment was delivered in 2017.64 The intended parents in that case were not biologically related to the child and their legal relationship was also ‘uncertain’ under Icelandic law, although it was subsequently secured by the foster agreement.65 According to the ECtHR in that case, the close emotional bonds between the family members were ‘reinforced by the

60 Supra note 6, para. 61.
61 Ibid., para. 152.
62 Ibid., para. 153.
63 Ibid., para. 157.
64 Supra note 5, para. 61.
65 Ibid., para. 61.
foster care arrangement adopted by the national authorities and not contested by the Government before the Court.\textsuperscript{66} Thus, the principal difference between the family relationships in \textit{Paradiso} and in \textit{Valdís Fjölnisdóttir} concerned the duration of the relationship with the child and the legal certainty of that relationship.

There are two central difficulties with the ‘Paradiso test’ as endorsed in \textit{Valdís Fjölnisdóttir}. First, this approach suggests that the personal ties and emotional bonds between parents and children cease to develop upon their physical separation. If this was the case, we might then question why international law places such emphasis on reunification in cases where children are separated from their parents.\textsuperscript{67} Moreover, in a situation of surrogacy, where the child is much longed for and the conception carefully planned, it is difficult to accept that the intended parents could simply ‘switch off’ their emotional connection to the child after the intervention of the authorities. Similarly, the child’s emotional connection to the parents will likely endure after a physical separation. In these circumstances, the length of cohabitation should arguably be a less significant factor than the strength of the enduring family bonds.

Second, one cannot overlook the fact that, in \textit{Paradiso}, the relationship between the intended parents and the child had been severed by the decisions of the national authorities: the child was removed from the care of the applicants thus impeding the development of ‘family life’ for the purpose of Article 8 ECHR. In this way, the short duration of cohabitation between the family members was a result of the decisions of the national authorities. Indeed, these were the very actions that formed the basis of the subsequent complaint to the ECtHR. Without the intervention, ‘family life’ would have continued to develop for the purpose of the Article 8 ECHR assessment as it did in \textit{Valdís Fjölnisdóttir}.

In previous cases, the ECtHR has acknowledged situations as being outside of the parents’ control where the State procedure inhibited the development of family life. For example, in \textit{Pini and Others v Romania}, it was noted that ‘although family life has not yet been fully established in the instant case, seeing that the applicants have not lived with their respective adopted daughters or had sufficiently close de facto ties with them either before or after the adoption orders were made, that fact is not attributable to the applicants.’\textsuperscript{68}

\begin{flushleft}
\footnotesize\textsuperscript{66} Ibid., para. 62. \\
\footnotesize\textsuperscript{67} See, for example, Articles 9 and 10 UNCRC. \\
\footnotesize\textsuperscript{68} \textit{Pini and Others v Romania}, application Nos 78028/01 and 78030/01, 22 June 2004, para. 146 \footnotesize{[emphasis added]}. \\
\end{flushleft}
This aspect was addressed in *Paradiso* but, rather than acknowledging the role of the authorities in disrupting the development of family life, the intended parents were found to have contributed to their own unfortunate legal situation:

Although the termination of their relationship with the child is not directly imputable to the applicants in the present case, it is nonetheless the consequence of the legal uncertainty that they themselves created in respect of the ties in question, by engaging in conduct that was contrary to Italian law and by coming to settle in Italy with the child.69

By contrast, the ECtHR does not reprimand the intended parents in *Valdís Fjölnisdóttir* in the same way, and one cannot ignore the very different responses of the authorities in the two cases. Whereas the actions of the Italian authorities served to impede the development of ‘family life’ for the purpose of Article 8 *ECHR* in *Paradiso*, the child in *Valdís Fjölnisdóttir* had been placed in the care of the intended parents by the Icelandic authorities under a foster agreement and thus family life continued to develop following the State intervention.

The third notable feature of the Paradiso test is the focus on the certainty of the legal ties between the family members. Reliance on this criterion seems anomalous when the certainty in question is dictated by the State against which the case is taken. Moreover, it is significant that the ‘uncertainty of legal ties’ has not been consistently applied as a criterion for determining the existence of family life in other cases. The ECtHR has found family life to exist in a number of cases where de facto family relationships were not recognised under national law and hence were legally ‘uncertain’. For example, in *X, Y and Z v the United Kingdom*,70 family life for the purpose of Article 8 *ECHR* was found to exist between a transgender man, his female partner and their child conceived using sperm provided by a donor. The family relationships in that case were not recognised under domestic law yet the ECtHR did not take into account the ‘certainty of legal ties’ when determining that family life was applicable. In *Wagner and J.M.W.L. v Luxembourg*, family life was found to apply to the relationship between a child and his adoptive mother in circumstances where the adoption was not recognised in domestic law (and was therefore legally ‘uncertain’).71 In that case, the uncertainty of the ties was

69 Supra note 6, para. 136.
70 *X, Y and Z v the United Kingdom*, application No. 21830/93, 22 April 1997.
not a relevant factor in the Court’s assessment of family life. More recently, in Mennesson, the ECtHR focused on the ‘concrete reality of the relationship’ rather than the certainty of the legal ties (which were also lacking in that case) when determining that family life existed between intended parents and their surrogate-born children. In this light, it is curious that the certainty of the legal relationship forms a central part of the ‘Paradiso test’.

Examination of the application of the ‘Paradiso test’ in Paradiso and in Valdís Fjölnisdóttir raises questions about whether it is an appropriate test for the determination of family life in cases of cross-border surrogacy. It is arguable that, following the principles established in other cases, family life should have been found to exist in Paradiso. This is significant since a finding of family life may have led to a finding of a violation of the right to family life, as argued in the next section.

4.3.2 No Violation of Family Life

Having found family life to exist between the child and the intended parents in Valdís Fjölnisdóttir, and that there had been an interference with that family life, the ECtHR considered the proportionality of the State interference. The Chamber’s assessment of this point was largely based on an examination of the factual reality of the family’s life in Iceland. Ultimately, the Court was satisfied that the family experienced limited ‘[a]ctual, practical obstacles to the enjoyment of family life’ due to the non-recognition of the legal parent-child relationships. The parents were able to care for the child under the foster agreement and this agreement was facilitated and supported by the authorities. Moreover, the child had been granted Icelandic citizenship and permanent residence. In this way, the Chamber found that there was no violation of Article 8 ECHR with regard to the applicants’ right to respect for their family life.

The practical approach adopted by the ECtHR in its assessment of the proportionality of the impugned measures is similar to the approach adopted by the Court in the earlier case of Mennesson. In Mennesson, the French authorities had refused to recognise the legal relationship between the surrogate-born children and the intended parents following a surrogacy procedure conducted in the United States. In that case, the intended father was also the genetic

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72 Mennesson, supra note 1, para. 45.
73 Iliadou (supra note 8, p. 151) argues that ‘[f]ocusing on the emotional bond and that the parents behaved as such in every aspect towards the child could have led to recognition of de facto family ties for the Paradiso Campanelli family.’
74 Supra note 5, para. 72.
father of the children. The ECtHR was satisfied that family life existed between
the applicants and the children as the intended parents had cared for the chil-
dren from birth and there was nothing to distinguish the family from any other.
The Court also found that the private life aspect of Article 8 was applicable
to the case as it concerned aspects of the children’s right to identity and the
legal determination of parentage. While a violation of the children’s right to
private life was found in *Mennesson*, the ECtHR was satisfied that there was no
violation of the right to family life under Article 8 ECHR. The ECtHR based this
finding on the fact that the French authorities’ refusal to recognise the parent-
child relationships did not create ‘insurmountable difficulties’ for the family:
the applicants were able to live with the children in France and there was no
suggestion that the children would be removed from their care. This is com-
parable to the approach adopted in *Valdís Fjölnisdóttir*.

This focus on the practical impact that non-recognition has on surrogacy
families is important as it ensures that the focus is on the reality of life for
children born through cross-border surrogacy and is responsive to their rights
and interests. While it is encouraging to see this approach adopted in *Valdís
Fjölnisdóttir*, it again reminds us that such an approach was not adopted in
*Paradiso*. The family in *Paradiso* experienced significant practical difficulties
because of the State interference as the child was removed from the care of the
intended parents and placed in foster care with a different family. Yet, these
practical difficulties were not considered in the same manner as they were in
the other cases. If family life had been found to exist in *Paradiso*, it seems likely,
following the approaches in *Mennesson* and *Valdís Fjölnisdóttir* that a violation
of family life would have been found due to the interruption to the Paradiso’s
‘actual enjoyment of their family life.’

5 Conclusion

*Valdís Fjölnisdóttir* does not establish any new principles pertaining to cross-
border surrogacy but rather confirms the existing trend in favour of ‘accommo-
dation, as opposed to recognition, of familial diversity.’ The emerging ECtHR
jurisprudence on cross-border surrogacy seems to indicate a preference for

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75 *Mennesson*, supra note 1, paras 45–46.
76 Ibid., paras 92–94.
77 I. Isailovic and A. Margaria, ‘Conversations on transnational surrogacy and the ECtHR case
*Valdís Fjölnisdóttir and Others v. Iceland* (2021)’, *Conflict of Laws* (27 June 2021), available
online at https://conflictoflaws.net/2021/conversations-on-transnational-surrogacy-and-
some form of accommodation for parent-child relationships created through cross-border surrogacy, but the form differs from case to case. In Mennesson, the Court found that the State was required to legally recognise the father-child genetic relationship notwithstanding the French prohibition on surrogacy. In Valdís Fjölnisdóttir, no violation was found in circumstances where the State had provided recognition of the family relationships via the foster care agreement. Thus, accommodation was achieved in both cases, but in very different circumstances and following very different lines of reasoning. As was outlined in this article, the child’s right to private life was central to the deliberations in the seminal case of Mennesson but not even considered in Valdís Fjölnisdóttir. Hence, while Valdís Fjölnisdóttir largely confirms and reinforces existing principles, it also raises questions of consistency in the approach adopted by the ECtHR in cases of cross-border surrogacy. This inconsistency casts doubt on the Court’s commitment to the best interests of the child as a ‘paramount’ (as articulated in Mennesson) consideration in cases of cross-border surrogacy.

Isailovic and Margaria note that the Valdís Fjölnisdóttir decision ‘confirms the wide, yet not unlimited, freedom States enjoy in regulating surrogacy and the legal consequences of international surrogacy in their territories and legal systems.’78 It is well-established that it is not the role of the ECtHR to substitute itself for the competent national authorities in determining the most appropriate policy for regulating the complex and sensitive matter of the relationship between intended parents and a child born abroad as a result of commercial surrogacy arrangements, which are prohibited in the respondent State.79

However, one cannot help but to recall that the ECtHR has, on occasion, intruded on the policy-making role of the State in respect of cross-border surrogacy. In Mennesson, the Court found that the State was required to legally recognise the father-child genetic relationship notwithstanding the French prohibition on surrogacy. In the 2019 Advisory Opinion, the ECtHR found that the right to respect for private life of a child born abroad through gestational surrogacy demanded that a mechanism should exist to allow the child’s relationship with their intended mother to be recognised under domestic law where certain conditions are met.80

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78 Ibid.
79 Supra note 5, para. 67.
80 Supra note 2.
This article has argued that the *Valdís Fjölnisdóttir* judgment could have offered a new perspective on cross-border surrogacy – one that centralises the rights and best interests of the child – and hence could have led to the emergence of new principles. Instead, *Valdís Fjölnisdóttir* continues the trend of subordinating the rights of the child in cases of cross-border surrogacy where there is no genetic tie between either intended parent and the child. This article has shown that the facts of the case and submissions of the parties raised important questions regarding various rights of the child and so the ECtHR’s failure to take the opportunity presented by *Valdís Fjölnisdóttir* to consider those rights is unfortunate. In this way, while it may be said that *Valdís Fjölnisdóttir* does not add anything ‘new’ to the jurisprudence, its addition to the case law may simply entrench previous omissions as regards consideration of the rights of the child. Such an approach would be inconsistent with the UNCRC and so it is to be hoped that a children’s rights approach will be adopted in future cases of cross-border surrogacy that come before the ECtHR.