THE IMPACT OF HUMAN RIGHTS ON PRIVATE INTERNATIONAL LAW: THE DANISH AND SWEDISH RESPONSES TO INTERNATIONAL AND DOMESTIC SURROGACY

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This article analyses the legal developments in Sweden and Denmark as regards surrogacy under the impact of case-law developments from the European Court of Human Rights. Both countries have traditionally adopted sceptical positions grounded in women's rights and concerns about exploitation. Against this background, the article examines how restrictive domestic approaches have shifted regulatory attention towards surrogacy arrangements carried out abroad, raising private international law questions concerning the recognition of parent–child relationships. In such situations, particular emphasis is placed on the child's right to respect for private and family life under Article 8 of the European Convention on Human Rights and on the requirement that children born through surrogacy are not left in a legal vacuum. Whereas recent legal developments stemming from international situations have taken legislative form in Denmark, the Swedish development is characterised by legislative standstill, placing courts dealing with international surrogacy arrangements in a difficult position. The article concludes that, even where international developments have affected domestic surrogacy regulation, different values are at stake in international and domestic contexts. Consequently, it is not necessary to treat domestic situations equally to international situations.

1. Introduction

Since surrogacy became a practical reality in the 1980's, both Denmark and Sweden have approached such arrangements with scepticism. Emphasising women's rights and concerns about exploitation, none of the countries has legislated to fully permit domestic surrogacy. Nonetheless, this domestic law stance has shifted attention to the handling of foreign surrogacy arrangements. Developments regarding the best interests of the child under the right to respect for family and private life in the European Convention on Human Rights (ECHR) have compelled the two countries to reconsider their restrictive positions on surrogacy arrangements conducted abroad.

Whereas the impact of human rights on private international law aspects of surrogacy arrangements has been addressed primarily through case law in Sweden, whereas Denmark has opted for explicit legislative regulation. For Denmark, the cascading effect has recently

had an impact on the liberalisation of surrogacy arrangements, also at the domestic level. Still, the domestic approaches are restrictive, which has led to a situation where Danish and Swedish authorities are confronted with surrogacy arrangements having been completed abroad. Legally, that situation raises the private international law issue of whether a family relation established abroad shall be recognized. From a principal point of view, that issue can be seen as either a way to pre-empt circumvention of the domestic law position. However, it can also be seen as a situation of granting vested rights to the families that have been established.

This article examines the Danish and Swedish legal positions on domestic and international surrogacy and how the legal positions have been formed by the cascading effect of the ECHR. The article first analyses the legal positions as regards domestic surrogacy. Thereafter, the situation of international surrogacy is discussed.

2. How are Domestic Surrogacy Relations Treated in Denmark and Sweden?

2.1. Introduction

Already in the Book of Genesis, a type of surrogacy arrangement was depicted. In chapter 16, it was told that Abraham and Sarah could not have children. Sarah, therefore, asked Abraham to have sexual intercourse with the female slave Hagar. Hagar gave birth to a son, Ishmael, who was to be raised by Abraham and Sarah. In a way, this arrangement is an example of surrogacy as the intended mother was another person from the genetic mother. Apparently, such *traditional surrogacy* arrangements have a long history.

However, the biblical example differs from contemporary practices that have made surrogacy a relatively common phenomenon and an alternative for people who either cannot or do not want to be pregnant themselves. An important distinction is that, in modern surrogacy arrangements, sexual intercourse has been replaced by insemination or *in vitro* fertilization (IVF). Also, the surrogate mother is typically not the genetic mother of the child. Instead, the surrogate mother carries an embryo created from the gametes of others – often one or both of the persons intended to be parents through the surrogacy arrangement. This type of surrogacy is typically referred to as *gestational surrogacy* and has only been medically possible since the 1980's.

Since gestational surrogacy has been made a reality, it has challenged traditional assumptions of family law and compelled legislators worldwide to take a stance – not only on whether to permit such arrangements domestically, but also on how to handle *fait accomplis* cases arising from surrogacy arrangements conducted abroad.

In addition to the distinction between traditional and gestational surrogacy, a distinction is often drawn between commercial and altruistic surrogacy arrangements. For legislative purposes, the distinction between commercial and altruistic surrogacy arrangements is often viewed through the lens of women's rights, reflecting concerns about exploitation and the commodification of reproductive capacity.

From the outset, the debates on the domestic permissibility of surrogacy in Denmark and Sweden have focused on women's rights. Balancing the potential risk of exploitation against women's autonomy and right to self-determination, both countries concluded early

on that the risk of exploitation prevails.[1] Consequently, domestic surrogacy arrangements have traditionally not been permitted. Yet the underlying scepticism towards surrogacy has had different legislative outcomes in Denmark and Sweden.

The following section examines the Swedish legal position, which continues to rest on the ambition of preventing surrogacy. Thereafter, the Danish approach will be analysed, where recent reforms mark a departure from the restrictive stance.

2.2. Can Surrogacy Arrangements be Conducted in Sweden?

In Swedish law, there are no explicit provisions on surrogacy arrangements, and the practice is not permitted within public healthcare.[2] Still, surrogacy is not expressly nor completely forbidden. Pursuant to Chapter 7 Section 4 of the Act on Genetical Integrity (*lagen [2006:351] om genetisk integritet*), it is permitted to carry out assisted reproduction using both donated sperm and donated eggs, but only with the approval of the authorities. Because surrogacy is not permitted in Sweden, such arrangements cannot be approved.

However, if a surrogacy arrangement were carried out in Sweden, the woman giving birth to the child would be regarded as the legal mother even if the egg was not her own.[3] This presumption relies on the old principle that the mother is always known, '*mater semper certa est*'. It was introduced in the early 2000's with the express purpose of disallowing surrogacy arrangements.[4]

The strict '*mater semper certa est*' rule was put to the test in the Swedish Supreme Court case NJA 2006 p. 505. In this case, a married Swedish couple consisting of a man and a woman travelled to Finland to arrange for a surrogacy in which the husband's sister acted as surrogate mother. The child, conceived with the couple's gametes, was later born in Sweden. After a year, the mother applied for stepparent adoption under Chapter 4 Section 3 of the Swedish Parental Code. Swedish step-parent adoption can only be granted with the other parent's consent. In the case at hand, the father withdrew his consent during the procedure. Despite the genetic link between the intended mother and the child, the Supreme Court held that the surrogate mother was to be regarded as the legal mother of the child in line with the purpose of the legislation and that stepparent adoption was not available when the father no longer gave his consent. Two Supreme Court Justices had a dissenting opinion holding that an adoption should be allowed with reference to the aim of establishing consistency in the genetic and legal parental relations.

The Supreme Court judgment prompted criticism in the legal literature. It has, e.g., been noted that the strict application of the *mater est* rule was not equipped for surrogacy arrangements and that, particularly, an intended mother will end up in an uncertain legal

[1] As an example, it was held in the Swedish preparatory works "that surrogate motherhood is not ethically defensible and that it therefore shall not be permitted" and that "[i]t cannot be regarded as consistent with the principle of human dignity to use another woman as means of solving the childless couple's problem", see SOU 2001/02:89 p. 85 (translation by the author). Similar arguments have been made also in later Swedish preparatory works, see SOU 2016:11 p. 445. Similar arguments were raised in Denmark in preparatory works already in 1986 where it also was held that "children should not be treated as commodities", see the Parliamentary Bill 164 presented in the Parliament on January 30, 1986, pp. 1 and 5 a–d.

[2] See e.g. prop. 2021/22:188 p. 63 (Swedish preparatory works).

[3] Swedish Parental Code (*Föräldrabalken*) Chapter 1 Section 7.

[4] See prop. 2001/02:89 p. 55 (Swedish preparatory works).

situation.[5] Another point that was raised was that it is inappropriate to let the determination of legal parenthood be influenced by what the legislator likes and dislikes, but that it shall be construed in order to protect the child.[6]

A potential liberalisation of the Swedish rules on domestic surrogacy has been discussed and ultimately rejected in a number of Swedish legislative inquiries spanning from the 1980s until the 2020s.[7] These inquiries have consistently emphasised concerns relating to the protection of women and children.

2.3. Can Surrogacy Arrangements be Conducted in Denmark?

Denmark differs from Sweden in that altruistic domestic surrogacy arrangements are now explicitly permitted. The possibility of engaging in such arrangements represents a novel development in Danish law, introduced through a legislative reform that entered into force in January 2025. The background to this change was a political agreement concluded in 2024, following the European Court of Human Rights' judgment in K.K. and Others v. Denmark (2022).[8] That case concerned the private international law issue of recognizing the parent–child relation after a surrogacy arrangement conducted abroad, in which the Court found that Denmark's restrictive approach was incompatible with Article 8 of the European Convention on Human Rights. Consequently, the Danish legislator undertook a comprehensive reconsideration of its legal framework on surrogacy, drawing a sharp legal and ethical boundary between altruistic and commercial surrogacy arrangements. The new legal framework still upholds a negative attitude to commercial surrogacy, but allows for altruistic surrogacy.

It follows from Chapter 3 Section 13 of the Danish Act on Assisted Reproduction (*lov om assisteret reproduktion i forbindelse med behandling, diagnostik og forskning m.v.*) (*lov nr. 460 av 10. juni 1997*) that '[a]ssisted reproduction must not take place when there is an agreement between the woman in whom pregnancy is to be established and another person, stating that the woman is to give birth to a child for that person (surrogacy)'.[9]

Since 1 January 2025, it is possible to conduct an altruistic surrogacy arrangement in Denmark. Legislatively, the legal reform constitutes the seven sections 30 a–g in Chapter 5 b of the Danish Children's Act (*børneloven*).

[5] J. Stoll, *Surrogacy Arrangements and Legal Parenthood – Swedish Law in a Comparative Context*, Juridiska institutionen, Uppsala universitet, 2013, p. 55 ff. for a description of the Swedish legislative debate in which altruistic surrogacy arrangements have been considered to be ethically defensible from a women's rights perspective.

[6] A. Singer, "Mater Semper Certa Est"?, *JT* 2006/07: 424–431, at p. 430.

[7] In the most recent inquiry, SOU 2021:56, the conclusions of earlier inquiries are summarized at p. 147 ff.

[8] See the political agreement of February 5, 2024 on children's rights to their parents in surrogacy situations (*Aftale mellem regeringen og Socialistisk Folkeparti, Liberal Alliance, Danmarksdemokraterne, Det Konservative Folkeparti, Radikale Venstre og Alternativet om børns ret till deres forældre ved surrogataftaler*) available at: https://www.sm.dk/Media/638560405114489554/Aftale%20_om_børns_ret_til_deres_forældre_ved_surrogataftaler_UA.pdf (accessed January 14, 2026). For the judgment see ECtHR's judgment of December 6, 2022 in the case of *K.K. and others v. Denmark* (application no. 25212/21) .

[9] Translation by the author.

Sections 30 a–30 g establish the comprehensive legal framework for altruistic surrogacy in Denmark, introduced by the 2025 reform. The provisions collectively define, regulate, and safeguard such arrangements within Danish jurisdiction.

A statutory definition of a Danish altruistic surrogacy agreement is provided in Section 30 a, requiring that the surrogate mother be resident in Denmark and receive no remuneration, including compensation for loss of income. The agreement must be approved by the Agency of Family Law (*Familieretshuset*).

Section 30 b enumerates cumulative conditions for the Agency of Family Law's approval. These conditions include that the surrogate mother is at least 25 years old, has given birth to at least one child before, and is not under guardianship. Further, a lack of close relation between the intended parents and the surrogate mother is treated as a presumption that remuneration has been paid or will be paid. The surrogate contract must also include information on the relationship between the surrogate mother and the intended parents or parent. Also, the intended parents must be at least 18 years old at the entrance of the surrogacy contract. Further, at least one of the intended parents must have a genetic link to the child, and a guarantee that the vulnerable position of the surrogate mother has not been used or will not be used must be included in a form contract that is provided by the Agency of Family Law. These conditions can be seen as aiming to prevent exploitation and ensure voluntary participation.

The legal consequences for the intended parents are set out in Section 30 c. Here, it is declared that a parent with a genetic connection will be a parent and that another parent will be considered a co-parent.

Section 30 d governs termination of an agreement, granting the surrogate mother a right to withdraw before parentage is registered, establishing deadlines for reconfirmation and registration, and allowing intended parents limited withdrawal rights before conception.

Sections 30 e and 30 f regulate the recognition and determination of parentage after the birth of the child. Compared to how surrogacy works in, e.g., the USA, the timing of the recognition decision is noteworthy. To allow for the determination of parentage only after the birth of the child is to put a lot of risk at all involved parties. Parentage may be acknowledged by the parties or, failing that, determined by the Agency of Family Law. However, recognition is barred if remuneration was involved, the agreement has lapsed, or no genetic link exists.

Finally, Section 30 g provides for revocation of parentage in cases of procedural error, invalid approval, or lapse of the agreement, while protecting the stability of established relationships by prioritizing the best interests of the child.

Taken together, Sections 30 a–30 g establish a formalized model for altruistic surrogacy in Denmark, which can be seen as an attempt to balance the interests of the surrogate mother, the intended parents, and the child.

If a commercial surrogacy arrangement occurs in Denmark, the new rules do not apply. Nevertheless, the child must have legal parents. In such cases, Denmark continues to apply the previous rules, which favour the genetic father.[10] The only option for a non-genetic intended parent to obtain parentage is to pursue step-parent adoption. Previously, this was strictly prohibited where remuneration had been paid, but this has now changed. Under Section 15 (2) of the Danish Adoption Act, step-parent adoption is now possible even when

[10] Meldgaard Abrahamsen and J. Scherpe, Neue Gesetzgebung zur Leihmutterschaft in Dänemark, *FamRZ* 2025, 1, p. 3.

payment has occurred, provided that it is consistent with the best interest and does not conflict with the provisions of the 1993 Hague Adoption Convention.

2.4. Part-Conclusion

To summarize, it is not possible to domestically conduct gestational surrogacy arrangements in Sweden, and Denmark allows only for altruistic surrogacy arrangements to be conducted domestically. In an internationalized society, this puts emphasis on how surrogacy arrangements conducted abroad are handled. This raises the private international law issue of how to treat the legal relationship between the child and the intended parent. Should the foreign legal relation be recognized? Is it possible for an intended parent to adopt the child?

3. Foreign Surrogacy Arrangements

3.1. Introduction

As was mentioned in the previous section of this article, an international surrogacy case from the ECHR made Denmark change its rules for domestic surrogacy arrangements by allowing altruistic arrangements. In addition to the rules on domestic altruistic surrogacy arrangements, the new Danish reform also addressed recognition of foreign surrogacy arrangements, which was the issue at stake in the ECtHR case that triggered the reform. Hence, Denmark now has explicit legislation in Chapter 5 c of the Children's Act. Also, this marks a difference between Sweden and Norway that deal with international surrogacy relations under legislation primarily designed for traditional forms of child reproduction. From a theoretical point of view, the private international law issue of recognition holds several principal issues. First, there is a risk of internationally 'limping' family relations if a parent relationship is recognized in one country but not in another. For the country where recognition is sought, issues of evasion and public policy on the one hand must be weighed against vested rights and the best interest of the child on the other hand. Normally, the threshold must be set very high in international cases out of respect for legal and cultural diversity.[11] However, international surrogacy cases are rarely truly international. Common is, instead, that parents unable or unwilling to have children themselves go abroad for 'legal tourism' purposes. Such evasion, or circumvention, of domestic law would normally motivate a state to set aside the status vested abroad by not recognizing it. In international surrogacy cases, those principle arguments of private international law do not hold. The reason for that is that the object of the dispute is a child with legal rights of its own.[12]

In light of the conflicting principles outlined above, and given the generally negative attitudes toward domestic surrogacy, it is instructive to analyse the Scandinavian legal positions on the recognition of parental relationships established through surrogacy arrangements conducted abroad. Since the answer to these questions largely depends on the influence of the ECHR, the impact of that framework will first be outlined.

[11] See e.g. Karjalainen, Acquiring a child abroad and paths to parenthood in Finland: The difference between private adoptions and international surrogacy arrangements, *Journal of Private International Law,* 2025, vol. 21, no. 2: 282–303, p. 283.

[12] See, similarly, C. Thomale, State of play of cross-border surrogacy arrangements: Is there a case for regulatory intervention by the EU?, *Journal of Private International Law,* 2017: 463–473, p. 469 f.

3.2. The Impact of the ECHR on the Recognition Issue

Article 8 of the ECHR states that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'. As has already been pointed out, the fact that a child itself is entitled to rights is an important factor for determining national legislation's compatibility with the ECHR.

It is one thing to disregard an intended parent's wish to have a family, but something completely different to disregard a born child's right to its parents. This distinction is made clear in ECHR case-law, where the rights of the parents are weaker than the rights of the born children. Often, the intended parent has a right to legally represent the born child. In such cases, the parents may have no Article 8 rights infringed at all, but as the child has, the outcome will still help the parents in the goal of establishing a legal parent relationship.[13]

For a long time, the European Court of Human Rights did not have cases to deal with private international law issues relating to surrogacy. That changed in 2014, when the first ECtHR judgment, *Mennesson v. France*, was rendered.[14] After that, the ECtHR has clarified the implications of the right to a family life under Article 8 of the ECHR for international surrogacy.

An ECtHR case on international surrogacy, which deserves attention, is *Mennesson v France*. Not only was it the first landmark judgment from the ECtHR on the issue, but the principles set out in it still hold.[15] The *Mennesson v. France* judgment was accompanied by another judgment rendered on the same day, *Labassee v. France*.[16] The facts in the two cases were similar. Both couples had had children through surrogacy arrangements in the USA, and the children had genetic connections to their intended French fathers. However, French authorities refused to recognize the parental legal relationship between the intended parents and the children. Whether this refusal to recognize the parental relation violated the right to a family life under Article 8 of the ECHR was the issue for the ECtHR.

For an interference with Article 8 to be legitimate, it needs not only to be established in law, it must also have a legitimate aim. In the two judgments concerning France, the ECtHR held that the interferences had legitimate aims by preserving the 'protection of health' and the 'protection of the rights and freedoms of others'.

As there is no consensus on surrogacy in Europe and as it is regarded sensitive ethical matter, the ECtHR held that this motivates a wide margin of appreciation. Thereafter, the court separated the intended parents' rights to a family life from the children's rights to respect for their private life. Concluding that the non-recognition could be motivated by the intended parents' rights to a family life, the Court held that the same could not be said about the children's right to respect for their private life. Regarding the children's right to respect for their private life, which includes that everyone shall be able to establish the essence of his or her identity, was significantly affected by the refusal. That the children were genetically related to the father emphasised the critique in this part. France was therefore considered to have violated the children's rights to respect for their private life under Article 8.

[13] See e.g. ECtHR's judgment of December 6, 2022, in the case of *K.K. and others v. Denmark* (application no. 25212/21).

[14] ECtHR's judgment of June 26, 2014 in case *Mennesson v. France* (application no. 65192/11).

[15] See e.g. European Court of Human Rights, Guide on the case-law of the European Convention on Human Rights: Rights of the child (updated on August 31, 2025), p. 9.

[16] ECtHR's judgment of June 26, 2014 in case *Labassee v. France* (application no. 65941/11).

After the initial French cases, the ECtHR has repeatedly dealt with international surrogacy, consistently returning to the principle idea of protecting the children's right to respect for their private life, which includes the legal relationship between the child and the parent.

As regards a genetic intended parent in a surrogacy arrangement, that relation must always be recognized in some way.[17] The importance of the genetic relation between at least one of the intended parents and the child follows particularly from the case Paradiso and Campanelli v. Italy.[18] In this case, which concerned a child born through a Russian surrogacy arrangement and taken to Italy to parents that had no genetic links to the child, the ECtHR held that there was no violation of the intended parents' rights under article 8 to take the child into public custody care. It is notable, though, that the child's rights under Article 8 were never put to the test as the intended parents had no legal right to represent the child. [19]

How recognition is done is up to the states to decide for themselves. It can be done through adoption or by other means, but it must be quick and efficient when the relation already exists and is a reality.[20] Here, the Danish solution of not allowing adoption for the intended mother was held to be a violation of these rights in the *K.K. and others v Denmark* case.[21]

K.K. and others v. Denmark deserves some attention as the objective of the non-recognition in that case was to prevent commercial surrogacy arrangements.[22] The case concerned a Danish couple who went to Ukraine to have a commercial surrogacy arrangement. The intended father was also the biological father.

3.3. Are Foreign Surrogacy Arrangements Recognised in Sweden?

A traditional family law matter is to address the situation when a father is unknown. Often, that situation is addressed in legislation with, e.g., presumptions of fatherhood for married men, but also a possibility for a genetic father to come forward and identify himself in order to be recognised as the legal father.

[17] See e.g. European Court of Human Rights, Guide on the case-law of the European Convention on Human Rights: Rights of the child (updated on August 31, 2025), p. 9 with further references to ECtHR's judgment of June 26, 2014 in case *Mennesson v. France* (application no. 65192/11) para 96–112, ECtHR's judgment of June 26, 2014 in case *Labassee v. France* (application no. 65941/11) para 75–80, ECtHR's judgment of July 21, 2016 in case *Foulon and Bouvet v.* France (application nos. 9063/14 and 10410/14) para 55–58 and ECtHR's judgment of August 31, 2023 in case *C v. Italy* (application no. 47196/21) para 56–68.

[18] ECtHR's judgment (Grand Chamber) of January 24, 2017 in case *Paradiso and Campanelli v. Italy* (application no. 25358/12).

[19] The importance of the genetic link follows from e.g. ECtHR's judgment (Grand Chamber) of January 17, 2024 in case *Paradiso and Campanelli v. Italy,* (application no. 25358/12).

[20] ECtHR's judgment of July 16, 2020 in case *D v. France* (application no. 11288/18) and ECtHR's judgment of November 12, 2024 (application no. 46808/16).

[21] ECtHR's judgment of December 6, 2022 in the case of *K.K. and others v. Denmark* (application no. 25212/21).

[22] See e.g. ECtHR's judgment of December 6, 2022 in the case of *K.K. and others v. Denmark* (application no. 25212/21) para 16 and 17 where the rationale of the Danish legislation is referred to in the facts of the case.

In Sweden, the Act (1985:367) on parental relations in international situations (*lag [1985:367] om föräldraskap i internationella situationer*) governs how foreign parental relations may be recognized in Sweden.[23] This act was designed in a time when surrogacy arrangements did not exist. The common rationale of the Act was to make sure that a genetic father could also be recognised as a legal father.[24]

Swedish law, up until recently, only recognized presumptions of parentage for men. This was changed in a 2022 legislative amendment. Even if the non-birthgiving spouse in a female same-sex relation could be recognized as a partner after assisted reproduction, this opportunity did not extend to a female partner to a sperm-donating father or to an egg-donating mother in a surrogacy arrangement. The legal opportunities offered in such a situation were either to make use of Chapter 1 Section 9 Paragraphs 2 and 3 of the Parental Code, which guarantees that a married spouse can be considered the parent to the child given birth to by the other spouse, despite a lack of genetic connection. A second option was to adopt the child. The 2022 legal amendments sought to address this inequality by making the act more gender neutral.[25]

Using step-parent adoption is permitted in Sweden, provided that the intended parents consent and are in a marriage or cohabitation relationship, according to Chapter 1, Sections 8 and 9 of the Swedish Parental Code (*Föräldrabalken* [1949:381]). In case-law, it has been proven that complicated situations arise when one of the intended parents, typically the genetic father, no longer gives his or consent to the step-parent adoption.

The Swedish Supreme Court has rendered judgments on international surrogacy agreements at a few times during a period when international legal development has been intense. The 2006 judgment, which was described in Section 2.2. above, was the first Swedish case in which the intended parents had the entire genetic connection to a child born by a woman in Finland.[26] As the Swedish man was the genetic father, he could easily acknowledge his parental status. For the Swedish woman to also be acknowledged as a mother, she needed to adopt the child that she had custody of the child together with her husband, the genetic father. Such an adoption required the approval of the father. As the father no longer approved the genetic mother to adopt the child, the majority of the Supreme Court held that the prerequisites for adoption were not met. In a dissenting opinion, two justices argued differently. The judgment was criticised for favouring male conceptions over female conceptions in international surrogacy arrangements.[27]

The next time the Supreme Court was faced with the issue was in 2019. By then, surrogacy arrangements had been subject to a significant legal development in the European Court of Human Rights, emphasising the rights of the child to parents as well as to an established family life under Article 8 of the European Convention on Human Rights.[28]

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[23] It can be noted that Act (1979:1001) on recognition of Nordic parental relations (*lag [1979:1001] om erkännande av nordiska föräldraskapsavgöranden*) prevails in Nordic relations (i.e. from Denmark, Finland, Norway and Iceland).

[24] See e.g. prop. 2021/22:188 p. 20 (Swedish preparatory works). The intra-nordic Act mentioned in the footnote above rests on the same rationale.

[25] Prop. 2021/22 p. 21 (Swedish preparatory works).

[26] Swedish Supreme Court's judgment of July 7, 2006 in case Ö 5151-04 (in Sweden reported as NJA 2006 p.505).

[27] Stoll, *op.cit.*, p. 138.

[28] See e.g. Hellner, *International Surrogacy Arrangements. An Overview and Synthesis of the Case-Law of the European Court of Human Rights*, FS Jänterä-Jareborg, 2022.

In the Supreme Court case NJA 2019 p. 504, a child was born through a surrogacy arrangement in California. The intended Swedish parents were an unmarried couple. Already before the child was born, the intended mother was declared a legal parent by a California judgment. Soon, upon arrival in Sweden, the couple separated. The intended mother got sole custody of the child. Even if the intended mother was the actual caregiver, she could not adopt the child since that would extinguish the parental rights of the father. As adoption did not work, she urged that the Californian judgment must be recognized in Sweden. There are no rules on the recognition of foreign maternity decisions in Swedish law. With respect to the human rights development for children born through surrogacy, the Swedish Supreme Court now unanimously held that the Californian decision must be recognised in Sweden. To the judgment, all justices also enclosed a very rare amendment urging the legislator to take action and regulate international surrogacy.

Another important Swedish Supreme Court ruling on recognition of foreign parental relations established after surrogacy is NJA 2019 p. 969. In this case, a Swedish woman entered into an agreement with a surrogate mother in Arkansas, USA. Both gametes were donated by anonymous third parties, thereby precluding any genetic link between the intended mother and the child. Before the child was born, the Swedish woman initiated legal proceedings in an Arkansas court, acquiring a parentage order to acknowledge her as the legal mother and to extinguish the surrogate mother's parental rights.

When the child was born, a birth certificate was issued listing the surrogate mother as the parent. One week after the birth, the first certificate was replaced with a new one naming the Swedish woman as the sole legal parent. Upon returning to Sweden, the intended mother brought the baby with a tourist visa and later applied for the child's permanent residence permit.

The intended mother then sought to have her parental status recognised under Swedish law. Her attempt to have the legal relationship established by a Swedish court was rejected. A subsequent application to adopt the child was also denied, as such an adoption was deemed to contravene the prohibition against remuneration in adoption cases, as laid down in Chapter 4 Section 10 of the Swedish Parental Code.

Referring to its earlier judgment that same year in the Californian surrogacy case (NJA 2019 p. 504), the Supreme Court reiterated that Swedish law allows only a limited possibility to recognize foreign judgments establishing parenthood through surrogacy. Nonetheless, in the Arkansas surrogacy case, the Supreme Court developed its reasoning further. It emphasized that a child's right to privacy includes the right to know about their origins and identity.

Although there was no genetic connection between the intended mother and the child, the Court recognized that non-recognition of the parentage could lead to disadvantages for the child. Consequently, the Court held that recognition might be necessary in the child's best interests. However, such recognition would only be justified if no other options – such as adoption – were available under Swedish law.

One Justice in the Supreme Court had a dissenting opinion, even if he joined the majority for the conclusion. He meant that already the fact that a foreign parental relation has been established would mean that a Swedish non-recognition must be considered to have disadvantages for the child. With private international law terminology, it can be said that the dissenting opinion stressed the importance of avoiding 'limping relations'.[29]

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[29] See e.g. M. Bogdan, Svensk och EU-domstolens rättspraxis i internationell privat- och processrätt 2019–2020, *SvJT* 2021, p. 949.

The restriction that foreign parental relations established after surrogacy may only be recognized when no other means are available has been criticized in Swedish legal literature. Scholars have observed that this exception can, in practice, benefit intended parents who have separated, but not those who remain together. This inconsistency has been viewed as problematic, since it creates an incentive for intended parents to separate temporarily in order obtain recognition of their parenthood, only to reunite afterwards.[30]

Another uncertainty under the Swedish legal position is that it is made as recognition of foreign judgments. It has been noted that this solution makes it uncertain when the country where the surrogate arrangement offers no possibility of a declaratory judgment on the parent relation for the intended parents.[31]

3.4. Are Foreign Surrogacy Arrangements Recognised in Denmark?

Previously, Denmark tried to uphold its restrictive approach to commercial surrogacy arrangements by not allowing the 'second' parent to make use of a step-parent adoption. As famously shown in the *KK and Others v. Denmark* case, this was not compatible with the concerned children's rights to a parent.[32] This case marks an important turning point for Danish private international law regarding surrogacy.

The background to the *KK and Others v. Denmark* case was that a surrogate mother in Ukraine gave birth to twins. In the Ukrainian birth certificates, a Danish wife and husband were registered as mother and father. Upon their return to Denmark, the Danish authorities refused to recognize the Danish woman named in the birth certificate as a legal parent under Danish law, as she had not given birth to the children. Nonetheless, the father was recognized, as he indeed was the biological father of the children. Due to their family connection to the father, the twins obtained Danish citizenship.

Shortly after the refusal to recognise the intended mother as a legal mother in Denmark, she was granted joint custody of the children together with the father. To become a legal parent, she applied for the adoption of the children as a step-mother. That application was processed in different Danish authorities and court procedures for more than six years. Eventually, the Danish Supreme Court held that the adoption would be contrary to Section 15 of the Danish Adoption Act as the Ukrainian surrogate mother had received remuneration.

After the Supreme Court judgment, the woman, who had not been recognized as a mother, and the father filed an application to the ECtHR, claiming that their rights to a family life under article 8 of the ECHR had been violated.

The ECtHR found, with the smallest possible majority, that Denmark had violated the family rights of the two children who were also applicants in the case. In its judgment, the

[30] See M. Bogdan, HD om erkännande i Sverige av utomlands genomfört arrangemang avseende surrogatmoderskap, *SvJT* 2019: 700–704, p. 704 and M. Hellner, Erkännande av utländska surrogatarrangemang, *JT* 2019/20: 433–447, at p. 442 and p. 447.

[31] M. Hellner, Erkännande av utländska surrogatarrangemang, *JT* 2019/20: 433–447, at p. 445.

[32] For a comment to the case, see J. Scherpe, Abstammung, *FamRZ* 2023, 8: 615–619. The author of this article has also written a short case note on the judgment for the EAPIL blog. The blog post, titled "ECtHR Overrules Danish Anti-Surrogacy Judgment", was published on April 13, 2023, and is available on the following link: https://eapil.org/2023/04/13/ecthr-overrules-danish-anti-surrogacy-judgment/ (last accessed January 14, 2026).

ECtHR referred to the principles set out in the landmark judgments *Mennesson v. France* and *Paradiso and Campanelli v. Italy.* Those principles, which were effectively summarized in the ECtHR's 2019 advisory opinion, can be said to indicate that article 8 of the ECHR, read in the light of the principle of 'the best interests of the child', protects the rights of children produced through surrogacy.[33] Non-recognition of a parent-child relationship is therefore a violation of the children's article 8 rights. Following those principles, the ECtHR held that Denmark did not violate Article 8 in relation to the woman by not recognizing her legal parent-child relationship. However, the children's rights under Article 8 were violated by not having their relationship to the intended mother recognized. In its conclusion, the court stressed that it was in the best interest of the children to have the legal relationship recognized.

It is noteworthy that the judgment was a close call for the applicants. Only four of seven judges voted for the judgment. In stark contrast to the majority, the remaining three judges' joint dissenting opinion was that Denmark had not violated any ECHR rights at all. Emphasizing that there is no consensus within the member states of the Council of Europe on the sensitive matter of commercial surrogacy, the dissenters initially held that there must be a margin of appreciation for states to strike a balance between private and public interests or convention rights. According to the minority, the judgment 'practically eliminate[s] altogether, in substance, the margin of appreciation' for foreign commercial surrogacy arrangements. The minority also questioned the majority's application of the principle of the best interests of the child. In the judgment, it was held that the best interests of the children are 'paramount'. For its part, the dissenting opinion states that the best interests of the children shall be a 'primary consideration,' which is the standard set out in international law.

Following this judgment, Denmark changed its legislation. Politically, the new legislation was passed after an agreement between the Danish government and most of the opposition parties in 2024. The aim of the legislation was to address and improve the legal status of children born through surrogacy, particularly in the context of foreign surrogacy arrangements, ensuring their rights to legal parents, without the requirement of a stepparent adoption. In the agreement, it was recalled that surrogacy arrangements are complex, both ethically and legally. As Denmark does not have influence over surrogacy arrangements entered into in other countries, it was concluded that Denmark cannot regulate nor monitor whether such arrangements involve exploitation of women or other ethical concerns. However, recognizing the challenges and legal gaps that arise from these arrangements, the Danish political agreement chose to focus on the children who are born because of such agreements, rather than trying to prevent or promote surrogacy abroad.

Focusing on the issue that was in focus in the *K.K.* judgment, the political agreement sought to make it possible to immediately recognize parental relations after foreign surrogacy arrangements. This replaced the old situation where a non-biological parent must go through a stepparent adoption process, which could not be initiated before at least three months after the birth. This adoption process has created a period of legal uncertainty for children and families, leaving them in a 'legal void' until the adoption is formalized. Under the new system, intended parents can apply for legal parenthood from abroad before the child arrives in Denmark, ensuring that the child's legal relationship with both parents is established from birth.

[33] See ECtHR's advisory opinion of April 10, 2019 (request no. P16-2018-001).

The new rules on recognition of foreign legal parental relations following a surrogacy arrangement follow from Section 30 h and 30 i of the Danish Children's Act. Section 30 h defines a foreign surrogacy arrangement as an arrangement in which a surrogate mother who has not had domicile in Denmark for the last six months gives birth to a child with other intended parents or with another intended parent instead of the surrogate mother. Such an arrangement needs to be initiated before the surrogate mother is pregnant. In Section 30 i) of the Danish Children's Act, the Agency of Family Law is given the mandate to recognise mother, father, co-mother, or co-father based on a foreign surrogacy arrangement if certain conditions are met. For the Agency of Family Law to determine legal parenthood, it needs to have 1) documentation showing genetic connection between at least one of the intended parents and the child, 2) a notary declaration (or a similar document) made in the child's birth country in which the surrogate mother confirms that she want to convey the parentage of the child after the birth of the child 3) surrogacy arrangement itself and 4) a birth certificate (or a similar document) for the child.

The agreement also stipulated conditions to prevent exploitation and to ensure ethical standards. In the case of international surrogacy, at least one of the intended parents must have a genetic connection to the child. Additionally, the surrogate mother must confirm her consent to transfer parenthood after the birth through a notarized declaration for the child's country of birth.

By allowing legal parenthood to be recognized retroactively from the child's birth, the agreement respects the child's right to know their background, with the surrogacy arrangement and notarized declaration forming part of the legal record.

The new Danish legislation has not only effects for foreign surrogacy arrangements. Although commercial surrogacy arrangements remain illegal in Denmark, altruistic surrogacy is permitted, though rarely practiced. The agreement extends the same legal protections to children born through altruistic surrogacy within Denmark. Under the old rules, these children also faced a period of legal uncertainty because the non-biological parent had to adopt the child after birth. With the agreement, altruistic surrogacy agreements can be pre-approved and registered with Danish authorities before the pregnancy occurs. This has allowed the intended parents to be recognized as the legal parents from birth, thus removing the need for a step-parent adoption and providing immediate legal security for the child.

The legislation entered into force on January 1, 2025. It was immediately reviewed by the Committee of Ministers of the Council of Europe under Article 46 of the ECHR, which enables supervision of the execution of judgments. With reference to an action report prepared by Denmark, the Committee of Ministers held, in a decision on 12 June 2025, that Denmark had taken all necessary measures to comply with the judgment.[34]

3.5. Part-Conclusions

Comparing Sweden's and Denmark's legislative attitudes toward foreign surrogacy arrangements gives a clear picture of two different methods. Whereas the Swedish Supreme Court interpreted Swedish law *contra legem* in order to comply with ECtHR case law, the Danish Supreme Court instead upheld the strict national legislation on preventing

[34] The Danish Action Report is titled DH-DD(2025)336. The decision of the Committee of Ministers is (CM/ResDH(2025)140) of June 12, 2025.

commercial surrogacy arrangements. In turn, however, the Danish approach led to the important KK and others case in the ECtHR, which compelled the Danish legislator to change not only its position on the private international law situation, but also its stance on domestic surrogacy relations. In that sense, one can say that the principles of the ECHR have had a direct effect on private international law in Denmark and Sweden.

4. Conclusions

The Danish and Swedish approaches to surrogacy reveal that restrictive domestic legislation does not eliminate the phenomenon. Merely, it externalises surrogacy. By prohibiting or severely limiting domestic surrogacy, Denmark and Sweden have redirected the practice abroad, leaving the domestic legal systems to grapple with private international law questions of recognition of surrogacy agreements created abroad.

One can argue that the international practice of surrogacy should encourage domestic legislation to liberalise the rules on domestic surrogacy. On the other hand, such liberalisation would still not displace foreign surrogacy arrangements for those who do not meet the domestic legal criteria or who simply seek a less costly option.

The comparison between the Danish and Swedish approaches and their respective adaptations to the ECtHR's case law on the right to respect for private and family life illustrates the Court's influence not only on the private international law issue of recognising foreign parental relations arising from surrogacy, but also more broadly on domestic legal developments. In Denmark, the ECHR right has had a clear impact to influence also domestic surrogacy relations.

Whether a similar dynamic will eventually liberalise Sweden's rules on domestic surrogacy remains to be seen. Nonetheless, a gradual trend towards acceptance of surrogacy is evident. As international surrogacy becomes increasingly common, maintaining a strict prohibition at the domestic level may become progressively more difficult.

Even if it may seem inconsistent to allow parental relations established abroad but not domestically, the two situations must also be treated differently for the reason of internationality. A child born abroad through an international surrogacy arrangement raises the issue of a limping legal relationship that is acknowledged in one state but not in another. From a private international law perspective, such situations are imperfect as they risk having future domino effects. Also, a fight against surrogacy arrangements as a phenomenon cannot simply be taken in individual cases. Leaving idealism aside, one must realise that children will be born through surrogacy whether one likes it or not. The children born through such arrangements can never be the victims of a legislator's attempt to prevent the way that children are brought to life.

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