Neutral Citation Number: [2014] EWHC 3135 (Fam)

Case No: BM13P08884
BM14P00065

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 October 2014

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

- -

Re X (A Child) (Surrogacy: Time limit)

- -
- -

Ms Elizabeth Isaacs QC and Mr Matthew Maynard (instructed by Anthony Collins Solicitors LLP) for the child (X)
Ms Tracy Lakin (instructed by Greens Solicitors LLP) for the commissioning father
Ms Dympna Howells (instructed by Glaisyers) for the commissioning mother
The surrogate mother and the surrogate father were neither present nor represented

Hearing date: 23 June 2014

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was handed down in open court

Sir James Munby, President of the Family Division :

1. This case raises a question in relation to the law of surrogacy which is both of fundamental significance to the parties and also of considerable general public importance.

2. Section 54(1)(c) of the Human Fertilisation and Embryology Act 2008 provides that in certain specified circumstances "the court may make an order providing for a child to be treated in law as the child of the applicants" – a parental order – "if … the conditions in subsections (2) to (8) are satisfied." So far as material for present purposes subsection 54(3) is in the following terms:

> "the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born."

The question is whether the court has jurisdiction to make such an order if the application is made after the expiration of 6 months. Hitherto, the common belief has been that the court cannot make such an order unless the application has been made within the 6 month period. The question for me is whether that belief is well-founded. In my judgment, and with all respect to those of my brethren who have taken a different view, it is not.

The background facts

3. B and P, respectively "the commissioning father" and "the commissioning mother", married in 1998. In 2011 they made a surrogacy agreement in India with G and R, respectively "the surrogate mother" and "the surrogate father". The surrogate mother conceived using eggs donated by a third party and the commissioning father's donor sperm.

4. The child, X, was born in India on 15 December 2011. X entered the United Kingdom on a British passport on 6 July 2013. By that date, of course, the 6 month period under section 54(3) has already elapsed. The reason is simple: the commissioning parents were unaware of the need to apply for a parental order, let alone of the terms of section 54.

5. On 4 August 2013 the surrogate parents confirmed, in separate written documents, that they wished to relinquish all their parental rights and responsibilities in respect of X. On 1 December 2013 they confirmed that their wishes and feelings about relinquishing parental rights and responsibilities remained the same. The order made on 6 January 2014 by His Honour Judge Plunkett (see below) recites that the surrogate parents have "clearly" and "unequivocally" relinquished and surrendered all parental rights in respect of X.

The problem

6. It is correctly common ground that the expert evidence before me demonstrates that the surrogacy agreement was valid under Indian law and that under Indian law the surrogate father and the surrogate mother, being married, are treated as X's parents to the exclusion of both the commissioning father and the commissioning mother. That is also the position under English law: see section 35 of the 2008 Act. It follows from

this that the surrogate father and surrogate mother have parental responsibility for X under English law. The commissioning father and commissioning mother do not; in fact under English law they have no rights at all. The surrogate parents are X's parents "for all purposes": see section 48(1) of the 2008 Act. It is also correctly common ground that the surrogate parents are, in law, unable to transfer or surrender parental responsibility for X. If the commissioning parents are to acquire parental rights or parental responsibility for X they need an order of the court.

7. What the commissioning parents want, and what on the face of it X's best interests plainly demand, is an order permanently extinguishing all the legal rights and responsibilities of the surrogate parents and permanently vesting all such rights and responsibilities in the commissioning parents. There are only two ways in which, in principle, such an outcome can be achieved: an adoption order made in accordance with section 46 of the Adoption and Children Act 2002 or a parental order made in accordance with section 54 of the 2008 Act. Adoption is not an attractive solution given the commissioning father's existing biological relationship with X. As X's guardian puts it, a parental order presents the optimum legal and psychological solution for X and is preferable to an adoption order because it confirms the important legal, practical and psychological reality of X's identity: the commissioning father is his biological father and all parties intended from the outset that the commissioning parents should be his legal parents.

The litigation history

8. In June 2013 the commissioning parents separated. They remained separated, but not divorced, until June 2014 when they became reconciled. On 9 July 2013 the commissioning father issued an application in the Birmingham County Court for a residence order in respect of X. The case was listed before Her Honour Judge Hindley QC on 19 July 2013. Judge Hindley drew attention to the omission to apply for a parental order under section 54 and to the fact that neither of the commissioning parents had parental responsibility. She transferred the case to the High Court and made X a ward of court. She made an order the effect of which was to split X's living arrangements between the commissioning parents at their separate homes. Those arrangements, endorsed by subsequent orders of the court, remained in place until June 2014, since which time X has lived together with both commissioning parents. Further hearings took place before his Honour Judge Plunkett, sitting as a Deputy Judge of the High Court, on 12 September 2013, 19 September 2013, 7 November 2013 and 6 January 2014.

9. Throughout this period the parties and the court were proceeding on the basis, as set out in a recital to the order made by Judge Plunkett on 12 September 2013, that "It is no longer possible for any party to apply for a Parental Order under section 54 of the 2008 Act, as the time limit for the same is set at six months from birth which has expired and is not capable of extension." The common assumption was that, in the absence of any application for an adoption order, the only available legal options were residence, special guardianship or wardship.

10. The order made by Judge Plunkett on 6 January 2014 recorded that there was a significant issue with X's right to family life justifying the instruction of Leading Counsel to advise, amongst other matters, on whether the time under section 54(3)

can be extended and, if not, whether it was appropriate to apply for a declaration of incompatibility.

11. Ms Elizabeth Isaacs QC duly advised. Her opinion is dated 12 January 2014. It dealt comprehensively with all the issues. Importantly, for present purposes, and having referred to *Re S (Parental Order)* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156 (Hedley J), *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145 (Theis J), *G v G (Parental Order; Revocation)* [2012] EWHC 1979 (Fam), [2013] 1 FLR 286 (Hedley J) and *A and B v SA* [2013] EWHC 426 (Fam) (Theis J), Ms Isaacs suggested that, although the wording of section 54(3) was mandatory and that no statutory exception appears to be provided or permitted, and notwithstanding what had been said by Hedley J in *In re X (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71, [2009] 1 FLR 733, para 12, and by Theis J in *J v G* [2013] EWHC 1432, para 30, it was arguable that the time limit under section 54(3) was not absolute. She suggested that the commissioning parents issue a joint application for a parental order as a matter of urgency. Her opinion reached them on 29 January 2014.

12. On 19 February 2014, and in accordance with directions given by Judge Plunkett on 12 February 2014, the commissioning parents lodged a joint application at the Family Proceedings Court for a parental order in respect of X. It was issued the next day. The application was transferred to the County Court and thence to the High Court and came before me on 30 April 2014. At that hearing I raised the question of whether any assistance was to be derived from the line of cases starting with the decision (I could not then recall the name of the case but subsequently notified the parties on 8 May 2014) of Lord Penzance in *Howard v Bodington* (1877) 2 PD 203.

13. The application came on for final hearing before me on 23 June 2014. The commissioning father was represented by Ms Tracy Lakin and the commissioning mother by Ms Dympna Howells. Ms Isaacs, leading Mr Matthew Maynard, appeared for X. At the end of the hearing I reserved judgment.

The statutory provisions and legislative history

14. The relevant legal framework is contained in section 54 of the Human Fertilisation and Embryology Act 2008, reproducing with only minor changes provisions originally enacted as section of 30 of the Human Fertilisation and Embryology Act 1990. Section 54 provides as follows:

> "Parental orders
>
> (1) On an application made by two people ("the applicants"), the court may make an order providing for a child to be treated in law as the child of the applicants if –
>
> (a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,
>
> (b) the gametes of at least one of the applicants were used to bring about the creation of the embryo, and

(c) the conditions in subsections (2) to (8) are satisfied.

(2) The applicants must be –

(a) husband and wife,

(b) civil partners of each other, or

(c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.

(3) Except in a case falling within subsection (11), the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born.

(4) At the time of the application and the making of the order –

(a) the child's home must be with the applicants, and

(b) either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man.

(5) At the time of the making of the order both the applicants must have attained the age of 18.

(6) The court must be satisfied that both –

(a) the woman who carried the child, and

(b) any other person who is a parent of the child but is not one of the applicants (including any man who is the father by virtue of section 35 or 36 or any woman who is a parent by virtue of section 42 or 43),

have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

(7) Subsection (6) does not require the agreement of a person who cannot be found or is incapable of giving agreement; and the agreement of the woman who carried the child is ineffective for the purpose of that subsection if given by her less than six weeks after the child's birth.

(8) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of –

(a) the making of the order,

> (b) any agreement required by subsection (6),
>
> (c) the handing over of the child to the applicants, or
>
> (d) the making of arrangements with a view to the making of the order,
>
> unless authorised by the court.
>
> (9) For the purposes of an application under this section –
>
> (a) in relation to England and Wales, section 92(7) to (10) of, and Part 1 of Schedule 11 to, the Children Act 1989 (c. 41) (jurisdiction of courts) apply for the purposes of this section to determine the meaning of "the court" as they apply for the purposes of that Act and proceedings on the application are to be "family proceedings" for the purposes of that Act,
>
> (b) in relation to Scotland … , and
>
> (c) in relation to Northern Ireland …
>
> (10) Subsection (1)(a) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination.
>
> (11) An application which –
>
> (a) relates to a child born before the coming into force of this section, and
>
> (b) is made by two persons who, throughout the period applicable under subsection (2) of section 30 of the 1990 Act, were not eligible to apply for an order under that section in relation to the child as husband and wife,
>
> may be made within the period of six months beginning with the day on which this section comes into force."

15. Ms Isaacs and Mr Maynard, for whose assistance in relation to this as to all other aspects of the case I am immensely grateful, have conducted detailed research into the Parliamentary process leading up to the enactment of section 30 of the 1990 Act.

16. The Bill which eventually became the 1990 Act was introduced in the Lords. The problem, for which the solution was what eventually became section 30, was raised in the Commons at Second Reading on 2 April 1990 by a back bencher, Mr Michael Jopling MP, prompted by concerns raised with him by constituents involved in on-going litigation. A government amendment was introduced at Report on 20 June 1990, essentially in the terms of what became section 30. The Bill received its Third Reading the next day, 21 June 1990, and returned to the Lords, where the relevant clause was briefly debated and approved on 18 October 1990. The Bill received Royal

Assent on 1 November 1990. It is apparent from counsel's researches that in neither House was there any explanation of or discussion about the terms of section 30(2), now section 54(3). The case referred to by Mr Jopling had in fact come before Scott Baker J on 30 October 1990, the day before the Bill received the Royal Assent: *Re W (Minors) (Surrogacy)* [1991] 1 FLR 385.

17. In *In re X (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71, [2009] 1 FLR 733, Hedley J commented (para 12) that "no specific reason can be ascertained" for the time limit in section 30(2). Ms Isaacs observes that no reason was identified in Parliament and that the Parliamentary debates are silent as to any policy underpinning section 30(2).

18. So we are left with the statutory language.

Section 54(3): the argument

19. There are three strands to the argument put forward by Ms Isaacs and Mr Maynard. I will deal with them in turn.

20. The first strand of their argument focuses on the case-law specifically relating to section 54. The starting point, as they have to concede, is a consistent assumption by judges of the Division that the time-limit in section 54(3) cannot be extended. I can take the cases chronologically.

21. The first is *In re X (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71, [2009] 1 FLR 733, where, in relation to the corresponding provisions of section 30 of the 1990 Act, Hedley J said this (para 12):

> "Section 30(2) provides for a non-extendable time limit of 6 months from the date of birth for the issuing of the parental order application. This has been complied with in this case, but it is noteworthy that apparently there is no power to extend though no specific reason can be ascertained for that. That may especially cause problems where immigration issues have led to delay."

In *Re S (Parental Order)* [2009] EWHC 3146 (Fam), [2010] 1 FLR 1156, the same judge said (para 9) that "the time limit … appears to be incapable of enlargement." The next case is in *J v G* [2013] EWHC 1432 (Fam), where Theis J said (para 30):

> "It should be remembered parental order applications must be made within six months of the child's birth, there is no power vested in the court to extend that period."

22. The next case is *JP v LP and others* [2014] EWHC 595 (Fam), a case where the application for a parental order was lodged when the child was 33 weeks old. Eleanor King J said this (paras 29-31):

> "29 When the matter came before the High Court it was agreed by all parties … s54(3) says that the parties must apply for the order during the period of 6 months beginning with the

> day on which the child is born. There is no provision within the Act to provide for a discretionary extension to the statutory time limit and no one sought to argue that the court could, or should, whether by means of the use of its inherent jurisdiction or otherwise, seek to circumnavigate the mandatory provisions of the statute.
>
> 30 It was recognised by the parties that the policy and purpose of parental orders is to provide for the speedy consensual regularisation of the legal parental status of a child's carers following a birth resulting from a surrogacy arrangement. Such a policy does not fit comfortably with extensions of time which inevitably result in the continued involvement over a protracted period of the surrogate mother in the lives of the commissioning couple and their child.
>
> 31 A parental order is not therefore an option for this family."

Finally, there is *Re WT (A Child)* [2014] EWHC 1303 (Fam), where Theis J said (para 42(3)):

> "A parental order application has to be made within six months of the child's birth. There is no power vested in the court to extend that period."

23. Ms Isaacs and Mr Maynard challenge this assumption. Their careful argument proceeds in two stages.

24. First, they draw on that part of the case-law which identifies the fundamental principles and policy underlying section 54, directing my attention to three decisions of Theis J. The first is *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145, paras 24-26:

> "24 The primary aim of s 54 of the HFEA 2008 is to allow an order to be made which has a transformative effect on the legal relationship between the child and the applicants. The effect of the order is that the child is treated as though born to the applicants. It has clear implications as regards the right to respect for family life under Art 8 of the European Convention. Family life exists in this case as the child has lived with both Mr and Mrs A. The child is biologically related to Mr A and perhaps Mrs A. The effect of not making an order will be an interference with that family life in that the factual relationship will not be recognised by law. The court's responsibility to 'guarantee not rights that are theoretical and illusory but rights that are practical and effective' *Marckx v Belgium* (1979–80) 2 EHRR 330, at para 31.
>
> 25 A further relevant consideration is that family life is not only a matter of fact and degree but also the significance of

> legal relationships. In this case if an order is not made there is no legal connection between the child and his deceased biological father. Protection of the right to family life pre-supposes the factual existence of family life (*Pini and Bertani; Manera and Atripalidi v Romania* (2004) 40 EHRR 312, [2005] 2 FLR 596, at para 143). Once that is established (and it is in this case) the state must facilitate and protect that right.
>
> 26 The consequences of not making an order in this case are as follows:
>
> (i) there is no legal relationship between the child and his biological father who is also the commissioning father;
>
> (ii) the child is denied the social and emotional benefits of recognition of that relationship;
>
> (iii) the child may be financially disadvantaged if he is not recognised legally as the child of his father (in terms of inheritance);
>
> (iv) the child does not have a legal reality which matches the day-to-day reality;
>
> (v) the child is further disadvantaged by the death of his biological father."

25. In *J v G* [2013] EWHC 1432 (Fam), paras 27-29, the same judge said this:

> "27 A parental order will safeguard the children's welfare on a lifelong basis as it will
>
> (1) Confer joint and equal legal parenthood and parental responsibility upon both the applicants. This will ensure each child's security and identity as lifelong members of the applicants' family.
>
> (2) Fully extinguish the parental status of the respondents under English law.
>
> (3) Make each of the children British citizens which will entitle them to live in the UK with their family on a permanent basis. This is by the operation of Schedule 4 paragraph 7 of the HFEA Regulations which provides that the children will become British citizens upon the grant of parental orders in favour of either of the applicants, both of whom are British citizens.
>
> 28 As the parental order reporter observes in her report

> "A parental order allows the reality for [the children] to be formalised now and bestows a sense of finality and completeness. It closes the door on official challenges to the intended parents' authority and paves the way for the future without delay and the further anxiety that will inevitably be experienced if another route to permanency and security has to be sought."
>
> 29 I am entirely satisfied the only order that will secure the lifelong welfare needs of each of these children is a parental order. Only that order will provide the lifelong security and stability that their welfare clearly demands."

26. Theis J returned to the same point in *Re C (A Child), AB v DE* [2013] EWHC 2413 (Fam), para 36:

> "His welfare needs would clearly not be met by the Respondents remaining his legal parents in this jurisdiction, when they are not so recognised in their own jurisdiction and have no intention of having any future parental role in C's life. C's future is in the long term care of the Applicants, they are his de facto legal parents and his welfare demands their relationship is given lifelong security which can only be achieved by making a parental order."

27. In this connection Ms Isaacs and Mr Maynard also draw attention to what Hedley J said in *In re L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam), [2011] Fam 106, [2011] 1 FLR 1143, paras 5, 9-10:

> "5 It has to be accepted that in implementing the new 2008 Act, Parliament must be taken to have had in mind the accumulated jurisprudence under the 1990 Act. It is therefore significant that, with one material exception, section 54 of the 2008 Act reproduces section 30 of the 1990 Act. The exception is the widening of the categories of those who may apply and the making of transitional provisions for those who have only become entitled to apply on the coming into force of the 2008 Act. It necessarily follows, with one significant change (relating to welfare), that the law in respect of parental orders is not affected by the 2008 Act save as is noted above.
>
> 9 The significant change in the 2008 Act other than the enlargement of the scope of applicants relates to the welfare test. The effect of the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010/985) is to import into section 54 applications the provisions of section 1 of the Adoption and Children Act 2002 … What has changed, however, is that welfare is no longer merely the court's first consideration but becomes its paramount consideration.

> 10 The effect of that must be to weight the balance between public policy considerations and welfare … decisively in favour of welfare. It must follow that it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making."

To similar effect see also Theis J in *J v G* [2013] EWHC 1432 (Fam).

28. The second stage of the argument is based upon a careful analysis of the four cases which Ms Isaacs had referred to in her opinion: *Re S (Parental Order)* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156, *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145, *G v G (Parental Order: Revocation)* [2012] EWHC 1979 (Fam), [2013] 1 FLR 286 and *A and B v SA* [2013] EWHC 426 (Fam).

29. In *Re S (Parental Order)* [2009] EWHC 2977 (Fam) [2010] 1 FLR 1156, Hedley J was concerned with the requirements of section 30(7) of the 1990 Act, what is now section 54(8) of the 2008 Act, in circumstances where, as he found (para 6) the commissioning parents "can in fact give no account" for how the sum of $23,000 paid to the surrogate mother was used. His conclusion was that "the applicants are wholly unable to persuade the court that no sum was paid which offends the provisions of s.30(7)." Ms Isaacs draws attention to what Hedley J said (paras 7-8):

> "7 … There is no doubt, in my judgment, that Mr and Mrs A entered into this agreement in good faith and without any understanding on their part that the agreement that they had entered into was not one that would be recognised under English law …
>
> 8 … I am satisfied on the evidence … that the welfare of these children viewed in a lifelong perspective is such that it is in their interests that a parental order under s 30 should be made, and I am accordingly prepared to make it."

I do not, with respect, see how this assists Ms Isaacs. All that Hedley J was doing was to explain why he was prepared, consistently with the principles he had earlier expounded in *In re X (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71, [2009] 1 FLR 733, to exercise the jurisdiction conferred on the court by section 30(7), now section 54(8), to authorise otherwise prohibited payments.

30. The next case relied on by Ms Isaacs and Mr Maynard is the decision of Theis J in *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145. The problem in that case arose in relation to sections 54(1), 54(2)(a) and 54(4), because although the commissioning father was alive when, jointly with the commissioning mother, he applied for a parental order, he had died before the application came on for hearing. I have already set out, in paragraph 24 above, what Theis J said about her general approach to section 54. She identified the question she had to decide as being (para 17) whether the word 'applicants' in section 54 "can be construed in this case so as to require two people to make the application

but not require that there be two living applicants at the time of the making of the order." She decided (paras 10-12) that the cause of action survived the commissioning father's death and that accordingly she had jurisdiction to consider the application notwithstanding his death.

31. Counsel submitted (para 16) that "the court must consider whether it is possible to purposively construe the relevant provisions to allow for the common intention of the applicants to be met and for an order to be made which is clearly in the best interests of the child"; that (para 19) "In considering whether to construe the statute in the way suggested … the court must have regard to the purpose of the relevant provisions"; and (para 22) that "the court must have regard to not just the intention of Parliament but it should seek to adopt any possible construction which is compatible with and upholds convention rights."

32. Having referred (para 27) to Article 8 of the United Nations Convention on the Rights of the Child 1989, Theis J said this (para 28):

> "The concept of identity includes the legal recognition of relationships between children and parents. In *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 All ER 783 Baroness Hale of Richmond considered that the courts in this jurisdiction and decision makers had to have regard to the key principles of the UNCRC 1989, both in respect of Art 8 of the European Convention and in its application to decisions by authorities in this jurisdiction (see paras [22]–[25]). If the consequences of a purposive construction of s 54(4) of the HFEA 2008 are that the child's identity with his biological father is preserved and the child's identity is linked to both Mr and Mrs A the court may consider itself bound to arrive at such a conclusion on the combined reading of Art 8 of the European Convention and Art 8 of the UNCRC 1989."

33. She expressed her conclusion as follows (para 31):

> " … I have reached the conclusion I am able to interpret s 54(4)(a) and 54(5) of the HFEA 2008 in such a way that allows the court to be satisfied that the relevant requirements are met in this case for the following reasons:
>
> (1) For the reasons outlined above no other order or combination of orders will recognise B's status with both Mr and Mrs A equally.
>
> (2) Article 8 is engaged and any interference with those rights must be proportionate and justified.
>
> (3) In the particular circumstances of this case the interference cannot be justified as no other order can give recognition to B's status with both Mr and Mrs A in the same transformative way as a parental order can.

> (4) To interpret s 54(4)(a) and 54(5) of the HREA 2008 in the way submitted will not offend against the clear purpose or policy behind the requirements listed in s 54. It will not pave the way for single commissioning parents to apply for a parental order or orders being made in favour of those under the age of 18 years.
>
> (5) Mr and Mrs A were lawfully entitled to apply for a parental order when they made their application.
>
> (6) Such an interpretation will protect the identity of B and the family unit in accordance with Art 8 of the UNCRC 1989.
>
> (7) It is clearly in B's interests that a parental order is made to secure his legal status with both Mr and Mrs A.
>
> (8) B's home was with Mr and Mrs A from the time of his birth up until the time of Mr A's death, thereafter he has remained in the care of Mrs A. But for Mr A's death B would have remained in the care of them both.
>
> (9) Mrs A is now 36 years and Mr A would have been 34 years."

34. This is a crucially important decision. I shall return in due course to analyse Theis J's reasoning and the use Ms Isaacs seeks to make of it.

35. The next case is the decision of Hedley J in *G v G (Parental Order: Revocation)* [2012] EWHC 1979 (Fam), [2013] 1 FLR 286. Hedley J was considering an application by the commissioning father for the revocation of a parental order on the grounds (para 11) that, first, the order had been wrongly made by reason of numerous procedural defects and, secondly, it had been obtained by a concealment by the commissioning mother of a fact – that she was intending to leave him and raise the child as a lone parent – which, if known, would, according to the commissioning father, have resulted in no order being made. Hedley J refused the application, essentially on the ground (paras 29-30, 33) that a parental order, like an adoption order, confers a lifelong status and inalienable parental responsibility to the permanent exclusion of those who until then had parental status, and that, there being no statutory power to set aside a parental order, the court considering such an application should therefore be guided by the authorities on revoking adoption orders. It does not seem to me that this throws any light on the point I am currently considering.

36. The final case is the decision of Theis J in *A and B v SA* [2013] EWHC 426 (Fam). The question here was as to the commissioning parents' domicile: the specific issue was whether they had each acquired a domicile of choice in England and Wales at the date of the parental order application. Theis J held that they each had. On the facts as she set them out, that finding was unsurprising. The case does not assist me.

37. The second strand in the argument put forward by Ms Isaacs and Mr Maynard is based on the long line of cases of which the decision of Lord Penzance, sitting as

Dean of Arches, in *Howard v Bodington* (1877) 2 PD 203 is usually taken as the starting point. Lord Penzance said this (pages 210-211):

> "The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the Courts hold a provision to be mandatory or directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end. Now the question is, to which category does the provision in question in this case belong?
>
> … I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

38. Down the years a vast jurisprudence developed around the imperative / directory dichotomy. There is no purpose to be gained by entering into this morass, for the dichotomy has fallen into disfavour in recent years: see the historical analysis by Lord Steyn in *Regina v Soneji and another* [2005] UKHL 49, [2006] 1 AC 340, paras 15-22.

39. Lord Steyn identified what he called the core problem (para 14):

> "A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were

> refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance."

He concluded (para 23):

> "Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead … the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction."

In applying that approach in the particular case Lord Steyn adopted (para 24) what he called "a purposive interpretation" of the statute in question.

40. Lord Rodger of Earlsferry illustrated the point with a striking example (para 30):

> " … if your young daughter wants to go out with friends for the evening and you agree, but tell her that she must be home by eleven o'clock, she is under a duty to return by then. But this does not mean that her duty is to return by then or not at all. Rather, even if she fails to meet your deadline, she still remains under a duty to return home. On the other hand, if you contract with a conjuror to perform at your daughter's birthday party, you want the conjuror and his tricks only for the party. His duty is accordingly limited to performing at the party held on your daughter's birthday and, if he fails to turn up, he cannot discharge the duty later. In the present cases Parliament has placed the court under a duty, where appropriate, to make a confiscation order before it sentences an offender. If the court fails to do so and proceeds to sentence the offender first, does Parliament intend that – like your daughter – the court should remain under a duty to make the order? Or does Parliament intend that the duty should be limited so that – like the conjuror – the court can perform it only before sentencing?"

41. Ms Isaacs and Mr Maynard referred me to a number of subsequent decisions of the Court of Appeal. There is no need for extended citation, for all, in the final analysis, are merely decisions upon particular statutes. Three, however, merit brief reference. In *Dharmaraj v Hounslow London Borough Council* [2011] EWCA Civ 312, [2011] PTSR 1523, para 25, Toulson LJ said that:

> "The modern approach towards breach of a statutory procedural requirement is to consider the underlying purpose of the requirement and whether it follows from consideration of that

> legislative purpose that any departure from the precise letter of the statute, however minor, should amount to the document being regarded as a nullity."

42. In *Newbold and others v Coal Authority* [2013] EWCA Civ 584, [2014] 1 WLR 1288, para 70, Sir Stanley Burnton said:

> "In all cases, one must first construe the statutory … requirement in question. It may require strict compliance with a requirement as a condition of its validity … Against that, on its true construction a statutory requirement may be satisfied by what is referred to as adequate compliance. Finally, it may be that even non-compliance with a requirement is not fatal. In all such cases, it is necessary to consider the words of the statute … , in the light of its subject matter, the background, the purpose of the requirement, if that is known or determined, and the actual or possible effect of non-compliance on the parties. We assume that Parliament in the case of legislation … would have intended a sensible … result."

43. *Khakh v Independent Safeguarding Authority* [2013] EWCA Civ 1341 was a case where the relevant provisions of the Safeguarding Vulnerable Groups Act 2006 provided that the judge in the Crown Court "must inform the person at the time he is convicted" that his name would be included on the statutory barring lists. The judge failed to do so. Explaining why Parliament cannot fairly have intended that the consequence of the judge's failure should be that the appellant's inclusion on these lists was a nullity, Elias LJ gave as one of his reasons (para 10) that:

> "the scheme is designed to protect children and vulnerable adults, and I cannot believe that Parliament can have intended that a failure by the judge should undermine that vital public objective."

44. The third strand in the argument put forward by Ms Isaacs and Mr Maynard is based on the Convention and both the commissioning parents' and X's human rights.

45. I have already set out the relevant passages from the passages of Theis J's judgment in *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145, which was, as we have seen, heavily underpinned by an analysis centred on Article 8. Ms Isaacs and Mr Maynard rely upon two further cases: *Pomiechowski v District Court of Legnica, Poland and another* [2012] UKSC 20, [2012] 1 WLR 1604, and *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818, [2013] 1 WLR 3156. Neither was a family case. *Pomiechowski* was an extradition case and *Adesina* involved the disciplinary proceedings of a professional body, so the focus in each case was on Article 6 rather than Article 8. But the fundamental analysis, as we shall see, is much the same.

46. In *Pomiechowski v District Court of Legnica, Poland and another* [2012] UKSC 20, [2012] 1 WLR 1604, the issue for the Supreme Court was the effect of provisions in the Extradition Act 2003 stating that in relation to appeals to the High Court the notice of appeal "must be given" within a specified seven-day period. Lord Mance

gave the primary judgment. Having held that extradition proceedings involved a 'civil right' engaging Article 6, and then rehearsed the Article 6 jurisprudence, Lord Mance continued (para 35):

> "… it is not sufficient under article 6.1 if in most or nearly all cases the right of appeal can be or should be capable of being exercised in time. The "very essence" of the right may be impaired in individual cases and there may still be no "reasonable relationship of proportionality between the means employed and the aim sought to be achieved"."

He continued (para 37):

> "I am not persuaded that the interests of finality and certainty outweigh the interests of ensuring proper access to justice by appeal in the limited number of extradition cases where this would otherwise be denied. There would not be "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved"."

47. Turning to consider what this meant in concrete terms, Lord Mance said this (paras 38-39; citations omitted):

> "38 … The opposed possibilities are, on the one hand, that the statute can be read in a manner consistently with the Convention rights, pursuant to the court's duty under section 3 of the Human Rights Act 1998 so to read it "so far as it is possible to do so", and, on the other hand, that the statutory time limits are simply incompatible with article 6.1. The former solution may involve reading in words, provided that they are "compatible with the underlying thrust of the legislation" and do not go against "the grain of the legislation".
>
> 39 In the present case, there is no reason to believe that Parliament either foresaw or intended the potential injustice which can result from absolute and inflexible time limits for appeals. It intended short and firm time limits, but can only have done so on the basis that this would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time. In these circumstances, I consider that … the statutory provisions concerning appeals can and should all be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time … where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under article 6.1 in *Tolstoy Miloslavsky* [*Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442]. The High Court must have power in any individual case to determine whether the operation of the time limits would have this effect. If and to the extent that it would

> do so, it must have power to permit and hear an out of time appeal which a litigant personally has done all he can to bring … timeously."

48. Lady Hale (paras 47-54) would have preferred to come to the same conclusion more directly and without the need for recourse to Article 6.

49. In *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818, [2013] 1 WLR 3156, the question for the Court of Appeal was the effect of a statutory provision stating that an appeal to the High Court from the Nursing and Midwifery Council "must be brought before the end" of a specified period of 28 days. There was no express provision permitting the court to extend time. The issue was whether the 28-day time limit was an absolute one, admitting of no exceptions, or whether it might be tempered and, if so, on what basis. The argument was summarised by Maurice Kay LJ thus (para 3):

> "it is submitted, *Pomiechowski's* case now requires us to "read down" [the statutory provision] so as to interpret it in a manner compatible with article 6 of the Convention, thereby leaving some wriggle-room, notwithstanding the apparently absolute nature of the time limit."

50. Having considered the decision in *Pomiechowski*, and rejected a submission that it was an extradition case of no general application, Maurice Kay LJ said this (para 14):

> "The context, exclusion from a profession, is still one of great importance to an appellant. There is good reason for there to be time limits with a high degree of strictness. However, one only has to consider hypothetical cases to appreciate that, without some margin for discretion, circumstances may cause absolute time limits to impair "the very essence" of the right of appeal conferred by statute. Take, for example, a case in which a person, having received a decision removing him or her from the register, immediately succumbs to serious illness and remains in intensive care; or a case in which notice of the disciplinary decision has been sent by post but never arrives and time begins to run by reason of deemed service on the day after it was sent … In such cases, the nurse or midwife in question might remain in blameless ignorance of the fact that time was running for the whole of the 28-day period. It seems to me that to take the absolute approach in such circumstances would be to allow the time limit to impair the very essence of the statutory right of appeal."

51. He continued (para 15):

> "The real difficulty is where to draw the line. Mr Pascall, on behalf of the claimants, does not contend for a general discretion to extend time. Parliament is used to providing such discretions, often circumscribed by conditions … The omission to do so on this occasion was no doubt deliberate. If article 6

> and section 3 of the 1998 Act require [the statutory provision] to be read down, it must be to the minimum extent necessary to secure compliance with Convention. In my judgment, this requires adoption of the same approach as that of Lord Mance JSC in *Pomiechowski's* case [2012] 1 WLR 1604, para 39. A discretion must only arise "in exceptional circumstances" and where the appellant "personally has done all he can to bring [the appeal] timeously". I do not believe that the discretion would arise save in a very small number of cases. Courts are experienced in exercising discretion on a basis of exceptionality."

The stringency of the approach adopted in that case is shown by the fact that neither appellant succeeded, even though one of them was only two days out of time. The fact (para 17) that it had taken some time for her to find a specialist solicitor and to obtain legal aid availed her nothing. As Maurice Kay LJ observed (para 18):

> "although the absolute approach can no longer be said to be invariable, the scope for departure from the 28-day time limit is extremely narrow."

Section 54(3): discussion

52. The starting point is clear and remains essentially unchanged from that identified by Lord Penzance in *Howard v Bodington* (1877) 2 PD 203 and most recently re-stated by Sir Stanley Burnton in *Newbold and others v Coal Authority* [2013] EWCA Civ 584, [2014] 1 WLR 1288. I must consider section 54(3) having regard to and in the light of the statutory subject matter, the background, the purpose of the requirement (if known), its importance, its relation to the general object intended to be secured by the Act, and the actual or possible impact of non-compliance on the parties. The question, as posed by Lord Steyn in *Regina v Soneji and another* [2005] UKHL 49, [2006] 1 AC 340, is, Can Parliament fairly be taken to have intended total invalidity? As Toulson LJ put it in *Dharmaraj v Hounslow London Borough Council* [2011] EWCA Civ 312, [2011] PTSR 1523, Is any departure from the precise letter of the statute, however minor, to be fatal? And the assumption, as Sir Stanley observed, must surely be that Parliament intended a "sensible" result.

53. In addressing these questions, I start with Theis J's powerful analysis in the three cases I have already referred to in paragraphs 24-26 above and, in particular, with what she said in *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145, paras 24-26. Since I respectfully agree with every word of it, I can be brief.

54. Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family. As Ms Isaacs correctly puts it, this case is fundamentally about Xs identity and his relationship with the commissioning parents. Fundamental as these matters must be to commissioning parents they are, if anything, even more fundamental to the child. A parental order has, to adopt Theis J's powerful expression, a transformative

effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in *Re J (Adoption: Non-Patrial)* [1998] INLR 424, 429, referred to as "the psychological relationship of parent and child with all its far-reaching manifestations and consequences." Moreover, these consequences are lifelong and, for all practical purposes, irreversible: see *G v G (Parental Order: Revocation)* [2012] EWHC 1979 (Fam), [2013] 1 FLR 286, to which I have already referred. And the court considering an application for a parental order is required to treat the child's welfare *throughout his life* as paramount: see in *In re L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam), [2011] Fam 106, [2011] 1 FLR 1143. X was born in December 2011, so his expectation of life must extend well beyond the next 75 years. Parliament has therefore required the judge considering an application for a parental order to look into a distant future.

55. Where in the light of all this does the six-month period specified in section 54(3) stand? Can Parliament really have intended that the gate should be barred forever if the application for a parental order is lodged even one day late? I cannot think so. Parliament has not explained its thinking, but given the transcendental importance of a parental order, with its consequences stretching many, many decades into the future, can it sensibly be thought that Parliament intended the difference between six months and six months and one day to be determinative and one day's delay to be fatal? I assume that Parliament intended a sensible result. Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe section 54(3) as barring forever an application made just one day late is not, in my judgment, sensible. It is the very antithesis of sensible; it is almost nonsensical. It is, after all, easy to imagine far from fanciful circumstances in which the application arrives too late: the solicitor misunderstands section 54(3) and excludes the day on which the child was born from his calculation of when time runs out; the solicitor's legal executive is delayed by a broken down train or a traffic jam and arrives at the court office just after it has closed; on the way to their solicitor's office to give instructions the commissioning parents are involved in a car crash that leaves them both in a coma from which they recover only after the six-month period has elapsed. Why should they be barred? Even more to the point, why should the wholly innocent child be barred by such mishap? Let it be assumed, though in truth, and with all respect to her, this is little more than speculation, that the underlying policy is that identified by Eleanor King J in *JP v LP and others* [2014] EWHC 595 (Fam), namely to provide for the speedy consensual regularisation of the legal parental status of a child's carers following a birth resulting from a surrogacy arrangement; that policy surely does not require section 54(3) to be read as meaning that *any* delay, however trivial, is to be fatal. One can see why Eleanor King J was concerned that there should not be what she referred to as delay over "a protracted period", but that is a different point.

56. I have considered whether the result at which I have arrived is somehow precluded by the linguistic structure of section 54, which provides that "the court may make an order … if … the [relevant] conditions are satisfied." I do not think so. Slavish

submission to such a narrow and pedantic reading would simply not give effect to any result that Parliament can sensibly be taken to have intended.

57. I conclude, therefore, that section 54(3) does not have the effect of preventing the court making an order merely because the application is made after the expiration of the six month period. That is a conclusion which I come to, without reference to the Convention and on a straightforward application of the principle in *Howard v Bodington* (1877) 2 PD 203.

58. If for some reason that is wrong, if to go that far is in truth to take a step too far, the same conclusion is, in my judgment, amply justified having regard to the Convention. The two key authorities here are the decision of Theis J in *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145, and the later decision of the Supreme Court in *Pomiechowski v District Court of Legnica, Poland and another* [2012] UKSC 20, [2012] 1 WLR 1604. Although, as I have pointed out, Theis J founded her analysis on Article 8, whilst the Supreme Court's analysis was based on Article 6, the reasoning in both cases is fundamentally the same: the statute must be 'read down' in such a way as to ensure that the "essence" of the protected right is not impaired and that what is being protected are rights that are "practical and effective" and not "theoretical and illusory."

59. I agree entirely with Theis J's powerful and compelling reasoning. Her focus was on section 54(4)(a), but in my judgment her reasoning applies *mutatis mutandis* with equal force to section 54(3).

60. I add two things. First, I draw attention to the fact that Theis J was prepared to read down – and in my judgment correctly prepared to read down – section 54(4)(a) to enable her to make a parental order *after* one of the commissioning parents had died notwithstanding that section 54(4)(a), in contrast it may be noted to section 54(3), seemingly requires the relevant condition to be satisfied both "at the time of the application" *and* "at the time of … the making of the order." If that degree of 'reading down' is permissible in relation to section 54(4)(a) – and Theis J held that it was, and I respectfully agree – then the lesser degree of 'reading down' required in relation to section 54(3) is surely *a fortiori*.

61. The other point is this. Theis J focussed on that aspect of Article 8 which protects "family life", but Article 8 also protects "private life", and 'identity', on which she appropriately laid stress, is an important aspect of "private life". So, any application for a parental order implicates both the child's right to "family life" and also the child's right to "private life". The distinction does not matter in the circumstances of the present case (see further below) but I make the point because it is, I suppose, possible to conceive of a case where, on the facts, it might be more difficult or even impossible to demonstrate the existence of "family life."

62. Having got thus far in the analysis, the remaining question is whether in the present case the commissioning parents are to be allowed to pursue an application made some two years and two months after X was born. In my judgment, they are.

63. This period in fact falls into two parts: first, the period from December 2011, when X was born, until July 2013, when Judge Hindley first drew attention to the significance of section 54; second, the period thereafter until the application was issued in

February 2014. In the particular circumstances of this case, the latter period, in my judgment, properly falls out of account. Until Ms Isaacs suggested otherwise in January 2014, everyone – the parties' legal advisers and the judges dealing with the case – were agreed that section 54(3) presented an insuperable obstacle. And that was hardly surprising given the decisions of Hedley J and Theis J referred to in paragraph 21 above. So the true focus must be on the period of thirteen months delay from June 2012, when the six month period expired, until the hearing before Judge Hindley in July 2013.

64. In one sense that is a long time, both in absolute terms and when compared with the statutory time limit of six months. And it is a very long time indeed compared with the matter of a few days that were fatal to the appellant in *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818, [2013] 1 WLR 3156. But principle demands that I have regard to the statutory subject matter, the background, and the potential impact on the parties if I allow section 54(3) to bar the application. I repeat in this context what I have already said in paragraphs 54-56 above. There are, without labouring the point, three aspects of a parental order which very obviously and very fundamentally distinguish it from the kind of case which the court was concerned with in *Adesina*. The first is that a parental order goes not just status but to identity as a human being. The second is that the court is looking, indeed is required by statute to look, to a future stretching many, many decades into the future. The third is that the court is concerned not just with the impact on the applicant whose default in meeting the time limit is being scrutinised but also with the impact on the innocent child, whose welfare is the court's paramount concern. In these circumstances the court is entitled, indeed in my judgment it is bound, to adopt a more liberal and relaxed approach than was appropriate in *Adesina*. After all, as Maurice Kay LJ recognised in *Adesina*, what the court is required to do, albeit it is required to do no more, is to secure compliance with the Convention. I would not be doing that if I were to deny the commissioning parents and X access to the court.

65. I intend to lay down no principle beyond that which appears from the authorities. Every case will, to a greater or lesser degree, be fact specific. In the circumstances of this case the application should be allowed to proceed. No one – not the surrogate parents, not the commissioning parents, not the child – will suffer any prejudice if the application is allowed to proceed. On the other hand, the commissioning parents and the child stand to suffer immense and irremediable prejudice if the application is halted in its tracks.

Sections 54(2) and 54(4)(a)

66. The commissioning parents were separated at the time the application was issued. But they were not divorced, so they remained "husband and wife" within the meaning of section 54(2)(a) and are now, as I have mentioned, reconciled. They made the application jointly, so it was, within the meaning of section 54(1), an application "made by two people." The real question arises in relation to section 54(4)(a): can it be said that X's "home" was "with" them at the time of the application (it plainly is now)?

67. There are, in my judgment, two reasons why this question should be answered in the affirmative. In the circumstances as I have described them in paragraph 8 above, X

had his "home" with the commissioning parents, with both of them, albeit that they lived in separate houses. He plainly did not have his home with anyone else. His living arrangements were split between the commissioning father and the commissioning mother. It can fairly be said that that he lived with them.

68. Even if this is not right, the Convention applies and for all the reasons I have already explained the statute can and therefore should be 'read down' to achieve this result. It involves, after all, a lesser degree of reading down than Theis J was prepared to accept in *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145. I add in this context a reference to *Kroon v The Netherlands* (1994) 19 EHRR 263, [1995] 2 FCR 28, where the Strasbourg court accepted that family life existed between two parents and their children even though the parents had never married, did not cohabit and lived in separate houses. There is no doubt, in my judgment, that there is family life within the meaning of Article 8 as between the commissioning parents and X.

Remaining issues

69. The first stage in the judicial task is to be satisfied that each of the requirements in sections 51(1)-(8) of the 2008 Act is met. The second stage requires the exercise of a judicial discretion – as section 54(1) says, "the court may make an order" – in accordance, as we have seen, with the provisions of section 1 of the 2002 Act.

70. I have dealt with the requirements of sections 54(2), 54(3) and 54(4)(a). The facts as I have already set them out demonstrate that the requirements of sections 54(1)(a) and 54(1)(b) are satisfied. The commissioning parents are both domiciled in this country and both over the age of 18, so the requirements of sections 54(4)(b) and 54(5) are satisfied. This court has already acknowledged that the requirements of section 54(6) are satisfied.

71. The only remaining issues are therefore those which arise under section 54(8) and those which relate to discretion.

Remaining issues: section 54(8)

72. The evidence from the commissioning parents in relation to the financial arrangements is that they paid a total of 550,000 rupees. The exchange rate at the time was, I am told, approximately 80 rupees to the £ sterling, so the total was some £6,875. This total comprised three elements: 100,000 rupees (£1,250) paid to a "mediator" whose "role was to locate an appropriate woman to act as a surrogate"; 200,000 rupees (£2,500) paid to the surrogate mother "to act as surrogate … paid in instalments"; and 250,000 rupees (£3,125) paid to the clinic as "fees", covering all testing, IVF treatment and the delivery – in the obstetric sense – of X. The expert evidence is that these arrangements were legal under the law of India. That is relevant but cannot be determinative, for the matter so far as this court is concerned is governed by section 54(8) which, subject to the power of the court to authorise such payments, forbids all payments "other than for expenses reasonable incurred".

73. The sums paid in this case may appear modest by Western standards, but that is not the point, as Hedley J observed in *In re L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam), [2011] Fam 106, [2011] 1 FLR 1143, para 7.

74. As Hedley J has pointed out (*In re L*, para 7) the statutory phrase "reasonable expenses" remains a somewhat opaque concept. For present purposes I propose to proceed on the footing that, whatever view might be taken about the nature and quantum of the other two payments, the payment to the "mediator" falls foul of the statutory prohibition. The question then is whether I should nonetheless authorise these payments.

75. The proper approach to this question is to be found in a number of judgments of Hedley J and Theis J. Extensive citation is unnecessary. It suffices to refer to what Theis J said in *Re WT (A Child)* [2014] EWHC 1303 (Fam), para 35. She said, and I agree, that the relevant principles are now firmly established. She set them out in numbered paragraphs as follows:

> "(1) the question whether a sum paid is disproportionate to "reasonable expenses" is a question of fact in each case. What the court will be considering is whether the sum is so low that it may unfairly exploit the surrogate mother, or so high that it may place undue pressure on her with the risk, in either scenario, that it may overbear her free will.
>
> (2) the principles underpinning section 54(8), which must be respected by the court, is that it is contrary to public policy to sanction excessive payments that effectively amount to buying children from overseas.
>
> (3) however, as a result of the changes brought about by the Human Fertilisation and Embryology (Parental Orders) Regulations 2010, the decision whether to authorise payments retrospectively is a decision relating to a parental order and in making that decision, the court must regard the child's welfare as the paramount consideration.
>
> (4) as a consequence it is difficult to imagine a set of circumstances in which, by the time an application for a parental order comes to court, the welfare of any child, particularly a foreign child, would not be gravely compromised by a refusal to make the order: As a result: "it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making", per Hedley J in [*In re L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam), [2011] Fam 106, [2011] 1 FLR 1143] at paragraph 10.
>
> (5) where the applicants for a parental order are acting in good faith and without 'moral taint' in their dealings with the surrogate mother, with no attempt to defraud the authorities, and the payments are not so disproportionate that the granting of parental orders would be an affront to public policy, it will ordinarily be appropriate for the court to exercise its discretion

> to give retrospective authorisation, having regard to the paramountcy of the child's lifelong welfare."

I agree that these are the principles I must apply.

76. The guardian has explored this issue with the commissioning parents and I have her report. The commissioning parents acted in good faith and without 'moral taint'; there was no exploitation or pressuring of the surrogate mother; and there will be no affront to public policy if I exercise my discretion in favour of the commissioning parents, as I propose to do. X's welfare plainly demands that I do so.

Remaining issues: welfare

77. I turn, finally, to the question of X's welfare. The submission on his behalf is simple and compelling. It is, say Ms Isaacs and Mr Maynard, plainly in X's interests for the commissioning parents, with one or other of whom he has lived for almost all of his short life, to be recognised in law as his legal parents, now and for his entire life. It cannot, they say, be in his interests for the surrogate parents to retain any form of legal right or responsibility in relation to him. I agree. The guardian's report is very positive. X is much loved and well cared for, he is happy and settled in the care of the commissioning parents. The guardian has no concerns and recommends the making of a parental order. I agree.

Conclusion

78. I shall therefore discharge the wardship and all the previous orders so far as they remain in force and make the parental order as sought.