

## **The regulation and recognition of surrogacy under English law: An overview of the case law**

**Abstract:** This commentary presents an overview of the recent English case law on recognition and regulation of surrogacy, particularly as it relates to the issue of international surrogacy arrangements. It demonstrates that when deciding whether to authorise a surrogacy arrangement, there is often a conflict between the enforcement statutory provisions, and the welfare of the child who will bear the burden of any refusal to grant a parental order. As a result, courts have been forced to interpret the legislation in an innovative manner in order to achieve justice for the child.

Over the last fifteen years, the use of international surrogacy has grown rapidly. While accurate statistics are not available, as not all surrogate births are registered, the number of parental orders for foreign surrogate births has increased from 2% of all parental orders in 2008 to 25% in 2011.<sup>1</sup> This phenomenon has raised difficult questions concerning conflicts of law, and in particular, whether the law should recognise an agreement that takes place legally in another jurisdiction, but which is contrary to domestic legislation.

This article will consider the English position on the recognition of parenthood as a result of surrogacy arrangements through a detailed analysis of the jurisprudence to date. This is of particular importance given the speed at which the case law is evolving, and the multitude of legal and ethical issues that have been raised by surrogacy arrangements. In undertaking this analysis, the article will show that while public policy may oppose such agreements, the welfare of the child requires that they be given effect, leaving courts with little choice but to find a way to justify their approval. This has led to judgments in which the law has been stretched and manipulated to fit the requirements of justice, making the legislation little more than an empty shell. As such, there is a need for a re-evaluation of the way in which surrogacy is regulated, and a principled approach developed that provides legal certainty and consistency, while protecting the rights of surrogate mothers and children.

### **1. Parental orders and commercial surrogacy in England**

The regulation of surrogacy in England has largely evolved in a piecemeal fashion in a series of responses to individual cases. In 1985, the UK was one of the first jurisdictions in the world to introduce legislation concerning surrogacy, when it responded to the publicity surrounding the high-profile pregnancy of Kim Cotton.<sup>2</sup> Cotton had been paid £6,500 to carry a surrogate child, and a further £20,000 to sell her story to the tabloid press, and the resulting public outcry and fear of a “babies-for-cash” industry led to the government taking swift legislative action.

At the time of the birth, the government was still debating the recommendations of the Warnock Committee, which in 1984 had taken a very antipathetic view of surrogacy.<sup>3</sup> This Committee, established in 1982 to inquire into the technologies of IVF and embryology, believed that regulation would encourage recourse to surrogacy, and thus recommended that any legislation prohibit the recruitment of women for surrogacy and render criminal the operation of agencies for such purposes. Following the Cotton case, the government ceased

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<sup>1</sup> Marilyn Cranshaw, Eric Blyth and Olga van den Akker, “The Changing Profile of Surrogacy in the UK – Implications for national and international policy and practice” (2013) 34(3) *Journal of Social Welfare and Family Law* 1, 3.

<sup>2</sup> *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846.

<sup>3</sup> Report of the Committee of Inquiry into Human Fertilisation and Embryology (HMSO, London 1988) Cm 9314 (“Warnock Report”).

its deliberations and expeditiously passed the Surrogacy Arrangements Act 1985 in line with these recommendations. Section 1(A) of this Act provides that surrogacy arrangements are not enforceable by law, while s 2 criminalises anyone initiating, offering, agreeing or taking part in negotiations on a commercial basis with a view to making a surrogacy arrangement.<sup>4</sup>

It was not until several years after the introduction of this “morally panicked”<sup>5</sup> legislation that Parliament came to consider more fully the implications of the advances in reproductive technology and embryonic research. However, under the Human Fertilisation and Embryology Bill, which led to the 1990 Act of that name, the only specific references to surrogacy were in the provisions that emphasised the unenforceable nature of surrogacy arrangements.<sup>6</sup> The status provisions in ss 27, 28 and 29 of that Act were not designed with surrogacy in mind, but were instead intended to cater to children born through IVF treatment, allocating parenthood to the couple who bore the child, rather than the genetic gamete donors. What would later become s 30, which provided for applications for parental orders for commissioning parents in surrogacy, was only inserted at the Report stage of the Bill, as a result of the complaint of a constituent to their Member of Parliament that they were having to adopt their “own” children born as a result of a gestational surrogacy agreement.<sup>7</sup> As such, a provision was hastily drafted to grant legal parenthood to married couples who had entered into a surrogacy arrangement, provided that they fulfil certain conditions.

Despite significant changes in attitude towards surrogacy over the following decades, epitomised by the Brazier Report in 1998 and the about-face taken by the medical profession on whether surrogacy should be permitted,<sup>8</sup> when Parliament returned to this question eighteen years later with the 2008 Human Fertilisation and Embryology Act (HFEA), it made few amendments to the sections relating to surrogacy. The only significant change was to extend the categories of applicants able to apply for a parental order to include unmarried and same-sex couples. The requirements for a parental order under s 30 remained largely the same, now incorporated into a new s 54 HFEA.

Where a surrogacy arrangement has been entered into, s 54 regulates the transfer of parentage from the surrogate mother (and her husband, if applicable) to the commissioning parents.

The key requirements of s 54 are as follows:

- a genetic relationship between the commissioning parents and the child (s 54(1))
- the commissioning parents are either married, civil partners, or in an enduring family relationship (s 54(2))
- the application must be made within six months of the child’s birth (s 54(3))
- the child is already living with the commissioning parents (s 54(4)(a))
- the commissioning parents are domiciled in the United Kingdom (s 54(4)(b))
- the commissioning parents are both over 18 (s 54(5))

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<sup>4</sup> Section 2 was primarily intended to stop not only surrogate mothers offering their services for commercial gain, but also to prohibit commercial surrogacy agencies and profit-making middlemen. However, it also applies to legal professionals, as a firm of Birmingham solicitors was recently reminded by the High Court, where they had charged a fee for drawing up a surrogacy arrangement (*JP v LP* [2014] EWHC 595).

<sup>5</sup> Michael Freeman, “Does Surrogacy Have a Future After Brazier?” (1999) 7 *Medical Law Journal* 1, 12.

<sup>6</sup> Which ultimately became s 36 of the 1990 Act. See Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team” (HMSO, London 1998) Cm 4068 (“Brazier Report”) [3.12].

<sup>7</sup> Brazier Report, [3.12].

<sup>8</sup> When the Warnock Report was drafted, opinion within the medical community was largely opposed to professional involvement in surrogacy, but in 1990 the British Medical Association endorsed a certain degree of professional assistance in surrogate pregnancy, and in 1996 suggested that surrogacy was an acceptable practice of last resort. See Brazier Report [1.6].

- both the surrogate mother, and any other man or woman recognised as a legal parent, have freely, unconditionally, and with full understanding, consented to the making of the order (s 54(6)) – unless such parent cannot be found or is incapable of giving consent (s 54(7))
- consent of the surrogate mother must be given more than six weeks after birth (s 54(7))
- unless authorised by the court, no money other than “expenses reasonably incurred” can be given in relation to making the surrogacy arrangement, handing over the child, or consenting to the order (s 54(8))

This article will consider the judicial interpretation of these conditions, and the ways in which the courts have worked around the legislative requirements in order to achieve a just outcome. The predominant focus of this article will be on the question of “reasonable expenses” under s 54(8), in line with the focus of the case law in this area. However, in recent years the courts have begun to take a more liberal approach to the issue of the timing of the application, the existence of two commissioning parents, and even to the question of searching for a person to give parental consent, and each of these will also be examined in turn.

## 2. The development of the English jurisprudence on commercial surrogacy

From the very first surrogacy cases to come before the courts, the difficulties resulting from commercial aspects of the practice have been apparent. Initially, these fell under either adoption legislation,<sup>9</sup> or the court’s inherent jurisdiction concerning wardship.<sup>10</sup> However, after the advent of the HFEA, these difficulties have been central to the courts’ consideration of surrogacy agreements under s 30, and subsequently s 54.

The first such case was *Re C (Application by Mr and Mrs X under s30 of the HFEA 1990)* in 2002,<sup>11</sup> in which a couple had paid a surrogate mother £12,000 to cover her expenses during pregnancy, including a component for loss of earnings. However, it was later discovered that she was in fact not working prior to her pregnancy, and was instead receiving State income support, which had continued to be paid. Evidence was also submitted that the usual sum recommended to cover expenses for a surrogate birth in England was £10,000, but in this case the mother had negotiated for the higher fee. The Court held that this higher sum could not be seen as “for expenses reasonably incurred”, but nevertheless authorised the payments retrospectively. In balancing the welfare of the child against the degree of taint on the transaction, the Court found that the sum was not so disproportionately greater than the usual sum so as to render it patently inapt, and it was clearly in the child’s interests to have the commissioning parents recognised legally.

While this case began to examine the tension between the prohibition on commercial surrogacy and the need to provide a secure environment for the child, it was not until more recently that the courts were forced to come to grips fully with the difficult balancing process they were being asked to perform. In domestic surrogacy arrangements, the lack of enforceability of contracts and the criminal sanctions for agents and middlemen has meant that there is little surrogacy industry in England. Further, the lack of payment has also had the effect that there are few women willing to act as surrogate mothers. As such, couples have begun to look to other jurisdictions that have more permissive regimes, giving rise to the

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<sup>9</sup> *Re Adoption Application AA212/86 (Adoption: Payment)* [1987] 2 FLR 291; *Re MW (Adoption: Surrogacy)* [1995] 2 FLR 759

<sup>10</sup> *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846. NB: the commercial aspect of the transaction was also heavily criticised in the first surrogacy case to come before English courts, *A v C* [1985] FLR 445, although this concerned questions of custody and access, rather than transfer of parentage.

<sup>11</sup> [2002] EWHC 157 (Fam); [2002] 1 FLR 909.

rapidly emerging phenomenon of reproductive tourism. As a result, English courts increasingly have been asked to authorise commercial surrogacy agreements undertaken in other countries that are contrary to domestic law.

The first English decision to deal with an overseas commercial surrogacy agreement was *Re X and Y (Foreign Surrogacy)*,<sup>12</sup> decided in 2008. In this case, the Ukrainian surrogate mother was given monthly payments of €235, plus a lump sum of €25,000 for a live birth; sums significantly exceeding what could be described as “reasonable expenses”. In deciding whether to authorise these payments, Hedley J set out three questions that the court should ask itself:

- (i) Was the sum paid disproportionate to reasonable expenses?
- (ii) Were the applicants acting in good faith and without 'moral taint' in their dealings with the surrogate mother?
- (iii) Were the applicants party to any attempt to defraud the authorities?<sup>13</sup>

In answering these questions, the court reminded itself that in deciding whether to authorise the payments and make a parental order, the best interests of the child must be a primary consideration. Hedley J stated:

I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (ie the child concerned) that rigour must be mitigated by the application of a consideration of that child’s welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.<sup>14</sup>

This dictum set the tone for the cases that have followed, all of which acknowledge, to a lesser or greater extent, the near futility of the balancing exercise the judges are engaged in. This approach has been strengthened by the Human Fertilisation and Embryology (Parental Orders) (Consequential, Transitional and Saving Provision) Order 2010, which imported into s 54 applications the provisions of s 1 of the Adoption and Children Act 2002. As a result, when deciding whether to authorise payments and allow the parental order, the child’s welfare is now the paramount consideration.

While the elevation of the child’s welfare to the paramount concern is laudable, it has undermined the ability of the courts to refuse a parental order. As Hedley J emphasised in the case of *Re L (Commercial Surrogacy)*:<sup>15</sup>

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

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<sup>12</sup> [2008] EWHC 3030 (Fam), [2009] 1 FLR 733.

<sup>13</sup> At p 742.

<sup>14</sup> At p 743.

<sup>15</sup> [2010] EWHC 3146 (Fam), [2011] 1 FLR 1423.

an order if otherwise welfare considerations supports its making.<sup>16</sup>

As a result, when we examine the cases that have come before the English courts, a very clear picture emerges of a permissive approach to payments beyond reasonable expenses, meaning that recognition of parenthood as a result of a commercial surrogacy agreement is almost a foregone conclusion. The questions to be considered in making a determination, set out by Hedley J, have been interpreted very liberally, in particular with regard to what is “proportionate” with reasonable expenses, leaving them largely hollow: a box to tick rather than a genuine substantive investigation. As such, since 2008, despite payments ranging from US\$23,000<sup>17</sup> and US\$53,000<sup>18</sup> in California, around £3,000 in India,<sup>19</sup> and £8,812 in Russia,<sup>20</sup> no application for a parental order has been refused on the grounds of payments contrary to s 54(8).<sup>21</sup>

In order to find these high sums “not disproportionate to reasonable expenses”, the courts have identified the relative comparator to be the amount given to other surrogates in the same jurisdiction. For example, in the case of *Re C (Parental Order)*<sup>22</sup> concerning a Russian surrogate birth, the payment was found to be proportionate, notwithstanding the fact that it was an amount equivalent to one to two years’ average local wage, on the grounds that it was “less than the amount reported to be paid to surrogate mothers in St Petersburg, and does not appear unusually high in the context of what is paid in other areas in Russia”.<sup>23</sup> Thus, the courts have focused on the “proportionality” aspect of the requirement, rather than any reference to reasonable expenses, as clearly the latter is not complied with. Indeed, in the case of *Re X and Y (Foreign Surrogacy)*, part of the monies paid were used to put a deposit on a house.

The same approach has been taken to payments made to surrogacy agencies or middlemen working on a commercial basis. As with payments to the surrogate mother, such payments must be authorised by the court under s 54(8).<sup>24</sup> In the case of *Re PM (Parental Order: Payments to Surrogacy Agency)*, the court was asked to consider a profit of US\$21,000 made by a commercial surrogacy agency. In authorising the payments, Theis J remarked:

[T]he level of profit is unlikely, in circumstances such as here where it is in compliance with the legal framework in the country that it is entered into [to] be a reason for refusing to make an order, save in the most exceptional case. The reality is there is a legal commercial framework which is driven by supply and demand.<sup>25</sup>

What we can see is that when determining whether expenses have been “disproportionate to reasonable expenses”, the court will not look to an objective standard based on the level of profit-making or commercial activity, but will instead take a subjective view of what is permitted in the country in which the surrogacy takes place. As long as the payments are within the amounts permitted by the legal framework in that country, the courts will not interfere. This is, in effect, a delegation of responsibility, presuming that the law in the

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<sup>16</sup> At p 1425.

<sup>17</sup> *Re S (Parental Order)* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156.

<sup>18</sup> *J v G* [2013] EWHC 1432 (Fam), [2014] 1 FLR 297.

<sup>19</sup> *Re X and Y (Parental Order: Retrospective Authorisation of Payments)* [2012] EWHC 3147 (Fam), [2012] 1 FLR 1347; *Re A and B (surrogacy: domicile)* [2013] EWHC 426 (Fam); [2014] 1 FLR 169.

<sup>20</sup> *Re C (Parental Order)* [2013] EWHC 2413 (Fam), [2014] 1 FLR 654.

<sup>21</sup> There have been refusals for other reasons, for example, lack of domicile within the United Kingdom (see *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam), [2008] 1 FLR 1047).

<sup>22</sup> *Re C (Parental Order)* [2013] EWHC 2413 (Fam), [2014] 1 FLR 654.

<sup>23</sup> At p 658.

<sup>24</sup> *Re PM (Parental Order: Payments to Surrogacy Agency)* [2013] EWHC 2328 (Fam); [2014] 1 FLR 725. Although payments to the egg donor will not fall within this section (*Re C* [2014] 1 FLR 757)

<sup>25</sup> At p 730.

surrogate mother's home jurisdiction will adequately protect her. While it respects legal pluralism, it undermines the rationale behind this area of law – that no-matter the jurisdiction the child is born in, parenthood should be assigned according to English law.

### 3. Payments and parental consent

In addition to considering payments in light of the domestic legal framework, the courts will also examine their effect on the surrogate mother, and whether “her will has been overborne by the level of payment given”.

In *Re C (Parental Order)*,<sup>26</sup> the court took into account evidence as to the surrogate's circumstances, her cooperation during proceedings, and the fact that all negotiations were conducted through a third party. Similarly, in *J v G (Parental Order)*,<sup>27</sup> the court paid particular attention to the fact that the Californian surrogate mother had undertaken a surrogate pregnancy twice before, and she was able to demand a higher payment because of this proven track record. Her ability to negotiate with the commissioning parents, in addition to the receipt of independent legal advice, convinced the court that her will was not overborne.

In principle, this is an important question to ask, and one that should be central to the decision-making concerning parental orders. However, it has not been applied in a consistent manner. Where circumstances have indicated a lack of ability to negotiate, or an absence of legal advice, the courts have not used these factors to question the mother's freedom of choice. Nor is such information on the position of the surrogate mother always available. This raises an issue not only in relation to the evaluation of the effect of reasonable expenses on the surrogate, but also as to whether she and her husband are able to give valid consent to the parental order under s 54(6) and (7). For example, in the recent case of *Re D (A Child)*,<sup>28</sup> the court was faced with a question as to the identity of the legal father of the child, as it was unclear whether the Georgian surrogate mother was married at the time of birth. When the court tried to contact her through an international detective at the address given by the surrogacy agency, although three women at that address claimed to answer to that name, none of them admitted to bearing the child. As a result, the court was forced to cease its enquiries. Similarly, in *Re D and L (Minors) (Surrogacy)*<sup>29</sup> the court had also tried to contact the surrogate mother at the time of the hearing, this time to gain her consent to the parental order, as her original consent was given less than six weeks after birth. The commissioning parents employed an inquiry agent to locate the surrogate, but this was unsuccessful, as the address that they had been given was the residence of the agent, rather than the mother. The surrogacy clinic, when asked for its assistance, replied with a single piece of paper printed with an “obscene gesture”. As such, the court itself admitted that all documents and evidence provided by the clinic had to be treated with caution.<sup>30</sup>

The case of *Re D and L* went further than this, however. When considering how to apply the exception to parental consent where the surrogate mother cannot be found, Baker J suggested that although the consent of the surrogate given before the expiry of the six-week period was not valid for the purposes of s 54(7), he was entitled to take into account evidence that the consent *had* been given at this earlier time.<sup>31</sup> While he cautioned that the importance attached to such consent should be limited, and that he himself gave little weight to it, it remains a curious conclusion. It is unclear in what capacity this evidence could ever assist the court in

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<sup>26</sup> *Re C (Parental Order)* [2013] EWHC 2413 (Fam), [2014] 1 FLR 654.

<sup>27</sup> *J v G (Parental Order)* [2013] EWHC 1432 (Fam), [2014] 1 FLR 297.

<sup>28</sup> [2014] EWHC 2121 (Fam).

<sup>29</sup> [2012] EWHC 2631 (Fam); [2013] 2 FLR 275.

<sup>30</sup> At p 286.

<sup>31</sup> At p 286.

relation to deciding whether to apply the exception. Does previous consent suggest that attempts to find the surrogate mother need not be as extensive? Or that we should be more willing to grant the parental order on the grounds of the child's welfare because the mother is unlikely to ask for the return of the child? The six-week rule is in place to protect women from making life-changing decisions in the immediate aftermath of birth, as this would exploit their weakness at a time when they are most vulnerable. As such, it is unjust to place any weight on her consent at such a time.<sup>32</sup> The only purpose of the inclusion of this evidence appears to be to paint the surrogacy arrangement in a more sympathetic light.

In this way, the courts have been put in an unenviable position. To undertake an ex-post facto examination of whether the mother had her will overborne by payments based simply on documents and no personal interaction is a difficult endeavour. To undertake it in circumstances where the mother cannot be found, and it is clear that information about her has been fabricated, is an exercise in futility, especially if the outcome remains unaffected by such revelations. In essence, it appears that courts are simply trying to justify the inevitable outcome, as required by the welfare of the child, knowing that in doing so they are undermining the principle of altruism that forms the basis of English surrogacy laws. Such a process requires a certain amount of interpretative creativeness, and the crafting of judgments in a way that can justify coming to what is clearly the only realistic outcome, while not appearing to expressly authorise that which the government has legislated against.

Even in determining whether the applicants have tried to defraud the authorities, under the third limb of Hedley J's guidance, the courts have been decidedly lenient. In the case of *Re C (Parental Order)* discussed above, a British couple who had undertaken a commercial surrogacy arrangement in Russia were advised that the child would not be able to obtain a British passport to leave the country if the surrogate mother was married (as the surrogate's husband, rather than the commissioning father, would be the legal father). On the basis of this advice, the commissioning parents tried to obtain the passport without disclosing the surrogacy arrangement, not knowing that it had become relatively routine for the Home Office to award British nationality on a discretionary basis in any case in such circumstances. It was only when the application was rejected that they came clean, and filed a new application disclosing the relevant details. Surprisingly Theis J, despite stating that the actions were "clearly wrong", emphasised that these should be "considered in the context of the out-dated advice they were relying on."<sup>33</sup> This appears to be counter-intuitive. The applicants only lied because they believed that they would not obtain the desired outcome if they told the truth – the only effect of the out-dated advice was that they did not know that such a lie was not in fact necessary.

#### **4. A moral dilemma**

Hedley J returned to the problems raised by international commercial surrogacy agreements a year after *Re X and Y* in the case of *Re S (Parental Order)*.<sup>34</sup> On this occasion, the surrogacy had been undertaken in California, with the surrogate mother paid US\$23,000 that could not be accounted for. In authorising the payments, Hedley J set out further considerations for judges exercising their discretion. He stated that:

[T]here is a problem for the courts of this country in that it raises the question of what the proper approach is where those who cannot do something lawfully in this country that they wish to do, go overseas do it perfectly lawfully according to the country in

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<sup>32</sup> A parallel with this in English adoption law may be seen in allowing mothers to give consent to *placement* for adoption before the expiry of six weeks, although not consent to the adoption itself, notwithstanding that consent to placement also has legal consequences.

<sup>33</sup> At p 660.

<sup>34</sup> [2009] EWHC 2977 (Fam) [2010] 1 FLR 1156. This judgment was also before the 2010 Orders.

which the surrogacy is carried into effect and then seek the retrospective approval of this country for something which, as I say, could not have been done here. This clearly raises matters of public policy and those matters really relate to, as it seems to me, three things:

(1) To ensuring that commercial surrogacy agreements are not used to circumvent childcare laws in this country, so as to result in the approval of arrangements in favour of people who would not have been approved as parents under any set of existing arrangements in this country.

(2) The court should be astute not to be involved in anything that looks like the simple payment for effectively buying children overseas. That has been ruled out in this country and the court should not be party to any arrangements which effectively allow that.

(3) The court should be astute to ensure that sums of money which might look modest in themselves are not in fact of such a substance that they overbear the will of a surrogate.<sup>35</sup>

While these considerations seem to be relevant and logical, they are no more easily enforced than those under *Re X and Y*. While the third issue has been discussed above, the first and second criteria bear closer scrutiny.

The first issue raised, concerning the identity of commissioning parents, relates to a wider question of whether surrogacy should be seen as an extension of natural birth, and therefore not subject to restrictions on availability, or more akin to adoption, where parents are screened according to the welfare of the child. It is, without doubt, a pertinent issue, and one that has recently been the centre of a media-storm concerning a convicted paedophile who, with his wife, commissioned a pregnancy through a surrogate mother in Thailand.<sup>36</sup> However, its relevance to the issue of authorising reasonable payments is less obvious.

As Hedley J himself suggested in *Re S (Parental Order)*, absent the threshold test in s 31 of the Children Act 1989 being crossed, it appears unlikely that the child's welfare will be best promoted by taking him or her into state care, no matter what the characteristics of the commissioning parents. An example of this can be seen in the intercountry adoption case of *Re C (Adoption: Legality)*<sup>37</sup> in which the adoptive mother, having been turned down by domestic adoption agencies on numerous occasions as an unsuitable parent, undertook an independent adoption in Guatemala. Upon the child's arrival in England, she sought an adoption order, as the Guatemalan order was not recognised. Despite serious concerns on the part of social workers, the children's guardian, and the court about the ability of the adoptive mother to provide for the needs of the child, an adoption order was granted as the least damaging alternative. In a decision that echoes many of the surrogacy decisions, the Court waived the procedural breaches that had occurred, as any other decision would be contrary to the welfare of the child. The child could not be taken away from the adoptive mother under the Children Act 1989, and would in all likelihood continue to remain in the UK and be brought up by the applicant. All that would be different would be his legal status, and denying him this would be contrary to his welfare.<sup>38</sup>

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<sup>35</sup> At p 1158-1159.

<sup>36</sup> See <http://www.theguardian.com/world/2014/aug/05/gammy-father-child-abuse-convictions-investigation> [7 September 2014].

<sup>37</sup> [1999] 1 FLR 370.

<sup>38</sup> [1999] 1 FLR 370, at p 376. While this case involved a situation in which the mother was considered unable to understand the needs of the child, rather than a more serious concern such as previous child



When considering the second requirement of avoiding “baby-buying”, the court gave no further explanation of when the threshold might be crossed on this account. In the case of *Re C (Application by Mr and Mrs X under s30 of the HFEA 1990)* discussed above, the court made clear that:

They were not paying £12,000 to buy a baby. They were paying a figure for expenses which they had been advised was on the high side, but which was not disproportionate.<sup>39</sup>

So what, then, can we consider as a payment to “buy” a baby? The Brazier Report on Surrogacy in 1998 addressed this issue, noting that:

It was argued by a number of the respondents to our questionnaire that surrogacy need not be equated with “baby-selling”, because any fee paid to the surrogate can be regarded as payment for the pregnancy, ie payment for her services, not the baby. We find it difficult to see how this distinction can be maintained, especially because any fully commercial transaction of this kind should be subject to the normal laws of contract. It is unimaginable that a commissioning couple should enter into a contract that required simply that the surrogate become pregnant and give birth. The contract would have to contain a requirement that in return for the fee the child was handed over to those contracting the pregnancy, with penalties for failure to fulfil this aspect of the agreement.<sup>40</sup>

As such, “baby-buying” according to the Brazier Report is connected not only with the commercialisation of the surrogacy process, but is predicated on the ability of the mother to refuse to hand over the child after birth despite payment. For this reason s 54(6) requires the mother’s consent to the parental order. However, where there is a divergence between English law and the domestic law of the surrogate mother, such “consent” cannot be taken lightly. If the law in her home state does not recognise her parenthood,<sup>41</sup> nor allow her to change her mind, can it be considered genuine consent when she agrees to the English proceedings? Is she in a position to change her mind, or is it this simply theoretical given her domestic legal context where she has no parental rights?

As such, the questions that the English courts have set themselves to consider have turned out to be smokescreens that do little in effect to restrict commercial surrogacy. In reality, where the child’s rights are paramount, unless there is a situation in which the birth mother requests the return of the child, the courts are unlikely to be able to interfere. Indeed, it seems that even “exploitation” of the birth mother is unlikely to be sufficient, even where she has been paid extortionate sums that could not help but overbear her will. If she does not want to keep the child herself, whatever her reasons for coming to that decision, then by the time the application comes before the courts the child’s welfare will almost inevitably dictate that the order is made to give effect to the social ties already established with the commissioning parents. While the actions of the commissioning parents may be met with disapproval, the sins of the parents must not bear on the children.

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sex offences (as has recently emerged in the case of Baby Gammy), it is likely that the same criteria would be applied. It is the crossing of the s 31 threshold that triggers action, not s 54.

<sup>39</sup> At p 913.

<sup>40</sup> Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team (HMSO, London 1998) Cm 4068, at [4.34]. See also Margaret Brazier, ‘Can You Buy Children?’ (1999) 11(4) CFLQ 345.

<sup>41</sup> For a discussion of potential types of parenthood recognised in surrogacy, see Kirsty Horsey, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’ (2010) 22(4) *Child and Family Law Quarterly* 449.

Herein lies the essential dilemma in recognising international surrogacy agreements: the courts are undertaking an ex-post facto examination of a situation in which they have no opportunity to talk to the surrogate mother, no ability to examine effectively the circumstances of the negotiation or the agreement, and are faced with a parent/child relationship that is already an established fact. As the courts have acknowledged, with the child's welfare being the paramount consideration, it is going to require extreme factual circumstances to overturn a completed agreement. In the meantime, as we have seen, courts must take a very liberal interpretative approach to justify the infractions involved that fall short of this, even if they offend public policy.

## 5. Other areas of s 54

It is not only in relation to payments made under s 54(8) that a permissive approach to the approval of parental orders can be seen. In the case of *A v P (Surrogacy: Parental Order: Death of Applicant)*<sup>42</sup> the Court had to determine whether to grant a parental order to the surviving spouse of a couple who had commissioned a surrogate to bear their child. Her husband had gone through the arrangement of the surrogacy with her, but died in the time between the lodging of the application for a parental order, and the time of the hearing before the Court. Section 54(4)(a) requires not only that there be two applicants at the time of the application, but also at the time at which the order is made, leaving the mother on tenuous legal ground, especially since it was uncertain whether she herself was biologically connected with the child as required under s 54(1).

Despite the lack of second surviving applicant, and the fact that the mother was not genetically connected to the child, Theis J held that the requirements under s 54 must be interpreted in a manner consistent with the child's best interests. She found that no other order or combination of orders would recognise the child's status with both the applicant and her deceased husband equally. The child's home from the time of birth until the husband's death had been with the couple, and but for the death he would have remained in the care of them both.

In coming to her decision, Theis J referred to the clear implications that a parental order has for the right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR). She found that the effect of not making an order would be an interference with this family life, in that the factual relationship between the child and both his parents would not be recognised by law. In this respect, she noted the obligation of the court to "guarantee not rights that are theoretical and illusory but rights that are practical and effective"<sup>43</sup>. She also relied on Article 7 of the United Nations Convention on the Rights of the Child,<sup>44</sup> which requires the state to protect the child's right to identity, including the legal recognition of the relationship between a child and his parents. As such, she concluded that the court must consider itself bound to take a purposive construction of s 54(4) to ensure the child's identity, and to preserve the link between the child and both his parents.

A purposive approach to interpretation was also taken in the 2014 case of *Re X (A Child) (Surrogacy: Time Limit)*,<sup>45</sup> concerning the statutory time limit in s 54(3) requiring an application for a parental order to be made within six months of the child's birth. This case involved a child born under a surrogacy agreement in India in December 2011, and the commissioning parents, who were living in India at the time, cared for the child from birth. In July 2013 they returned to the United Kingdom, only to separate later that month. Upon

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<sup>42</sup> [2011] EWHC 1738.

<sup>43</sup> [24] citing *Marckx v Belgium*, [31]. On this point, see now *Mennesson and Labasee v France* (Appl. No. 65941/11) Judgment of 26 June 2014.

<sup>44</sup> Incorrectly referred to as Article 8 in the judgment.

<sup>45</sup> [2014] EWHC 3135 (Fam).

separation, the commissioning father sought a residence order under the Children Act 1989. However, the parents had never sought a parental order, meaning that the surrogate parents remained the legal parents, and neither the commissioning mother nor father had parental responsibility.

As is common in these cases, the commissioning parents claimed that they were not aware of the requirements of the HFEA 2008, and were thus ignorant of the need to obtain a parental order, let alone the six month time limit imposed on making an application.

In *Re X and Y (Foreign Surrogacy)*, Hedley J had addressed the six month time limit in s30(2) (as it then was), describing it as “non-extendable”, and this reasoning has been followed in several cases since, including one merely six months prior to *Re X*, in which Mrs Justice King held that a parental order could not be granted in respect of a child of 33 weeks.<sup>46</sup> However, in *Re X* the President of the Family Division, Sir James Munby, held that this precedent was incorrect, and the courts not only had such a power, but were required to exercise it in the interests of the child’s welfare.

In a ground-breaking judgment, he reasoned:

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.<sup>47</sup>

In coming to this position, Munby P referred to a myriad of innocent reasons that might result in non-compliance, leaving the child and commissioning parents without recourse to s 54. These included the solicitor miscalculating the deadline; the legal executive being delayed in a traffic jam and arriving at the court after it has closed; and the commissioning parents being involved in a car crash leaving them in a coma for over six-months. He did not attempt to suggest that the facts of this case were even remotely similar, as it was mere ignorance that led to the delay. However, this was not deemed relevant. He also acknowledged that the two years between the birth and s 54 application was a long time, both in absolute terms, and when compared to the statutory time limit. However, having regard to the subject matter, the background, and the potential impact on the parties if the application were to be refused, Munby P found that the court was not only entitled, but in his judgment was *bound*, to adopt a “more liberal and relaxed” approach to the interpretation of the time limit. He indicated that a parental order goes not just to status, but to the identity of the child as a human being, and its impact will extend decades into the future. 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.”<sup>48</sup>

Importantly, however, he found that even if the statute could not be interpreted in this manner, his conclusions could be justified in the alternative by the requirements of Art 8 ECHR. Relying on the judgment of Theis J in *A v P* discussed above, Munby P found that the

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<sup>46</sup> *JP v LP* [2014] EWHC 595.

<sup>47</sup> [55].

<sup>48</sup> [64].

statute must be read down to ensure that the “essence” of the protected right is not impaired: in this case the child’s right to identity.<sup>49</sup>

In this way, we can see that the courts have been willing to read down the statute to allow flexibility even in the mandatory provisions, if it is necessary to achieve justice. The only area where the Court has stood strong – at least now that it has retreated on the issue of the six-month time limit – has been the requirement that the commissioning parents are domiciled in the United Kingdom under s 54(4)(b). In the case of *Re G (Surrogacy: Foreign Domicile)*,<sup>50</sup> a Turkish couple came to England to enter into a surrogacy arrangement, as such procedures are not permitted in Turkey. However, when they applied for a parental order, the Court found that this could not be granted, as the requirement for domicile was expressed in mandatory terms. Nevertheless, the Court found another mechanism to transfer legal parenthood to the commissioning parents, using s 84 of the Adoption and Children Act to enable the intended parents to return to Turkey with the child with a view to initiating adoption proceedings in that jurisdiction.

While an argument based on mandatory wording of the statute might hold less weight post-*Re X (A Child)*, especially given the emphasis placed on the child’s right to identity under Art 8 ECHR, there remain important differences between the two sections that would suggest that the reasoning in *Re G* will still stand. In *Re X and Y (Foreign Surrogacy)*, Hedley J had noted that “no specific reason can be ascertained”<sup>51</sup> for the time limit in s 54(3), and the lack of basis for the restriction was central to Munby P’s judgment in *Re X (A Child)*. On the other hand, the domicile requirement in s 54(4)(b) was enacted with a clear purpose in mind: to restrict reproductive tourism. In *A v P*, Theis J felt able to interpret s 54(2) in a purposive manner only because it would not offend the stated policy behind the legislation, namely that it would not pave the way for single commissioning parents. For this reason, it would be unlikely that the court would change its stance on either of these issues, and may instead continue to resort to adoption, an imperfect solution, but one that allows parenthood to be recognised without completely discarding the rule book.

## 6. Where to now for the regulation of international surrogacy?

We can thus see that although some minimum standards are still enforced, there is little real opportunity for surrogacy to be policed effectively through controlling the recognition of parenthood. In particular, in cases of commercial surrogacy undertaken in foreign jurisdictions, once the case comes before the court, there is little choice but to grant an order. In *Re X and Y (Foreign Surrogacy)*, Hedley J considered that “[t]he point of admission to the country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement.”<sup>52</sup> But even this is not early enough. Regulation of surrogacy after the birth has taken place does not, and cannot, work. Where the child is already in existence, his or her welfare must dictate the decision-making process, leaving authorities with little room to manoeuvre. While this article has been critical of the approach of the English courts to international commercial surrogacy, this does not mean that they have come to the wrong conclusion, nor that they are at fault for the lengths they have gone to in order to find a way to approve such arrangements. They have been set an impossible task by the legislature, asked to achieve a balance between public policy and child welfare, while simultaneously being told that their *can be no balance* due to the paramountcy of the children’s interests.

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<sup>49</sup> See also Claire Fenton-Glynn, “The Difficulty of Enforcing Surrogacy Regulations” (2015) 74(1) *Cambridge Law Journal*.

<sup>50</sup> [2008] 1 FLR 1047.

<sup>51</sup> [12].

<sup>52</sup> At p 743.

Faced with rapidly increasing numbers of international surrogacies each year, new approaches to the regulation of surrogacy need to be explored by domestic authorities. While the Hague Conference Permanent Bureau is currently considering a private international law convention on this subject, we cannot delay our deliberations until this comes to pass: given the diversity of approaches to this controversial practice throughout the world, sufficient consensus for a meaningful instrument may be a long time coming.<sup>53</sup> Moreover, even with such a convention, where permissive regimes continue to exist outside its framework, the possibility for circumventing legal restrictions will remain, raising the same dilemmas. The lid of Pandora's box has been opened, and the use of surrogacy is only going to increase: the United Kingdom must urgently re-evaluate its approach to surrogacy to develop a framework that can be effectively implemented, and that encourages commissioning parents to work with the system, rather than against it.

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<sup>53</sup> For a more detailed discussion of the problems faced in conceiving a new private international law convention on this subject, see Claire Fenton-Glynn, "Human Rights and Private International Law: Regulating International Surrogacy" (2014) 10(1) *Journal of Private International Law* 157.