Neutral Citation Number: [2020] EWFC 39 (Fam)

Case No: ZC19P00834

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2020

Before:

MRS JUSTICE THEIS

- -

Between:

Mrs Y	**1st Applicant**
- and -	
Mr Y	**2nd Applicant**
- and -	
Mrs Z	**1st Respondent**
- and -	
Mr Z	**2nd Respondent**
- and -	
X (through her children's guardian Maria Douglas)	**3rd Respondent**

- -

Ms Natalie Gamble (instructed by **NGA Law**) for the **1st & 2nd Applicants**
Ms Ruth Cabeza (instructed by **Eskinazi & Co Limited**) for the **3rd Respondent**
Mrs & Mrs Z did not attend the hearing
Ms Melanie Carew (**Cafcass Legal)** as Advocate to the Court

Hearing dates: 10th March 2020 and 20th May 2020

- -

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.

.....

MRS JUSTICE THEIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30AM on 20th May 2020.

Mrs Justice Theis:

Introduction

1. This matter concerns an application for a parental order concerning a young child, X, born following a surrogacy arrangement entered into between the applicants, Mr and Mrs Y, and the respondents, Mr and Mrs Z.

2. X is a long-awaited child for Mr and Mrs Y, who had experienced an emotional and difficult journey to fulfil their wish to have a family of their own. This was a domestic surrogacy arrangement. All the evidence points to the deep and strong relationship that had developed between the parties, underpinned by their shared goal for a child to be conceived, carried by Mrs Z and born safely.

3. Tragically, and without warning, Mr Y died when Mrs Z was five months pregnant.

4. Mrs Y was present at X's birth and X has been in her care since then.

5. Mrs Y brought this application jointly on behalf of herself and her late husband. It has the full and unconditional support of Mr and Mrs Z.

6. It is against this difficult and tragic background that the court is being asked to consider making a parental order. Whilst all the welfare instincts of this court point towards such an order being made, it is necessary for each of the relevant requirements in s 54 Human Fertilisation and Embryology Act 2008 (HFEA) to be met, which, for reasons that will become clear, is not straightforward as the circumstances in this case have not arisen before, or been contemplated.

7. In her statement Mrs Y sets out in a compelling way the significance both for her and X of the parental order being made:

> *"It is incredibly important to me to apply for a parental order. It is not just for myself or for [Mr and Mrs Z] (who have never intended to be her legal parents), but because I want her to have the surname [Y] and to have her father recognised. It will break my heart for her, and him, if it is not possible for [Mr Y] to be put on her birth certificate. We have been through so much for so many years; the clinic thought we deserved a chance to be parents, and [the egg donor and Mr and Mrs Z] all gave so much to make this possible. The fact that [Mr Y] has died should not change anything. The way [X] was conceived was all about love, and [Mr Y] is – and always will be – her daddy. I know, had he been here, that he would never have stopped talking about her, and she would have made him so proud. She deserves to have a parental order which recognises him as her father, and I hope that the court will find a way to make it possible."*

8. This is echoed in an email sent to the court by Mr and Mrs Z, who set out their unconditional support for the court to make the order and that they regard Mr and Mrs Y as X's parents.

9. The court has been greatly assisted by the excellent skeleton arguments and the skill and ingenuity of the advocates in their written and oral submissions, each of them have considerable expertise in this area of the law.

Relevant background

10. Mr and Mrs Y met in 2005 and married in 2013.

11. They encountered difficulties in being able to fulfil their wish to have a family of their own and underwent several unsuccessful IVF treatments, including using eggs donated from a friend. Following this they were advised to consider surrogacy. Through the friend who donated eggs, Mr and Mrs Y were introduced to the respondents, Mr and Mrs Z. After getting to know each other better, they decided to enter into a surrogacy agreement in 2017. That agreement sets out the intentions of the parties, which included Mr and Mrs Y applying for a parental order after the birth of the child.

12. They went through two embryo cycles using the eggs donated by the friend, sadly, both were unsuccessful. It was then that Mrs Z offered to use her own eggs. The parties took advice from the licensed fertility clinic and following that decided to proceed, with the embryo created using the gametes from Mrs Z and Mr Y being transferred to Mrs Z in May 2018. The pregnancy was confirmed shortly afterwards, the parties remained in very close touch and their relationships inevitably grew and became stronger.

13. Tragically Mr Y died suddenly and unexpectedly in September. Mrs Y understands he had suffered an electrical disturbance in his heart. Mrs Y and Mr and Mrs Z were united in grief at the loss of Mr Y.

14. Mrs Y is the sole executor of Mr Y's estate and a grant of probate was made in her favour.

15. X was born early the following year. Mrs Y was present at the birth and X has been in her care since then.

16. The application for a parental order was made within 6 months of X's birth. Mr and Mrs Z filed an acknowledgment of service, which confirmed their consent to the court making a parental order, and the Children's Guardian has confirmed this consent by Mr and Mrs Z signing a written consent in her presence in November 2019.

17. The case was allocated to this court and I gave directions in October, including joining X as a party to the application, Mrs Y to file a statement in support of her application and for the Children's Guardian to file a report. I directed skeleton arguments and invited Cafcass Legal to act as advocate to the court, which they accepted.

18. I heard oral submissions on 10 March. At the conclusion of that hearing I directed further written submissions and reserved judgment.

Relevant legal framework

19. For the court to make a parental order it is necessary for each of the relevant requirements set out in s 54 HFEA to be met, and for the court to be satisfied that such an order will meet the life-long welfare needs of the child in accordance with s 1 Adoption and Children Act 2020 (ACA) (Human Fertilisation and Embryology (Parental Orders) Regulations 2018 (SI2018/1412).

20. Section 54 HFEA provides as follows

> (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 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.

21. Section 3 Human Rights Act 1998 (HRA) provides

(1) "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section applies to primary legislation and subordinate legislation whenever enacted."

22. Where it is not possible to read primary and subordinate legislation in the way set out in s 3, the court can be invited to make a declaration of incompatibility under s 4 HRA.

23. The Convention rights engaged in this case are Articles 8 and 14.

24. The effect of s 3 HRA was considered in the leading case of *Ghaidan v Godin-Mendoza [2004] All ER (D) 210* where Lord Nicholls stated as follows at paragraphs 26 – 30, when considering the court's duties in respect of applying s 3 HRA

"26. Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights 'so far as it is possible to do so'. This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention.

27. Unfortunately, in making this provision for the interpretation of legislation, section 3 itself is not free from ambiguity. Section 3 is open to more than one interpretation. The difficulty lies in the word 'possible'. Section 3(1), read in conjunction with section 3(2) and section 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made Convention compliant by the application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which 'possibility' is to be judged? A comprehensive answer to this question is proving elusive. The courts, including your Lordships' House, are still cautiously feeling their way forward as experience in the application of section 3 gradually accumulates.

28. One tenable interpretation of the word 'possible' would be that section 3 is confined to requiring courts to resolve ambiguities. Where the words under consideration fairly admit of more than one meaning the Convention-compliant meaning is to prevail. Words should be given the meaning which best accords with the Convention rights.

29. This interpretation of section 3 would give the section a comparatively narrow scope. This is not the view which has prevailed. It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the

legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning…

30. From this it follows that the interpretive obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3."

25. Continuing at paragraph 32

"32. From this conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.".

26. Lord Steyn stated at paragraph 39 – 41

'"39… Given that under the 1998 Act the use of an interpretative power under section 3 is the principal remedial measure, and that the making of a declaration of incompatibility is a measure of last resort, these statistics by themselves raise a question about the proper implementation of the 1998 Act. A study of the case law reinforces the need to pose the question whether the law has taken a wrong turning.

40. My impression is that two factors are contributing to a misunderstanding of the remedial scheme of the 1998 Act. First, there is the constant refrain that a judicial reading down, or reading in, under section 3 would flout the will of Parliament as expressed in the statute under examination. This question cannot sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the 1998 Act.

41. The second factor may be an excessive concentration on the linguistic features of the particular statute. Nowhere in our legal system is a literalistic approach more inappropriate than when considering whether a breach of a Convention right may be removed by interpretation under section 3. Section 3 requires a broad approach concentrating, amongst other things, in a purposive way on the importance of the fundamental right involved."

27. Lord Roger of Earlsferry expressed his analysis regarding the extent of s 3 HRA at paragraph 122:

"122. The key to what is possible for the courts to imply into legislation without crossing the border from interpretation to amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contracts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with Convention rights, the implication is a legitimate exercise of the power conferred by section 3(1).".'

And at paragraph 124

"124. Sometimes it may be possible to isolate a particular phrase which causes the difficulty and to read in words that modify it so as to remove the incompatibility. Or else the court may read in words that qualify the provision as a whole. At other times the appropriate solution may be to read down the provision so that it falls to be given effect in a way that is compatible with Convention rights in question. In other cases the easiest solution may be to put the offending part of the provision into different words which convey the meaning that will be compatible with those rights. The preferred technique will depend on the particular provision and also, in reality, on the person doing the interpreting. This does not matter since they are simply different means of achieving the same substantive result."

28. The difficult issue of where the dividing line is drawn as to when it is possible for the court, in accordance with s 3 HRA, to read the provision compatibly with Convention rights and when it is not was considered by Lord Nicolls at paragraph 33 when he stated

"*Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of the legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation."*

29. Lord Roger of Earlsferry expressed the position at paragraph 115 as follows

In any given case, however, there may come a point where, standing back, the only proper conclusion is that the scale of what is proposed would go beyond any implication that could possibly be derived from reading the existing legislation in a way that was compatible with the Convention right in question. In that event, the boundary line will have been crossed and only Parliament can effect the necessary change.".

30. In the context of an application for a parental order and the requirements under s 54, a number of cases have considered the extent to which s 3 HRA enables the court to 'read down' the requirements, so they are compatible with Convention rights.

31. In *A v P [2011] EWHC 1738 (Fam)* this court 'read down' the requirement in s 54 (4) (a) and (5) to enable a parental order to be made where the intended father had died unexpectedly after the application was issued, but before the parental order was made.

In that case emphasis was placed on the transformative effect of a parental order on the child, who becomes the legal child of both parents, who themselves have the same legal status in respect of the child. Having considered the alternative orders that would be available, such as declaration of parentage, adoption, special guardianship or a child arrangement order I reached the conclusion that no other order, or combination of orders, would recognise the child's status with the intended parents equally, as was intended. The interference with the Article 8 rights could not 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'* and that a parental order would '*protect the identity of B and the family unit in accordance with Article 8' (*paragraph 31).

32. In *Re X (A Child) (Surrogacy: Time limit) [2014] EWHC 3135 (Fam)* Munby P considered the six-month time limit in s 54 (3). At paragraph 52 he stated *'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.'* In that case he concluded, for the reasons he set out at paragraphs 53 – 56, that s 54 (3) did not have the effect of preventing the court making an order merely because the application is made at the expiration of the six month period. He came to that conclusion applying the principle in *Howard v Bodington (1877) 2 PD 203,* without reference to the Convention. However, he went on to consider the position in the light of the Convention and stated the same conclusion was '*amply justified having regard to the Convention'.*

33. An important case that has considered the extent to which s 54 HFEA can be 'read down' in accordance with s 3 HRA is *Re Z [2015] EWFC 73*. In that case a single father asked the court to 'read down' s 54 (1) as if the reference to 'two applicants' was in fact a reference to 'one or two applicants'. Munby P refused to do that as, in his judgment, such a course would offend against a fundamental feature of the legislation. He summarised the guidance given in *Ghaidan* at paragraph 33

"In a number of passages in his speech, Lord Rodger indicated the boundaries of what is permissible. In para 111, he said that section 3(1) gives the court no power to 'change black into white' or to remove the 'very core and essence' or 'pith and substance' of what Parliament has enacted. In para 116 he said that it was not open to the court to depart substantially from a 'cardinal principle' of the legislation."

34. As he outlined in his judgment, at paragraphs 10 – 14, parental order applications had always excluded single applicants. He described that at the Committee stage of the Bill in 2008 an amendment had been tabled that would have enabled single applicants to apply. That was subsequently withdrawn after the then Minister for Health (Dawn Primarolo) made clear the decision to exclude single applicants was considered and intended. The rationale for that was set out in *Re Z* at paragraph 16 as follows

"His [the MP for Oxford's] point was that single people are able to adopt and to receive IVF, so why can they not get a parental order over surrogacy? The difference is this: adoption involves a child who already exists and whose parents are not able to keep the child, for whom new parents are sought. That is different, which is why there is no parallel. IVF involves a woman becoming pregnant herself and giving birth to her child – there is not a direct parallel. Surrogacy, however, involves agreeing to hand over a child even before conception. The Government are still of the view that the

magnitude of that means that it is best dealt with by a couple. That is why we have made the arrangements we have."

35. In the circumstances set out in *Re Z* Munby P rejected the argument that it was open to him to 'read down' s 54 (1) in the way sought on the basis that the very clear Parliamentary intent to exclude single applicants for a parental order was a prominent and longstanding feature of the legislation, and that the possibility of amending this had been specifically considered and excluded. At paragraphs 36 and 37 he stated

"36. The principle that only two people – a couple – can apply for a parental order has been a clear and prominent feature of the legislation throughout. Although the concept of who are a couple for this purpose has changed down the years, section 54 of the 2008 Act, like section 30 of the 1990 Act, is clear that one person cannot apply. Section 54(1) could not be clearer, and the contrast in this respect – obvious to any knowledgeable critic – between adoption orders and parental orders, which is a fundamental difference of obvious significance, is both very striking and, in my judgment, very telling. Surely, it betokens a very clear difference of policy which Parliament, for whatever reasons, thought it appropriate to draw both in 1990 and again in 2008. And, as it happens, this is not a matter of mere speculation or surmise, because we know from what the Minister of State said in 2008 that this was seen as a necessary distinction based on what were thought to be important points of principle.

37. Given that a parental order is a creature of statute, given that this part of the statutory scheme goes to the core question, the crucially important question, of who, for this purpose, can be a parent, this consistent statutory limitation on the ambit of the statutory scheme always has been, and remains, in my judgment, a 'fundamental feature', a 'cardinal' or 'essential' principle of the legislation, to adoption the language of, respectively, Lord Nicholls and Lord Rodger. Putting the same point the other way round, to construe s54(1) as Miss Isaacs would have me read it would not be 'compatible with the underlying thrust of the legislation', nor would it 'go with the grain of the legislation'. On the contrary it would be to ignore what is, as it has always been, a key feature of the scheme and scope of the legislation."

36. In her two skeleton arguments Ms Cabeza raises the issue of the extent to which the court needs to satisfy itself that Mrs Y, acting as executor of Mr Y's estate, has locus to issue an application for a parental order on his behalf. If she has locus then she stands in her own right as one of the applicants and as Mr Y's executor she stands in his shoes as the second applicant. In those circumstances, she submits, the condition for two applicants is met under s 54 (1) HFEA, although the court would still need to be satisfied that the remaining requirements in s 54(1) are met.

37. Section 1 Law Reform (Miscellaneous Provisions) Act 1934 (LR(MP)A) provides as follows

"(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this subsection shall not apply to causes of action for defamation."

38. This provision was considered in *A v P* in circumstances where the intended father had died after the application for a parental order had been issued and I concluded that an

application for a parental order in those circumstances was a cause of action that properly fell within s 1 LR(MP)A.

39. The question here is whether Mr Y, at the time of his death, had a cause of action vested in him to apply for a parental order in relation to his unborn child.

40. In *Harb v Aziz (No 2) [2005] EWCA Civ 1324* Thorpe LJ quotes what Lord Denning said in *Sugden v Sugden [1957] P 120*

"Causes of action" are not, however, confined to rights enforceable by action, strictly so called - that is, by action at law or in equity. They extend also to rights enforceable by proceedings in the Divorce Court, provided that they really are rights and not mere hopes or contingencies. They include, for instance, a sum payable for costs under an order of the Divorce Court, or a right to a secured provision under an order already made against a man before his death: see Hyde v. Hyde and Mosey v. Mosey and Barker."

41. *Harb v Aziz* concerned a case where the applicant wife made an application for a financial provision order under s 27 (6) Matrimonial Causes Act 1973 and the husband died before the application could be determined. In fact, he died prior to an appeal relating to a preliminary issue regarding jurisdiction to hear the application. The Court of Appeal decided a claim by one party to a marriage against the other for, or in relation to, financial relief is not a cause of action within the meaning of s 1 (1) LR(MP)A unless an order had been made in relation to the claim before death.

42. In her supplemental written submissions Ms Cabeza focuses on three cases referred to in *Harb v Aziz.*

43. Firstly, *Read v Brown (1888) 22 QBD 128, CA* where the plaintiff brough an action in the Mayor's Court in the City of London as assignee of a debt alleged to be due in respect of goods sold and delivered to the defendant by the assignor. The issue was whether any part of the cause of action arose in the City of London, to bring it within that court within the relevant statutory provisions at that time. The delivery of the goods had taken place in Surrey, the assignment of the debt took place in London. The defendant argued that the assignment itself could not be part of a cause of action giving rise to jurisdiction in the Mayor's Court, since the assignors did not possess that right. Lord Esher MR in accepting the plaintiff's argument relied on the provisions if s 25 (6) Judicature Act 1873 which gave to the assignee of a debt *'more than the mere right to sue for it; it gives him the debt and the legal right to the debt, and it follows from that he would have a legal right to sue for and recover it'.* Lopes LJ agreed that the assignment passes to the assignee *'not only the legal remedies for the debt, but the legal right to the debt itself'.*

44. Secondly, *Letang v Cooper [1965] 1 QB 232* a case concerning whether the plaintiff was time barred in bringing a claim for damages following a car accident where she alleged negligence and trespass to the person, which had different limitation periods. During his judgment Diplock LJ stated *'A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person'.* Diplock LJ emphasises that it is the existence of a set of facts which founds, or is, a cause of action stating *'the factual situation was the plaintiff's cause of*

action. It was the cause of action for which the plaintiff claimed damages in respect of the personal injuries she sustained'.

45. In her submissions Ms Cabeza states that the existence of a cause of action and whether it has vested are linked considerations. Both *Read v Brown* and *Letang v Cooper* place emphasis on the position that where a factual situation exists entitling a person to a legal remedy, there is a cause of action that, by implication, has vested.

46. These cases were distinguished in *Harb v Aziz* on the basis that applications for financial relief in matrimonial proceedings are not applications in respect of a cause of action as they only give the wife *"the right to ask the court to exercise discretionary powers in her favour"* which is *"an essentially different thing from her having an enforceable claim against the husband"* (per Dyson LJ at paragraph 48).

47. Thirdly, *Sugden v Sugden [1957] P 120* the issue was whether the husband's estate after his death was liable to pay maintenance of £300 a year less tax for his children until they attained 21 pursuant to an order made in 1946. Denning LJ held that the order only stated that the husband had to pay the sum, not his personal representatives, and it was consequently an obligation that was personal to him and ended on his death. Denning LJ stated s 1 LR(MP)A only applies to causes of action which in that section means *'rights which can be enforced…by legal proceedings in the Queen's Courts'* and continued with passage approved by the court in *Harb v Aziz* set out at paragraph 40 above.

48. In evaluating the accrual of rights, Denning LJ expressed a difference between actions in the Queen's Bench in which there is "*usually no difficulty in determining when the right or liability accrued*" and proceedings in the Divorce Court where "*there is no right to maintenance, or to costs, or to a secured provision, or the like, until the court makes an order directing it*." At page 135 he echoes Hodson LJ's findings in *Dipple v Dipple:*

"where he pointed out that all that the wife had was the hope that the court would in its discretion order a secured provision. She had no right to it at all until the order was actually made, and hence she had no cause of action at his death."

Interestingly, Denning LJ continued:

"While I entirely agree with that decision, I do not think that the fact that a cause of action is discretionary automatically takes it out of the Act. An injunction is a discretionary remedy, but, if a cause of action for an injunction subsisted at the death, I should have thought it would survive against the personal representatives. The only thing which takes a case out of the Act is the absence of an enforceable right at the time of death."

Denning LJ found that the ex-husband's estate was not liable to pay maintenance to the children as he had complied with the obligation to provide maintenance during his lifetime at the time of his death.

49. Hodson LJ concurred, adding that he agreed with Denning LJ about his use of the word '*discretionary*' in *Dipple v Dipple*, which may be a '*misleading adjective'*. At page 136 he stated:

The question really is whether there is a cause of action or not, and whether the court is asked to exercise powers is the question which is relevant – not whether those powers are discretionary. If I have misled anybody by the use of the word "discretionary" – after all it was apt in that case – I regret having used such a word.

In his judgment, the case turned on the construction of the order. Morris LJ agreed, reading the words of the order as "*involving an obligation on the husband which did not extend beyond the time of his death."*

50. In *Harb v Aziz* Dyson LJ expressed some uncertainty as to why an application for financial relief could not be a cause of action, stating at paragraph 51

"I do not see why a claim for financial relief under the 1973 Act is any more a "hope or contingency" than a claim for damages in tort or for breach of contract. In each case, I would say that there is no enforceable right until the claim has been established to the satisfaction of the court."

51. However, Dyson LJ accepted that applications for financial relief had consistently been held not to be a cause of action within s.1 LRMP, and so that must be the result in the case before him.

52. At the hearing on 10 March Ms Cabeza referred briefly to *Kelly v Kelly and Brown (Westminster Bank Ltd intervening) [1961] P 94*. In that case the husband filed a petition for the dissolution of his marriage on the grounds of his wife's adultery and the co-respondent Mr Brown and sought costs from him. Mr Kelly was successful in securing a decree nisi and an order against Mr Brown *'in the costs incurred on behalf of the petitioner in this cause and such further costs to be incurred on behalf of the petitioner as the court shall direct to be the costs in the cause, such costs incurred and to be incurred to be taxed as between party and party'.* The husband died before decree absolute, the bank became his executors and applied for taxation of the costs incurred in the suit. Mr Brown argued that with the abatement of the suit, the order for costs abated with it, so could not be enforced by the husband's executors.

53. In satisfying himself that that this was a cause of action that fell within s 1 LR(MP)A Marshall J listed that provision as a "*further ground for acceding to this application*". He said:

"Is an order for the payment of costs which has not proceeded to taxation a cause of action within this section? Apart from Stroud's Judicial Dictionary, in which a cause of action is defined as the entire set of circumstances giving rise to an enforceable claim, a definition which appears to me to cover an order for costs, there is authority for saying that it is within the above section."

Marshall J then cited *Sugden v Sugden* and Denning LJ's definition of cause of action namely *"rights that can be enforced … - as legal proceedings in the Queen's courts…which are rights and not mere hopes or contingen*cies" as supporting his view.

54. In her oral and written submissions, dealt with in more detail below, Ms Cabeza seeks to rely on the distinctive features of a parental order application and the fact that this court has previously found them to be *'causes of action'* within s 1 LR(MP)A in *A v P,* although accepting that in that case the application had been issued prior to the death.

Submissions

55. The focus of the submissions centre on the provisions in s 54 (1), (2) (a), (4) (a) and (5). Ms Gamble and Ms Cabeza invite the court to read down the requirements for two applicants (s 54 (1)), the status of the applicants' relationship (s 54 2 (a)), the requirement for the child to have her home with the applicants at the time of the application and the making of the order (s 54 (4)(a)) and for the applicants to be over the age of 18 years at the time of the making of the order (s 54 (5)).

56. There is much common ground between Ms Gamble and Ms Cabeza, with the result that following the hearing on 10 March Ms Gamble submitted an agreed document dated 16 March 2020, which Ms Carew, as advocate to the court, did not take any significant issue with.

57. Ms Cabeza submitted additional written submissions on 17 March, not detracting from the agreed document submitted the previous day, but seeking to provide a route for the court to navigate its way through s 1 LR(MP)A, if it was necessary to do so.

58. Their primary position is that in the circumstances of this case the court can and should 'read down' s 54 through the s 3 HRA lens to include the additional provisions (underlined) to s 54 (1), (2), (4) (a) and (5) as follows:

S54(1) On an application made by two applicants <u>(or on an application brought on behalf of two applicants who, but for the fact that one of the applicants has died after the conditions in s54(1)(a) were met, would have met the requirements of s54(1)(b) and s54(2))</u> ("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.

Section 54(2) The applicants must be <u>(or in the case of an application where an applicant has died were immediately prior to the applicant's death)</u>

(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

Section 54(3) – No amendment required

Section 54(4) At the time of the application and the making of the order

(a) The child's home must be with the applicants <u>(or in the case of an application where an applicant has died and the application is brought on his or her behalf by the surviving applicant, the child's home must be with the surviving applicant)</u>, and

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

Section 54(5) At the time of the making of the order both the applicants must have attained the age of 18 (or in a case where an applicant has died, the deceased applicant must have attained the age of 18 before his or her death).

Section 54(6), (7) and (8) – no amendment required.

59. Whilst in their initial written and oral submissions they included the need for the court to be satisfied that the application could be brought by Mrs Y on Mr Y's behalf as a result of s 1 LR(MP)A, in their later written document dated 16 March the submissions focussed on the ability of the court to read down the relevant provisions of s 54.

60. They justified this approach in the following way:

(1) It permits the court to make an order by reference to the HFEA, read through the HRA 1998 lens.

(2) It avoids the court having to consider whether s 1 LR(MP)A enables the applicant Mrs Y to bring a claim on behalf of Mr Y's estate, or whether the right to apply for a parental orders 'vests' before the child in question is born.

(3) This route confines the wider implications of the court's decision to similar surrogacy situations thereby avoiding the issues that may arise on other potential claims under s 1 LR(MP)A.

(4) Following such a course is justified and proportionate, recognising the unique significance of parental orders, highlighted by Munby P in *Re X [2014] EWHC* paragraph 54 as follows:

"*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."*

Thereby recognising the rights engaged under Articles 8 and 14.

(5) It means the applicants can remain as they are now, without the need for Mrs Y to be acting as executor to Mr Y's estate.

(6) In the event the court accepts these submissions the child's birth certificate should record, in accordance with the relevant regulations, the fact that Mr Y died.

61. They submit the argument for reading down in *Re Z* failed because it was clear Parliament had taken a deliberate policy decision to exclude single parents, as was demonstrated by what Munby P set out at paragraphs 15 – 17, when he detailed the course of the Bill in 2008, at the Committee stage and during its passage through Parliament. Consequently, the requirement for two applicants was a key feature of the *'pith and substance'* of the legislation.

62. The situation in this case, they submit, is different. There is no evidence that Parliament has ever considered the possibility of an intended parent dying during a surrogacy pregnancy, or that such a category of person should be excluded from obtaining a parental order.

63. In support of their submissions they rely on the history of the legislation. As was set out by Munby P in *Re X* at paragraph 16, there was limited policy analysis or rigorous Parliamentary debate at the time prior to the implementation of s 30 HFEA 1990. It arose because of an issue raised by the constituents of one of the back benchers, Mr Jopling MP. When the government sought to update the 1990 Act in 2008 the section 30 criteria, which became section 54, received limited legislative scrutiny, other than to expand the list of applicants to include same-sex and unmarried couples. There is no record of any discussion or debate regarding any other changes, which include consideration of a potential applicant for a parental order dying before being able to bring his or her application.

64. Ms Gamble and Ms Cabeza note that the issues raised in this case were not contemplated by the Law Commission in its recent 2019 surrogacy law reform consultation, which provided an encyclopaedic analysis of the history and legal framework of surrogacy arrangements. At paragraphs 8.59 to 8.76 it considers the attribution of legal parenthood in situations where the child dies, the surrogate dies and where both intended parents die. Paragraphs 8.71 to 8.76 set out what should happen when both intended parents die and recommends that in such a situation it should be possible for the intended parents to become legal parents and be registered on their child's birth certificate. The consultation paper does not consider the situation, as here, where one intended parent dies.

65. The grant of incompatibility by the court under s 4 HRA in *Re Z (No 2) [2016] EWHC 1191* was ultimately made with the government's agreement. That led to Parliament enacting the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018. During the discussions that led up to this order being made, they submit it became clear that it was no longer the *'thrust of the legislation'* to exclude any categories of applicants from obtaining parental orders as a result of their relationship status.

66. The government's draft remedial order, following the decision in *Re Z (No2),* was laid on 27 November 2017. This was scrutinised by the Parliamentary Joint Committee on Human Rights (JCHR), which reported in June 2018. This report criticised the narrow definition of a sole applicant and drew attention to the fact that it would exclude single applicants from applying for a parental order if they were married or in a relationship, unless their partner (who might be a new or recently reconciled partner) agreed to apply as well. The JCHR report stated

."36. … It is difficult to see the policy justification for seeking to distinguish between these different situations, or for placing such difficult emotional decisions on people with such significant potential impacts. This merely seems to introduce a new version of discrimination based on a new category, without any justification as to why this has been done.

37. Trying to put a blanket ban on a person who is in a couple getting a single parental order is clumsy and inflexible, as well as discriminatory."

67. In the light of the JCHR report the government agreed to widen the definition. Its report accompanying the revised draft remedial order stated

> *"3.7 … We agree with the Committee that there is a group of people not covered by the provisions of the initial draft order. There are circumstances where a new partner, a recently reconciled partner or someone not involved in the original surrogacy arrangement, may not wish to be the child's parent. The Committee raised concerns about couples in an enduring relationship. However, those in marriage or a civil partnership may also be affected in the same way. We therefore propose to remove all requirements in respect of relationship status."*

68. This, they submit, clearly signals that government policy and the will of Parliament now seeks to ensure that the law does not discriminate against different categories of applicants for parental orders on the grounds of relationship status. They rely on this to support their contention that a parental order made in the terms sought in this case, would not offend public policy and would *'go with the grain of"* the legislation.

69. Ms Gamble and Ms Cabeza seek to draw support for their position from provisions in HFEA 2008 where legal parenthood status is acquired from the date of transfer of the embryo or artificial insemination.

70. If an embryo transfer or artificial insemination takes place with donor sperm sections 35 – 37 HFEA apply. For married fathers s 35 provides that the intended father *'is to be treated as the father of the child'* based on his marriage at the date of the embryo transfer or artificial insemination. This provides the critical date for the creation of the status as being the date of the embryo or sperm transfer. It is that date which the parties must be married, and it is the event to which the father must have consented.

71. Where the father is not married to the mother ss 36 – 37 apply. The intended father is the legal father if the embryo transfer or artificial insemination with donor sperm takes place at an HFEA licensed clinic, and if the parents have met the 'agreed fatherhood' conditions at the date of embryo transfer or artificial insemination. Again, they submit, the critical date for the creation of the status is the date of the embryo transfer or artificial insemination. The conditions set out in s 37 require the signature on the required HFEA WP and PP Forms. In section 36 (1) (c) it requires the man to remain alive '*at the time'*, referring to the date of the embryo transfer or artificial insemination.

72. In each of these situations Ms Gamble and Ms Cabeza submit where the father dies during a pregnancy, he is already and remains the child's legal father for all purposes. He can also be registered as the father on his child's birth certificate.

73. In addition, they rely on the provisions in s 39 – 40 HFEA which provide for recording fathers on the birth certificates where the embryo transfer or artificial insemination takes place posthumously. These provisions are limited to enabling a father to be recognised as such for the purposes of birth registration, recognising the unique significance of birth certificates to a person's identity and the Article 8 implications of denying a person an appropriate birth certificate.

74. Section 39 enables a biological father to be treated as the father of the child for the purpose of *'enabling the man's particulars to be entered as the particulars of the child's father in a relevant register of births'.* It applies where the child is born following

embryo transfer or artificial insemination after the biological father's death on the basis of the father having consented during his lifetime and the woman electing to register the father on the birth certificate within 42 days of birth. This applies in circumstances where the embryo transfer or artificial insemination takes place after the father has died.

75. Section 40 goes a stage further, enabling a non-biological father through sperm donation to be recorded in his child's birth certificate following posthumous embryo transfer. To come within this provision an embryo with donor sperm must have been created before the intended father's death (with his consent) and then transferred after he has died. So, this applies where the embryo transfer takes place after the father has died but, unlike s 39, does not require a biological connection with the father.

76. Reliance is placed on these provisions as demonstrating situations where legal fatherhood is based on the circumstances in place at the time of the embryo transfer or artificial insemination, and the father retains his status (subject to certain conditions) irrespective of whether he dies before the child is born. Sections 39 and 40 go further and enable biological and non-biological fathers to be registered on a child's birth certificate where not just the birth but even the embryo transfer or artificial insemination takes place after the father's death.

77. They submit the combination of these amendments and features of the HFEA support the submission they make that it would go with *'the grain of the legislation'* to enable X to also have her father registered on her birth certificate, which would be done if a parental order is made, and in the light of the provisions outlined above, it would go against the grain of the legislation for X, uniquely among children conceived through assisted conception, to be denied that right in contravention of both her Article 8 and 14 rights.

78. Following issues raised by the court at the hearing on 10 March, the agreed document submitted on 16 March addresses the position regarding registration of a child's birth. The General Register Office (GRO) have confirmed that if a biological father dies after conception but prior to birth of the child and the mother and father are married, when the child is registered the birth certificate would state the father's name in space 4, occupation in space 6 and deceased would follow in brackets. If the parents were not married the mother would need to seek a declaration of parentage to allow for the father to then be recorded in the birth entry.

79. The relevant procedure for registering a birth when the father is deceased is set out in Regulation 9 of the Registration of Births and Deaths Regulations 1987.

Regulation 9 (4) (a) provides

"With respect to space 4 (father's name and surname) – (a) if, other than in a case to which sub-paragraph (b) applies, the father acquired after the child's birth a name or surname different from that borne by him at the date of the birth, the registrar shall (subject to section 10 of the Act) enter in space 4 the name and surname as at the date of the birth, following by the name and surname as at the date of the registration preceded by the word 'now' or, if the father is deceased, the name and surname at his death preceded by the word 'afterwards"

Regulation 9 (5) goes on to state

"With respect to spaces 5 and 6 (father's place of birth and occupation) – (b) if the father was deceased at the date of birth the registrar shall enter below the particulars in space 6 the word 'deceased"

80. Birth certificates issued following the making of a parental order are issued in accordance with the Parental Orders (Prescribed Particulars and Forms of Entry) Regulations 2010. These regulations do not provide for the form of entry where a parent has died. Schedule 1 contains the form of entry for the birth certificate which is issued and contains the parent's name in space 4 and occupation in space 6. A birth certificate issued after the making of a parental order does not record the date the parental order was made (in line with birth certificates issued in other assisted conception scenarios) thereby giving a whole of life identity for the child and preserves the child's privacy in respect of the circumstances of his or her birth.

81. A caseworker at the GRO has confirmed that in the registering of a birth where a parental order has been made the GRO do follow the 1987 regulations.

82. Ms Gamble and Ms Cabeza therefore submit that if a parental order is made X's birth certificate can be issued in accordance with that of any other child of a deceased father. In this case recording Mr Y's name in space 4 and recording 'deceased' next to his occupation in space 6.

83. In their agreed document they submit that if the court accepts their submissions in relation to reading down the provisions in s 54 HFEA that obviates the need for the court to go on and consider the provisions set out in s 1 LR(MP)A.

84. In her document dated 17 March 2020 Ms Cabeza submits that in the event the court needs to consider s1 LR(MP)A the extent to which this court is bound by the dicta of the Court of Appeal in *Harb v Aziz* is, she submits, effected by a number of distinguishing features of this situation which she summarises as follows:

(1) In both *Harb v Aziz* and *Sugden v Sugden* the applications the court was considering it was possible for an order to be made so that liability will fall against the payer after their death. This is referred to in *Sugden v Sugden* at page 134 and in *Harb v Aziz* at paragraphs 9 – 13.

(2) A feature of the analysis in *Harb v Aziz* at paragraphs 14 – 15 was the possibility that a claim could be made under the Inheritance (Provision for Family and Dependents) Act 1975.

(3) In both *Sugden v Sugden* and *Harb v Aziz* the Court of Appeal were constrained not to interpret s 1 LR(MP)A in a way that would have contradicted the intention of Parliament, which had provided a clear legislative framework that governed maintenance obligations of a spouse both before and after their death.

(4) The Court of Appeal in *Harb v Aziz* expressly stated the HRA did not apply at paragraph 28, as a right to maintenance is not a right within the meaning of the HRA, so did not consider the extent to which it may be possible to distinguish earlier cases.

(5) In *Harb v Aziz* it was the nature of the application not the point at which it was issued that determined the outcome.

(6) In *Harb v Aziz* the Court of Appeal placed reliance on the discretionary nature of the criteria under section 25 Matrimonial Causes Act 1973, which did not mean an order would be made. As a consequence the inherent uncertainty of outcome meant it gave no more than a hope that there would be any order, thereby taking it outside the provisions of s 1 LR(MP)O as being a cause of action subsisting against that person.

(7) An application for a parental order is not discretionary in the same sense, it is either granted or dismissed, with no range of orders which the court may identify as what is *'fair in all the circumstances of the case'* as in s 25 MCA. Once the application is made and the s54 criteria met the court is bound to make the order if it meets the lifelong welfare needs of the child under s 1 ACA.

(8) There is no alternative legislative scheme which Parliament had intended should address the legal relationship of a child with his or her intended parents in circumstances where the intended parent who has the biological relationship with the child dies after the embryo transfer in accordance with s 54, but prior to the making of a parental order.

(9) The person who is most affected by this lacuna in the legislative framework is X.

(10) The intention behind s 1 LR(MP)A was to ensure that applications that would otherwise have abated on the death of a person could nonetheless survive to effectively access the court. The terms of s 1 (1) LR(MP)A are wide and Denning LJ in *Sugden v Sugden* confirms they do not exclude discretionary remedies, such as injunctions.

(11) No party will suffer an injustice in this case if the court permits the application to proceed under s1 LR(MP)A.

(12) X's rights to identity and to family life are clearly established, and therefore her rights under the HRA are engaged. These rights require the court to consider whether s 1 LR(MP)A can be interpreted as being capable of recognising Mr Y's claim, as an intended father, as existing at the date of his death or, if not, to read that provision down in such a way to include after *'or vested in him'* the words *'including an application for a parental order where, but for death of the applicant after compliance with the provisions of s54 (1) HFEA 2008 and before the birth of the child, the provisions of s 54 HFEA would otherwise be met'.*

Discussion

85. In their powerful and cogent submissions Ms Gamble and Ms Cabeza realistically accept the limits on the court's power to read statutory provision through the s 3 HRA lens, even in a case with such compelling facts as these. When that limit is reached there is the alternative remedy; the power to make a declaration of incompatibility under s 4 HRA, which affords Parliament the opportunity to amend the relevant provision.

86. Which side of the s3 dividing line a particular case falls on was clarified by Lord Nicolls in *Ghaidan* when he identified that any meaning imported by s 3 *'must be compatible with the underlying thrust of the legislation being construed'* or in the words of Lord Rodger the words implied must *'go with the grain of the legislation'*. Lord Roger went on in paragraph 115 to state

"In any given case, however, there may come a point where, standing back, the only proper conclusion is that the scale of what is proposed would go beyond any implication that could possibly be derived from reading the existing legislation in a way that was compatible with the Convention right in question. In that event, the boundary line will have been crossed and only Parliament can effect the necessary change."

87. Are Convention rights engaged in this case? Articles 8 and 14 provide as follows:

Article 8: Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

88. Both Articles 8 and 14 are engaged in this case. X was not able to establish a family life with her biological father due to his premature death. However, as Munby P made clear in *Re X*, Article 8 rights refer not only to family life but also to private life and there is an obligation upon the State to respect both. In paragraphs 54 and 61 he stated

"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 X's 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…

61. 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 …. 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"

89. The State has a responsibility to ensure that it respects X's right to a private life and that extends to ensuring she is provided with recognition of her identity as the child of her deceased father. In *D, G v ED, DD, A, B [2015] EWHC 911 (Fam)* at paragraph 39 Russell J stated that Article 8 rights include *'the right to adequate legal recognition of biological and social ties'.* X currently has a birth certificate that names an individual (Mr Z) with whom she has no connection as her father.

90. Article 14 is also engaged on the grounds that X's Convention rights should be secured without discrimination of any ground, including birth or other status. Here X is not able, without a parental order being made, to have a birth certificate that reflects the relationship and connection that she has with Mr and Mrs Y as her parents, solely by virtue of the circumstances of her birth through surrogacy.

91. Having established those rights, it is necessary to consider whether those rights are interfered with, which it is accepted they are, and, if they are, whether such interference is justified and proportionate.

92. Munby P set out following analysis in *Re X* at paragraph 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."*

93. Can Parliament have intended that in circumstances such as this where the intended father dies after the embryo transfer but before the child's birth that, adopting the words of Munby P in *Re X* paragraph 55, the *'gate should be barred forever.'*. I cannot think so for a number of reasons:

(1) As in *Re X,* Parliament has not explained its thinking why such a situation is excluded, when but for Mr Y's death prior to the birth all the requirements under s 54 would have been met following X's birth. There is no reason to believe Parliament either foresaw or intended the potential injustice which would result in this case if a parental order cannot be made in the circumstances in this case.

(2) Other provisions in the HFEA 2008 (ss 35 – 37) provide clarity about the status of the father of the child born as a result of assisted conception at the time when the embryo is transferred, or artificial insemination takes place, provided certain safeguards are in place, in particular consent. Consent is not an issue in this case, any consent required by s 54 is present and secure.

(3) The provisions set out in ss 39 and 49 HFEA provide clarity as to the status of the father in the circumstances of sub-paragraph (2) where they take place after his death, again with safeguards in place relating to consent.

(4) Parliament has recently, when considering the declaration of incompatibility made by the court in *Re Z (No 2),* signalled that it seeks to ensure that the law does not discriminate against different categories of applicants for parental orders on the grounds of relationship status.

(5) A parental order is the only route by which X can have her status regarding Mr and Mrs Y recognised in a way that was intended by the surrogacy arrangement, which a parental order was specifically created for.

94. That conclusion is equally justified having regard to the Convention rights involved for the following reasons:

(1) Both Articles 8 and 14 are engaged.

(2) Munby P foreshadowed at paragraph 61 in *Re X* a situation such as this, when he highlighted the part of Article 8 that protects 'private life'; as he stated there may be cases where it may be more difficult to establish 'family life'. Here X did not have the opportunity to establish 'family life' due to the premature death of Mr Y, but X certainly has an established 'private life' right for her own identity to be protected by legal recognition of her relationship with Mr Y. The court's responsibility is 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 paragraph 31)*. As Russell J observed in *Re A and B [2015] EWHC 911* at paragraphs 62 – 63:

"62. It is undeniably a basic and fundamental part of these children's identity as human beings that the Applicant/father is their biological father, and that the Applicant/mother played a full part in the process of their conception having selected an egg donor, as she has herself explained to them and as they have grown up believing. The Applicants were their planned and intended parents from before conception and since the day on which they were born. All of these facts, fundamental to these children's very existence and identity are far from those present in adoption. Again I quote from the President's judgment in Re X; "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."

63. To make adoption orders would effectively deny adequate recognition of the Applicants' and children's identity and their right to family life under Article 8 ECHR, particularly their established identity, their biological and social ties. There is no doubt in this case that as far as these children are concerned their identity has already been formed as the biological children of their father and the commissioning of their conception and birth involving their mother."

(3) Although I have concluded that Parliament cannot have intended that a child in X's position would be excluded from such recognition, without the 'reading down' required by s 3 the provisions s 54 (1), (2) (a) (4) (a) and (5) could prevent a parental order being made.

(4) From the extensive review set out above it is clear such a reading down does not go against the *'grain of the legislation'*, on the contrary it seeks to provide the order that it is accepted best meets a child born as a result of this type of arrangement. The parental order was specifically created for a child born as a result of a surrogacy arrangement, such as in this case.

(5) No alternative order that can properly and accurately to reflect X's identity, including her relationship with Mr Y. A child arrangement or special guardianship order in favour of Mrs Y would mean Mrs Y secures parental responsibility limited to X's minority, but such an order would not negate X's legal relationship with Mr and Mrs Z, and would result in her biological father remaining a legal stranger to X. Mrs Y could apply for an adoption order, but only as a single applicant, which may give her the status of a legal parent but it will not accurately reflect X's identity in relation to either Mr or Mrs Y. This route would create something of a legal fiction, as s 67 ACA states that the effect of an adoption order is the adopted person is to be treated in law as if born as a child of the adopter, which does not reflect the reality of the surrogacy arrangement entered into. In addition, such a course could have a distorting effect as Mrs A would be an adoptive parent, the register would be marked that way and the tracing of the child's natural parents is still done in the same way as for any other adopted child.

(6) For X her connection with her biological father would be safeguarded in any other birth circumstances naturally or by way of assisted conception, consequently it is discriminatory for the circumstances of her birth to prevent this. A failure of the law to recognise her connection with her biological father as the result of her birth through a surrogacy arrangement amounts to a breach of her Article 14 right to enjoy her Article 8 rights without discrimination on the grounds of birth.

(7) Mrs Y's article 14 rights are also engaged. She is discriminated against based on her relationship status as a widow, rather than being married. In *Re Z (No 2)* Munby P stated at paragraph 17

"Sections 54(1) and (2) of the Human Fertilisation and Embryology Act 2008 are incompatible with the rights of the Applicant and the Second Respondent under Article 14 ECHR taken in conjunction with Article 8 insofar as they prevent the Applicant from obtaining a parental order on the sole ground of his status as a single person as opposed to being part of a couple."

(8) The consequences of not making a parental order in this case is that there is no legal relationship between X and her biological father; X is denied the social and emotional benefits of recognition of that relationship; X may be financially disadvantaged if there is not legal recognition as the child of her biological father; X does not have a legal reality that matches the day-to-day reality; X is further disadvantaged by the death of her biological father.

(9) The only order that will confer joint and equal parenthood on Mr and Mrs Y is a parental order. Only that order will ensure X's security and identity in a lifelong way respecting both her Article 8 and 14 rights.

95. It is clear that reading down the provisions in s 54 (1), (2) (a), (4) (a) and (5) in this case to permit the parental order to be made would not be incompatible with the '*underlying thrust of the legislation being construed'* and the words sought to be implied *'go with the grain of the legislation'*. The HFEA sought to provide a comprehensive legal framework for those undertaking assisted conception, with the aim of securing the rights of any child born as a result. That policy and legislative aim remains intact if the order sought in this case is made.

96. In the light of my conclusion about reading down s54 HFEA it is not necessary for the court to go on and consider Ms Cabeza's submissions in relation to s 1 LR(MP)A.

97. Having reached the decision that the application can be made by Mrs Y on behalf of Mr Y I am satisfied that the relevant s 54 criteria are met in the light of the Convention compliant reading I have set out above. The application is made by Mrs Y and on behalf of Mr Y who died after the embryo, created using Mr Y's gametes, was transferred to Mrs Z and as a result of the embryo transfer she gave birth to X and the requirements in s54 (2) – (8) are satisfied. Mr and Mrs Y were married at the time of his death, X has had her home with Mrs Y since her birth and Mrs Y is domiciled here. Mrs Y is over 18 years and Mr Y was at the time of his death. The application was issued less than 6 months after X's birth. The respondents, Mr and Mrs Z, consent to the making of a parental order, with Mrs Z's consent being give more than six weeks after X's birth. The only payments that have been made relate to expenses reasonably incurred so s 54(8) is not engaged.

98. The s 54 criteria having been met the court is required to consider whether a parental order will meet X's lifelong welfare needs, having regard to the matters set out in s 1 (4) ACA. All the evidence points one way. As the Children's Guardian, Ms Douglas, observed in her report

"[X] is too young to be aware of the application before the Court today or to express a view about the decision the Court is required to make for her. She does, however, only know [Mrs Y] as her mother since she had been her main caregiver since her birth. She was the first person to hold her and feed her and the attachment will be strong. [X] is flourishing under her intended mother's care. It is therefore reasonable to assume that, if she could, she would say that she

would want to live with and be cared for by her intended mother and remain in the home that has been provided for her by her biological father."

In relation to Mr Y she notes

*"[X's] home is adorned with pictures, paintings and the presence of her father in each room and is shared by a person who knew him the best and loved him very much. [X's] identity will be truly informed and celebrated if she is permitted to remain with her intended mother. Moreover, a child's birth certificate is a very powerful document; it is a tangible document which states very clearly who you are, where you come from and confirms you parentage and this will be essential for this child as she matures.***"**

99. X's welfare requires the court to make a parental order, as only that order will recognise X's reality in a transformative way, as the child of her parents, Mr and Mrs Y.