Neutral Citation Number: [2020] EWHC 1426 (Fam)

Case No: LE17P00251

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 18/06/2020

Before :
MR JUSTICE KEEHAN
- -

Between :
Re: A (Surrogacy: s.54 Criteria)

M	**1st Applicant**
- and -	
F	**2nd Applicant**
-and-	
SM	**1st Respondent**
-and-	
A	
(By his Children's Guardian)	**2nd Respondent**

- -
- -

MR A POWELL & MS L LOGAN GREEN (instructed by **JMW Solicitors LLP**) for the **1st Applicant**
MS M-L SAVAGE & MR S LUE (instructed by **Freemans Solicitors**) for the **2nd Applicant**
MR T HARRILL (instructed by **Mills & Reeve LLP**) for the **1st Respondent**
MR M KINGERLEY QC (instructed by **Mander Cruickshank Solicitors**) for the **2nd Respondent**
Hearing date: 7th May
- -

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.

.....
MR JUSTICE KEEHAN

This judgment was delivered following a remote hearing conducted on a video conferencing platform and attended by the press. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment 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 remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.30am on Monday 22nd June 2020.

The Hon. Mr Justice Keehan :

Introduction

1. In these proceedings I am concerned with one child A who was born in February 2017 and is 3 years of age. His biological mother is M ('the mother'), the First Applicant, and his biological father is F ('the father'), the Second Applicant.

2. A was born as a result of a surrogacy agreement in which his mother's and father's gametes were used. The surrogate mother is SM, the First Respondent.

3. Shortly after A's birth the mother made an application for him to be made a ward of court. On 28 February 2017 HHJ George confirmed the wardship, granted care and control of A to the mother and made an order preventing the father from removing A from his mother's care.

4. In July 2017 the mother made an application for a parental order as a single parent: the surrogate mother and the father were respondents to this application. This was before the amendment of the Human Embryology and Fertilisation Act 2008 ('the 2008 Act') to permit applications by a single applicant and, therefore, on 1 August 2017 the application was stayed. After the provisions of s.54A of the 2008 Act came into effect the stay was lifted on 11 September 2019.

5. On 16 December 2019 the mother and the father made a joint application for a parental order.

6. All parties are agreed that it is manifestly in A's welfare best interests to be made the subject of a parental order in favour of the mother and the father.

Background

7. The father has two older children from a previous relationship.

8. The mother and the father began their relationship in 2011. They wished to start a family but for medical reasons the mother could not conceive naturally. After a cycle of IVF treatment was unsuccessful, they entered into a surrogacy arrangement with SM. It was agreed she would not receive any payment for being the surrogate but that she would receive her reasonable expenses.

9. In April 2015 the mother and the father entered into an agreement with a fertility clinic. An embryo was created using their gametes.

10. In early 2016 the parents separated for what was then intended to be for a trial period.

11. On 29 May 2016 the embryo was transplanted into SM and the pregnancy was confirmed on 9 June 2016.

12. By late June 2016 the parents finally separated. Thereafter, the father had minimal involvement in the pregnancy.

13. A was born on 18 February 2017 and he was placed in the care of the mother. On 22 February she made an application for A to be made a ward of court and, as I have

noted, on 28 February HHJ George confirmed the wardship. In a recital to the order it was noted that the father had written a letter in which he had stated that he had no wish to be involved in the proceedings nor to play any part in the upbringing of A. The proceedings were then re-allocated to me.

14. At a hearing on 12 April 2017 I confirmed the above orders, made A a party to the proceedings and appointed a r. 16.4 guardian to represent him.

15. In July 2017 the mother made an application for a parental order. On 1 August 2017 HHJ Handley stayed this application with liberty granted to any party to apply for the stay to be lifted.

16. On 3 January 2019 the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 came into force and introduced s.54A into the Human Fertilisation and Embryology Act 2008 ('the 2008 Act') which permitted applications for a parental order to be made by one applicant.

17. In consequence, on 21 June 2019 the mother applied for the stay to be lifted and on 11 September 2019 HHJ George lifted the stay and gave case management directions.

18. Thereafter, the father changed his position and indicated that he wished to have contact with A and that he did not wish to relinquish his legal parenthood. The matter was listed for a further directions hearing before me on 16 December 2019. At this hearing the mother and the father made a joint application for a parental order. The mother's sole application for a parental order was, once again, stayed pending the court's determination of the joint application and I gave case management directions leading to this hearing before me on 7 May 2020. At this time the father was having indirect contact with A and I gave directions for the guardian to consider whether and, if so, how contact between the father and A could progress to direct contact, be that supervised or unsupervised.

The Law

19. The statutory criteria for the making of a parental order on the application of two people are set out in s.54 of the 2008 Act which provides that:

> "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 **[**F2(8A)**]** 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.
>
> (8A) An order relating to the child must not previously have been made under this section or section 54A, unless the order has been quashed or an appeal against the order has been allowed.
>
> (9) For the purposes of an application under this section—
>
> (a)in relation to England and Wales
>
> (i)"the court" means the High Court or the family court, and
>
> (ii) proceedings on the application are to be "family proceedings" for the purposes of the Children Act 1989,
>
> (b)in relation to Scotland, "the court" means the Court of Session or the sheriff court of the sheriffdom within which the child is, and
>
> (c)in relation to Northern Ireland, "the court" means the High Court or any county court F5....
>
> (10) Subsection (1)(a) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination.
>
> (11) An application which—
>
> (a)relates to a child born before the coming into force of this section, and
>
> (b)is made by two persons who, throughout the period applicable under subsection (2) of section 30 of the 1990 Act, were not eligible to apply for an order under that section in relation to the child as husband and wife,
>
> may be made within the period of six months beginning with the day on which this section comes into force"

20. The factual matrix of this case, therefore, presents three legal issues in respect of the application for a parental order made by the parents:

    i) the application was made outside of the 6-month time limit (s.54(3));

ii) the child's home at the time of the application and upon the making of any parental order will not be the same home as both parents because they are separated (s.54(4)(a)); and

iii) whether, at the time of the application, the mother and the father could be found to be "two persons who are living as partners in an enduring family relationship" (s.54(2)(c))?

21. In respect of the court's approach to statutory interpretation, I was helpfully referred by counsel to a number of leading authorities. In the case of Howard v. Boddington (1872) 2 PD 203, Lord Penzance observed:

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

22. In the case of Dharmaraj v. Hounslow London Borough Council [2011] EWCA Civ 312, Toulson LJ, as he then was, said that:

> "The modern approach towards breach of a statutory procedural requirement is to consider the underlying purpose of the requirement and whether it follows from consideration of that legislative purpose that any departure from the precise letter of the statute, however minor, should amount to the document being regarded as a nullity"

23. Sir Stanley Burnton observed in the case of Newbold & Others v. Coal Authority [2013] EWCA Civ 584, [2014] 1 WLR 1288, that:

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

24. In Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam) the former President, Sir James Munby, referred to the Court of Appeal decision of Khakh v. Independent safeguarding Authority [2013] EWCA Civ 1341 and observed:

> "[Khakh] was a case where the relevant provisions of the Safeguarding Vulnerable Groups Act 2006 provided that the judge in the Crown Court "must inform the person at the time he is convicted" that his name would be included on the statutory barring lists. The judge failed to do so. Explaining why Parliament cannot fairly have intended that the consequence of the judge's failure should be that the appellant's inclusion on these lists was a nullity, Elias LJ gave as one of his reasons (para 10) that:
>
> "the scheme is designed to protect children and vulnerable adults, and I cannot believe that Parliament can have intended that a failure by the judge should undermine that vital public objective.""

25. The introduction of the Human Rights Act 1998 ('the 1998 Act') had a significant impact on the statutory interpretation of legislation. By s.3 of the act it is provided that:

> "Interpretation of legislation
>
> (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–
>
> > (a) applies to primary legislation and subordinate legislation whenever enacted;

> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility"

26. The impact of this provision of the 1998 Act was considered by the House of Lords in the case of Ghaidan v. Godin-Mendoza [2004] 2 AC 557. Lord Nicholls opined:

> "From this the 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."

27. In the same case Lord Steyn observed:

> "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"

28. When a court is considering 'reading down' a provision of a statute the court must have regard to the purpose of the provision and to the intentions of Parliament. In the case of Re X (above) the former President expressed the exercise which the court must undertake in the following terms 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."

29. When undertaking this exercise in the case of A v. P (Surrogacy; Parental Order: Death of Applicant) [2011] EWHC 1738 (Fam) Theis J. noted that:

> "24. The primary aim of s 54 is to allow an order to be made which has a transformative effect on the legal relationship between the child and the applicants. The effect of the order is that the child is treated as though born to the applicants. It has clear implications as regard the right to respect for family life under Article 8. Family life exists in this case as the child has lived with both Mr and Mrs A. The child is biologically related to Mr A and perhaps Mrs A. The effect of not making an order will be an interference with that family life in that the factual relationship will not be recognized by law. The court's responsibility to 'guarantee not rights that are theoretical and illusory but rights that are practical and effective' Marckx v Belgium (ibid) para 31
>
> 25. A further relevant consideration is that family life is not only a matter of fact and degree but also the significance of legal relationships. In this case if an order is not made there is no legal connection between the child and his deceased biological father. Protection of the right to family life pre-supposes the factual existence of family life (Pini v Romania [2005] 2 FLR 596 at para 143). Once that is established (and it is in this case) the State must facilitate and protect that right.
>
> 26. The consequences of not making an order in this case are as follows:
>
> > (i) There is no legal relationship between the child and his biological father who is also the commissioning father
> >
> > (ii) The child is denied the social and emotional benefits of recognition of that relationship
> >
> > (iii) The child may be financially disadvantaged if he is not recognised legally as the child of his father (in terms of inheritance)
> >
> > (iv) The child does not have a legal reality which matches the day to day reality
> >
> > (v) The child is further disadvantaged by the death of his biological father
>
> 27. Article 8 of the United Nations Convention of the Rights of the Child ('UNCRC') requires the State to protect the child's right to identity, it provides as follows

> '1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without lawful interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protections, with a view to re-establishing speedily his or her identity."

30. In the case Re X [2020] EWFC 39, in which the judgment was handed down after I had heard submissions in this case, Theis J made the following observations, at paragraphs 85 & 86:

> "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.
>
> 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.""

31. Later in her judgment at paragraphs 93-95 Theis J concluded as follows:

> "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), signaled 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.

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.

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."

32. I make no apology for the length of the quotation from this judgment in which, in my respectful view, Theis J has succinctly but comprehensively set out (i) the reasons

why a court may 'read down' the statutory criteria of s.54; (ii) the justification for doing so and (iii) the adverse consequences for the child and for the applicants if the court did not make a parental order.

The Submissions

33. I am immensely grateful to leading and to junior counsel for their comprehensive written submissions which I found invaluable in formulating my analysis in this case and in coming to a decision on the parental order application.

34. A six-month time limit for the making of a parental order application after the birth of the child is one of the statutory criteria for the making of an order: s.54(3) of the 2008 Act. In this case an application should have been made no later than 17 August 2017. The joint application for a parental order was not made until 16 December 2019, some 2 years and 4 months after the expiry of the statutory time limit.

35. All counsel relied on and referred me to the decision of the former President, Sir James Munby, in Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135. At paragraphs 54-58 of the judgment he observed that:

> "Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family. As Ms Isaacs correctly puts it, this case is fundamentally about Xs identity and his relationship with the commissioning parents. Fundamental as these matters must be to commissioning parents they are, if anything, even more fundamental to the child. A parental order has, to adopt Theis J's powerful expression, a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences……..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.
>
> Where in the light of all this does the six-month period specified in section 54(3) stand? Can Parliament really have intended that the gate should be barred forever if the application for a parental order is lodged even one day late? I cannot think so. Parliament has not explained its thinking, but given the transcendental importance of a parental order, with its consequences stretching many, many decades into the future,

> can it sensibly be thought that Parliament intended the difference between six months and six months and one day to be determinative and one day's delay to be fatal? I assume that Parliament intended a sensible result. Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe section 54(3) as barring forever an application made just one day late is not, in my judgment, sensible. It is the very antithesis of sensible; it is almost nonsensical. …….
>
> I conclude, therefore, that section 54(3) does not have the effect of preventing the court making an order merely because the application is made after the expiration of the six month period. That is a conclusion which I come to, without reference to the Convention and on a straightforward application of the principle in Howard v Bodington (1877) 2 PD 203.
>
> If for some reason that is wrong, if to go that far is in truth to take a step too far, the same conclusion is, in my judgment, amply justified having regard to the Convention"

36. Later in the judgment, Sir James Munby concluded as follows:

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

37. Whilst accepting that each case is fact specific, Mr Powell & Ms Logan Green, for the mother, submitted that where a court is being invited to read down s.54(3), or indeed any of the s.54 criteria, the ratio in Re X can be distilled into 8 key principles to which the court must have regard:

> "i. The statutory subject matter;
>
> ii. The background;
>
> iii. The purpose of the requirement (if known);
>
> iv. Its importance;
>
> v. Its relation to the general object intended to be secured by the Act;
>
> vi. The actual or possible impact of non-compliance on the parties;

> vii. Can Parliament have fairly been taken to have intended total invalidity?
>
> viii. Is any departure from the precise letter of the statue, however minor, fatal?"

38. At the time the application for a parental order was made and at the time of the making of a parental order can it be determined on the facts of this case that A's 'home' was and is with his separated parents: s.54(4)(a)?

39. Mr. Powell and Ms Logan Green submitted that a 'family tie' plainly exists between both of the parents and A. They referred me to the decision of the ECtHR in Kroon v. The Netherlands (1994) 19 EHRR 263, [1995] 2 FCR 28 where the court observed:

> "Where the existence of a family tie with a child has been established, the State must act in manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child's integration in his family"

and that

> "In the Court's opinion, "respect" for "family life" requires that biological and social reality prevail over legal presumption"

40. The concept of 'family life' was further considered by Munby J, as he then was, in Singh v. Entry Clearance Officer New Delhi [2004] EWCA Civ 1075 when he said a paragraph 59:

> "It is also clear that "family life" is not confined to relationships based on marriage or blood, nor indeed is family life confined to formal relationships recognised in law. Thus family life is not confined to married couples. A de facto relationship outside marriage can give rise to family life (Abdulaziz, Cabales and Balkandali v United Kingdom at para [63]), even if the parties do not live together (Kroon v The Netherlands (1994) 19 EHRR 263 at para [30]), and even if the couple consists of a woman and a female-to-male transsexual (X, Y and Z v United Kingdom (1997) 24 EHRR 143 at para [37]). So there can be family life between father and child even where the parents are not married: Keegan v Ireland (1994) 18 EHRR 342 at para [44]. Likewise there can be family life between a parent and a child even where there is no biological relationship: X, Y and Z v United Kingdom at para [37] (family life existed as between the female-to-male transsexual partner of a woman and the child she had conceived by artificial insemination by an anonymous donor). A formal adoption creates family life between the adoptive parents and the child: X v Belgium and the Netherlands (1975) 7 D&R 75, X v France (1982) 31 D&R 241, Pini v Roumania (unreported – 22

> June 2004). Family life can exist between foster-parent and foster-child: Gaskin v United Kingdom (1989) 12 EHRR 36"

41. And later at paragraph 72 he observed:

> "But such is the diversity of forms that the family takes in contemporary society that it is impossible to define, or even to describe at anything less than almost encyclopaedic length, what is meant by "family life" for the purposes of Article 8. The Strasbourg court, as I have said, has never sought to define what is meant by family life. More importantly for present purposes, and this is a point that requires emphasis, the Strasbourg court has never sought to identify any minimum requirements that must be shown if family life is to be held to exist. That is because there are none. In my judgment there is no single factor whose existence is crucial to the existence of family life, either in the abstract or even in the context of any particular type of family relationship"

42. I respectfully agree.

43. This theme was developed by Theis J. in A v. P (above) when she said at paragraph 30:

> "Following the positive obligation identified by Marck v Belgium the court should seek to ensure that the child is in an equivalent relationship with each parent. The court is therefore seeking to protect the rights to respect to family life of the unit as well as each of the individual members. The rights of the child and his interests have
>
> '…primacy of importance…This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. Where the best interest of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.' (ZH (Tanzania) v Secretary of State for the Home Department (ibid) per Lord Kerr SCJ para 46).
>
> Only a parental order would have the effect of transforming the legal status of the child such that both commissioning parents are recognised as being the legal parents of the child."

44. Subsequently, in the case of A & B (No.2 – Parental Order) [2015] EWHC 2080 (Fam) Theis J. observed:

> "If de facto family life is established, which it is submitted it is on the facts of this case, then there is a positive obligation to construe statutes in a way as to enable them to comply with the Convention [The European Convention on Human Rights]."

45. More recently in the case of AB (Foreign Surrogacy – Children Out of the Jurisdiction) [2019] EWFC 22 Theis J. said at paragraphs 41-43 of her judgment:

> "In KB & RJ v RT [2016] EWHC 760 (Fam) Pauffley J concluded that the child lived with her parents, despite being stranded in India because of the level of contact she had with them, and their role in her day to day care. As she aptly described at [45]: "The concept of home must and should be construed flexibly".
>
> In this case the evidence establishes that the children had their home with the applicants in the sense that the children's living arrangements are entirely arranged by and provided for by the applicants. When they are not in Iran, they are in Skype contact two or three times a day. The evidence points to them both remaining utterly committed to the children. They have arranged to be there for virtually all the time, and though there are other circumstances that have driven them to be apart, either B's health or A's need to be able to return to work, the Children's Guardian commends them for the arrangements that they have made to ensure the children's stability of care. They have had to remain based here since December 2018 to ensure the evidence is available to ensure this hearing is effective.
>
> I am quite satisfied taking a broad and purposeful interpretation of the term "home with", this requirement is satisfied. In any event s.3 of the Human Rights Act 1998 makes clear that primary legislation should be read in a way that is compatible with Convention rights. The children and the applicants' Art.8 rights are clearly engaged in their case, their Art.8 rights point towards the court seeking to be in a position to secure the children's legal position with the applicants, so that they may be able to enjoy family life together."

46. I respectfully agree with all Theis J has said.

47. Can the court be satisfied that, at the time of the application, the mother and the father were "two persons who are living as partners in an enduring family relationship" (s.54(2)(c))?

48. This question was considered by Hedley J, as he then was, in T & M v. OCC & C [2010] EWHC 964 at paragraph 16 when he noted:

> "Clearly the crucial words are "living as partners in an enduring family relationship." These words are no doubt chosen so as not to require the residence of both in the same property. That is not surprising as historically many a parent has had to work abroad whilst the family remained at home without in anyway imperilling an enduring family relationship. Nor is that unusual today with people having to move jobs often at short notice. What is required is: first, an unambiguous intention to create

> and maintain family life, and secondly, a factual matrix consistent with that intention. That is clearly a question of fact and degree in each case"

49. In the case of Re F & M (Children) (Thai Surrogacy) (Enduring Family Relationship) [2016] EWHC 1594 (Fam), Russell J concluded that Parliament had intended that the court determine what was an 'enduring family relationship'.

50. Further, as Mr. Kingerley QC submitted, in the case of Re P and B v. Z [2017] 2 FLR 168, at paragraphs 22-28, Russell J referred to the record in Hansard of the speech of the then Minister of State for Public Health, Dr Primarolo, when she said:

> "the principle that the family division of the High Court, with its experience, is the best place to test whether a relationship is an enduring one. That decision is better made by the courts than by Parliament seeking to put in arbitrary time periods or definitions, however, well-meaning we may want to be. The ultimate test when issuing a parental order is what is best for the child."

51. Ms Savage and Mr Lue referred me to the case of Re N (Surrogacy: Enduring Family Relationships: Child's Home) [2019] EWFC 21where at paragraph 34 Theis J observed:

> "Unlike other provisions in s 54, s 54 (2) is silent as to the need for the requirement to be linked to any particular time. In those circumstances the court should be alert not to read in any requirement that is not there in the primary legislation"

52. And later at paragraph 37 she said:

> "The aim of s 54 is to allow an order to be made which has a transformative effect on the legal relationship between the child and the applicants. The article 8 rights of the applicants and the child are engaged. N has lived with the applicants all her life and is biologically related to K. The effect of not making an order will be an interference with that family life in that their factual relationship will not be recognised by law, there will be no legal relationship between N and the applicants, she would be denied the social and emotional benefits of recognition of that relationship and would not have the legal reality that matches the day to day reality."

53. In the absence of a parental order, I considered the alternative routes of securing the legal relationship between the parents and the child in M v. F, SM [2017] EWHC 2176(Fam) at paragraph 18:

> "The transformative legal effect of a parental order cannot be overstated. The only alternatives are:

> i)An adoption order, but, on the facts, it would be inappropriate for the biological mother to become in law the adoptive mother of her own child in order to gain the status of being the child's legal parent; or
>
> ii) Making the child a ward of court, granting and control of the child to the applicant and making such ancillary orders as to minimise the number of occasions the applicant would have to apply to the court: see Re Z (A Child) (No. 2) above and the judgment of the President at paragraph 7. But these collections of orders do not make the applicant the legal parent of the child."

Analysis

54. In light of the various authorities set out above I must apply the following principles when considering whether or not the statutory criteria are satisfied on the facts of this case and whether I should make a parental order in favour of the applicants:

i) when interpreting legislative provisions, the court must have regard to the underlying purpose of the requirement and ensure the interpretation does not 'go against the grain' of the intentions of Parliament;

ii) s.3 of the HRA requires the court, where possible, to give a Convention compliant interpretation of statutory provisions;

iii) a failure to adhere to the six-month time limit to make an application for a parental order is not fatal to the making of the order;

iv) the questions whether the applicants are in an enduring family relationship and whether the child has his home with the applicants are matters of fact for the court to determine;

v) where the court finds that the Article 8 and/or Article 14 rights of the child are engaged, the biological and social reality of the child's life must prevail over legal presumption;

vi) the existence of family life is not defined nor is its existence constrained by legal, societal or religious conventions;

vii) there are no minimum requirements that must be shown if family life is to be held to exist;

viii) what is required is an unambiguous intention to create and maintain family life, and secondly, a factual matrix consistent with that intention which is clearly a question of fact and degree;

ix) the mere fact that the parents are now separated is not fatal to the application for a parental order;

x) similarly, the mere fact that the parents live in separate homes is not fatal to the application;

xi) if a parental order is not made, the child is likely to be denied the social and emotional benefits of recognition of his relationship with his parents and would not have the legal reality that matches his day to day reality;

xii) the transformative effect of a parental order cannot be overstated; and

xiii) the ultimate test for the making of a parental order is the welfare best interests of the child.

55. I consider the following factors to be of crucial significance when deciding whether the statutory criteria are met in this case:

i) prior to the surrogacy arrangement the mother and father were in an enduring relationship;

ii) they wished to have a family and desperately wanted a child of their own;

iii) they agreed to pursue a surrogacy arrangement and each provided their gametes to produce embryos for transplantation into the surrogate mother;

iv) A has spent his entire life in the care of the mother;

v) at the time of the joint application in December 2019, both the mother and the father were committed to play key roles in A's life and both were committed to his care and well-being;

vi) at the time of the application both the mother and the father had and/or wished to have a close and loving relationship with A;

vii) they were and are committed to work together to promote the welfare best interests of A throughout his minority and beyond; and

viii) the mother and the father wished to have their biological status as A's parents to be recognised in law.

56. I am satisfied that the fact that this joint application for a parental order was made over 2 years after the time limit prescribed by s.54(3) is not a bar to the court making a parental order. To find to the contrary would be nonsensical and would deprive A of the enormous benefits of a parental order.

57. The mother and the father are committed to A's welfare and future care in which both are agreed they should play an active role. I am satisfied that A has a 'family life' with both of his parents. Accordingly, I am satisfied that his Art 8 and Art 14 rights are engaged. In light of their agreement and commitment to A, I am also satisfied that the parents are in an enduring family relationship.

58. The term 'home' must be given a wide and purposive interpretation. The authorities make clear that the term is not and should not be restricted to cases where the applicants live together under the same roof. It is the plain intention of the parents that A will be cared for by both of them, albeit not necessarily, and not at present, on the basis of an equal shared care arrangement. Giving a wide and purposive interpretation

of the word 'home', I am satisfied that A has his 'home' with the mother and the father.

59. The father's indirect contact is progressing to direct contact and, in due course, to staying contact. In the premises I shall focus on the parents' agreement in respect of the future care arrangements for A and their joint commitment to be fully involved in his life. I consider that in doing so I am acting in compliance with A's Art 8 and Art 14 rights.

Conclusion

60. A parental made in favour of the mother and the father in respect of A is the only order which will in law recognise them as his parents.

61. The transformative effect of making this order for A cannot be overstated. It is fundamental to his identity and status for the whole of his life.

62. For the reasons given above and reading the provisions of s.54 in a purposive and Convention compliant manner, I am satisfied that statutory requirements are met on the facts of this case.

63. It is overwhelmingly in the welfare best interests of A that he is made the subject of a parental order.

64. I, therefore, make a parental order in respect of A in favour of the mother and of the father.