# *Re Z (A Child) (No 2)* and surrogacy law reform

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'As the usages of society alter, the law must adapt itself to the various situations of mankind.' (per Lord Mansfield in *Barwell v Brooks* (1784) 3 Doug KB 371)

## Introduction

The desperate need for a review of surrogacy law in the UK has been apparent for some time. Most of the law was written in the 1980s, at a time when surrogacy was very much in its infancy and thought best to be discouraged. Attitudes have changed over the course of the intervening 30 years, and surrogacy is now an accepted and increasingly popular route to parenthood. Unsurprisingly, the law governing the area is now widely perceived to be out of date and unfit for purpose.

In May 2016, the President of the Family Division, Sir James Munby, declared in the case of *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam), [2016] 2 FLR 327 that certain provisions of one of the two principal statutes governing the area were incompatible with a father and child's rights pursuant to the European Convention on Human Rights. The provisions in question, ss 54(1) and (2) of the Human Fertilisation and Embryology Act 2008, permit only a couple to make an application for a parental order (the transformative order obtained by parents after the birth of a child through surrogacy). In *Re Z*, the child's father was prevented from obtaining a parental order on the sole ground of his status as a single person.

## Background to the case

Z was born further to a gestational surrogacy arrangement between the applicant father and a surrogate mother. The father, a UK national, was single at the time of Z's birth and throughout the course of the proceedings before the High Court. The surrogate was a divorced gestational surrogate based in Minnesota, United States. Accordingly, an agreement was made pursuant to the law of Illinois, which recognises surrogacy contracts where proper procedures are followed. Under the terms of the arrangement, the father agreed to pay the surrogate a base compensation figure of $25,000 plus various expenses. The embryo transferred to the surrogate was created using the father's sperm and an anonymous donor's eggs.

Z was born in August 2014, and within days a court in Minnesota had made an order declaring the father to be Z's sole legal parent. The father and Z travelled to the UK within eleven days of Z's birth.

## What a parental order is (and not)

First and foremost, it is vital to note that the parental order regime is not about access to surrogacy. A parental order effects the transfer of parental responsibility and legal parenthood to the parents of a child born through a surrogacy arrangement, and extinguishes the status of the surrogate (and her spouse or civil partner if applicable). As a result, the child is treated as though born to the applicants. It is an order that can only be sought after the child is born, and in no way regulates who can access surrogacy in the first place.

A single person has the same freedom to enter into a surrogacy arrangement as a couple. However, ss 54(1) and (2) of the Human Fertilisation and Embryology Act 2008 ('HFEA 2008') do not permit a single person to apply for a parental order. Instead, the legislation provides that these transformative orders are only available to married couples, civil partners, or two persons living as partners in an enduring family relationship.





## What the absence of a parental order means to Z

The effect for Z is that there is currently no-one in the UK, not even his biological father, who is able to exercise parental responsibility for him. The only person who does have parental responsibility for him is the surrogate, who lives in the US and who is unwilling to exercise her parental responsibility (by virtue of having entered into a surrogacy arrangement).

## Application to the court: stage one

Notwithstanding the difficulties set out above, the father issued an application for a parental order within the prescribed six-month period from Z's date of birth. Pursuant to s 3(1) of the Human Rights Act 1998, the father's legal team invited the Court to read and give effect to s 54 HFEA 2008 in a way compatible with the father and child's rights pursuant to the European Convention on Human Rights. The father argued that his rights pursuant to Art 8 (right to respect for private and family life) were engaged, either alone or in conjunction with Art 14 (right to enjoy Convention rights without discrimination on any ground – in this case, the father's status as a single person).

In effect, the father invited the Court to read and give effect to the overall meaning of s 54(1) HFEA 2008 by importing into the statute words that would make possible an application by a single person. As per the leading authority on 'reading down', *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 FLR 600, the father argued that the Court must consider the fundamental substance of the legislation under review. The father's legal team highlighted that s 54 HFEA 2008 intended to provide a legal scheme for the making of parental orders to regularise the legal status of children born via surrogacy arrangements, and that the proposed interpretation went with the grain of the legislation. Furthermore, it was argued that there was no evidence of a coherent policy that single people ought to be prevented from becoming legal parents for their children born via surrogacy arrangements, and that the context of surrogacy had changed considerably since the provisions of the Act were last debated in 2008.

The President gave judgment on the application to 'read down' in *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* [2015] EWFC 73. In rejecting the arguments put forward on behalf of the father, the President concluded that the principle that only two people – a couple – can apply for a parental order was a clear and prominent feature of the legislation, and not one that could simply be ignored or circumvented. The President also deduced from parts of a Public Bill Committee debate in respect of s 54 that the government considered the issue to be an important point of principle. In the June 2008 debate, the then Minister of State for the Department of Health, Dawn Primarolo, stated the following in response to a proposed amendment to the Bill in order to permit the making of a parental order in favour of one person:

> '... surrogacy is such a sensitive issue, fraught with potential complications such as the surrogate mother being entitled to change her mind and decide to keep her baby, that the 1990 Act [the HFEA 1990, predecessor to the 2008 Act] quite specifically limits parental orders to married couples . . . That recognises the magnitude of a situation in which a person becomes pregnant with the express intention of handing the child over to someone else, and the responsibility that this places on the people who will receive the child. There is an argument, which the government have acknowledged in the Bill, that such a responsibility is likely to be better handled by a couple than a single man or woman.'

Accordingly, the President held that the father's application for a parental order failed in limine.

## Application to the court: stage two

Further to the judgment that his application failed at the first hurdle, the father proceeded to invite the Court to make a declaration that the provisions of s 54(1) and (2) were incompatible with his and Z's Art 8 rights, either taken alone or in conjunction with their Art 14 rights.

By way of background, a declaration of incompatibility is made pursuant to s 4(1) of the Human Rights Act 1998 where it is not 'possible' for the court to read legislation in a way which is compatible with Convention right. Only 20 such declarations have ever been made since the legislation came into force. A declaration does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, and the courts must continue to apply the legislation as it is. However, a declaration has the effect of forcing Parliament to consider the issue and what steps are necessary to remedy the incompatibility in question. Parliament does not have to change the law, but has done so in all but one of the 20 cases in which a declaration has been made. Guidance given by the Parliamentary Joint Committee on Human Rights makes clear that, if a declaration is made, the remedying of an incompatibility should be "swift as well as full". Furthermore, the government is expected to have reached a detailed decision about how to respond to a declaration within four months of the date of the judgment: Parliamentary Guidance for Departments on Responding to Court Judgments on Human Rights (March 2010).

Amongst the authorities relied upon by the father in support of his case in respect on Art 8 were the judgments of the European Court of Human Rights in the linked cases of *Mennesson v France* (App No 65192/11), and *Labassee v France* (App No 65941/11). These important decisions considered the doctrine of proportionality and the margin of appreciation afforded to Member States when interfering with the exercise of a person's rights pursuant to Art 8. In each case the Court was concerned with the refusal to grant legal recognition in France to parent-child relationships that had been lawfully established in the United States between children born as a result of a commercial surrogacy agreement. In *Mennesson*, the ECtHR held that the wide margin of appreciation should be narrowed in cases involving identity and the legal relationships between children and parents. The ECtHR concluded that the Art 8 rights of the children involved were breached because the French authorities had denied their status in the French legal system as the children of the commissioning parents. By preventing the recognition and establishment of this relationship, the state had overstepped its permissible margin of appreciation.

In respect of Art 14, the father argued that the status-bar in s 54(1) HFEA 2008 constituted a difference in treatment between single people and couples on the basis that it makes an inherent distinction drawn on the basis of a relationship. In support of this contention, the father relied upon the House of Lords decision in *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2008] 2 FLR 1084, in which it was concluded that lack of marital status was as much a status for the purpose of Art 14 as the status of marriage itself. The House of Lords subsequently held that a blanket ban in Northern Ireland on unmarried persons being eligible to apply for an adoption order was discriminatory.

The father submitted that the distinction in s 54(1) HFEA 2008 between single people and couples was unnecessary and lacked any proportionate justification. First, it was highlighted that the requirement for two applicants was in stark contrast not only with wider assisted reproduction law, but also with the law in respect of adoption. It will be noted that a single person has been able to adopt a child ever since the first statute on adoption – the Adoption Act 1926. It was argued that there is no evidence to suggest that the task of parenting via adoption is significantly easier or less complex than the task of parenting via surrogacy. On the contrary, it might be considered that to parent one's own birth child, conceived specifically through choice and planning, represents a significantly less complex task than parenting a stranger's child who must necessarily have suffered actual or likely significant harm.

Second, it was argued that there is little or no evidence to support any speculative propositions about there being adverse consequences of single parenting that warrant such an avenue being discouraged. Research and papers published by academics such as Professor Susan Golombok conclude that children are able to thrive in a variety of family forms, and the findings of the studies of surrogacy that currently exist indicate that families formed in this way generally function well (see S Golombok, *Modern Families: Parents and Children in New Family Forms*, Cambridge University Press, 2015).

Finally, the father sought to dispel the myth that surrogacy arrangements are inherently risky and liable to fail. The father relied upon recent research confirming that most surrogacy arrangements are successfully implemented and that most surrogates are well-motivated and do not experience difficulty giving children born as a result of the arrangement back to their parents (see Soderstrom-Anttila et al, Human Reproduction Update, Vol.22, No.2 pp260–276, 2016). Evidence supporting this finding was adduced from a number of highly experienced, expert family lawyers specialising in surrogacy and fertility law from the United States, the UK, Canada and Australia.

The father also worked to undermine the suggestion that adoption provided a suitable alternative remedy in cases where a child is born to a single person via a surrogacy arrangement. The differences between an adoption order and a parental order have been highlighted in a number of recent decisions, including *AB v CD (Surrogacy – Time Limit and Consent)* [2015] EWFC 12, [2016] 1 FLR 41 (at para [71]), *B, C, D and A v The Local Authority* [2015] EWFC 17, [2015] 1 FLR 1392 (at para [33]), and *Re A and B (Children) (Surrogacy: Parental Orders: Time Limits)* [2015] EWHC 911 (Fam). In *Re A and B*, Russell J concluded as follows:





> 'The orders are not the same . . . nor are they intended to be as a matter of law and public policy. Parental orders were tailor-made for surrogacy situations as an alternative, albeit comparable, legal mechanism to adoption.' (at para [56])

and

> '... in terms of their identity only parental orders will fully recognise the children's identity as the Applicant's natural children, rather than giving them the wholly artificial and . . . in appropriate status of adopted children.' (at para [61])

The father's legal team highlighted that parental orders were designed to go further than adoption orders in surrogacy cases in recognising and confirming the important legal, practical and psychological reality of the child's identity, namely that:

(1) the intended parent is the child's biological parent;

(2) the surrogate intended from the outset that the intended parent should also be the child's legal parent;

(3) the child has been in the care of the intended parent immediately from birth and has known no other family; and

(4) the child's birth certificate should reflect the parent-child relationship as being that of a natural birth child relationship, and not the relationship of an adopted child.

Accordingly, it was argued that a parental order is the only viable transformative legal solution which presents both the optimum legal and psychological option for children born via surrogacy.

## Outcome of the proceedings

On the eve of the trial, the government, represented by the Secretary of State for Health, changed its position and conceded that the current provisions of s 54(1) and (2) of the HFEA 2008 are incompatible with Art 14 taken in conjunction with Art 8. It was accepted that there is a difference in treatment between a single person entering

into a lawful surrogacy arrangement and a couple entering the same arrangement, and that in light of cases such as *Mennesson*, this difference in treatment can no longer be justified within the meaning of Art 14. The Secretary of State did not accept that there was an incompatibility with Art 8 taken alone, and this point was not pursued by the father on the grounds of proportionality. The President agreed to make a declaration in the terms sought, and provided for the father's application for a parental order in respect of Z to be adjourned generally with liberty to restore.

Although now well outside of the timescales envisaged by the Joint Committee on Human Rights for remedying an incompatibility, the government confirmed in a House of Lords debate in December 2016 that it intended to introduce a remedial order (a fast-track procedure by which the government can amend law which has been declared by the High Court to be incompatible with human rights), with the effect that single people will be able to apply for parental orders on the same basis as couples. With evidence showing that a number of children, including Z, are currently living in legal limbo pending this legal change, the remedial order should now be progressed as a matter of urgency.

## Surrogacy law reform

The ruling in this case has also prompted the government to indicate that it would support a wider review of the UK's surrogacy laws by the Law Commission, which is currently considering what its next programme of work should be (with an announcement expected in the autumn, once government approval has been given).

Such a move would be very welcome. This case is just one example of how outdated the current law on parentage is in managing the realities of modern surrogacy. The Family Division has over the past ten years made decisions which either stretch the outdated legislation to the point of meaninglessness or, as in this case, are contrary to the best interests of children. The current law is bursting at the seams, and that is unsurprising given how much the world has changed in respect of social attitudes, family structures, assisted reproduction and technological advancement since the 1980s. What we need is a considered review of the law which takes account of the realities of modern surrogacy practice, both for families conceived in the UK and abroad, so that all children born through surrogacy arrangements can have a secure legal identity from birth.