PROJECT REPORT

Reproductive Health Care and Policy Concerns: Regulation of Surrogacy Arrangements in Sri Lanka and Lessons Learned from the United Kingdom

***Authors**:*
Ziyana Nazeemudeen (Parts 1 & 3-5), Rose Wijeyeskera & Dharshana Sumanadasa (Part 2)

***Edited by** Katarina Trimmings*

Table of Contents

Introduction

This Project Report has been prepared under the auspices of a collaborative research project titled 'Reproductive Health Care and Policy Concerns: Regulation of Surrogacy Arrangements in Sri Lanka and Lessons Learned from the United Kingdom', which was conducted between the 1st of January 2020 and the 31st of December 2021, with generous financial support from the British Council, the South Asia Small-Scale Research Project Scheme. The research was a collaboration between the University of Aberdeen Scotland, UK, (Ms Ziyana Nazeemudeen (junior researcher) and Dr Katarina Trimmings (senior researcher)) and the University of Colombo, Sri Lanka, (Dr Darshana Sumanadasa (junior researcher) and Dr Rose Wijeyesekera (senior researcher)). The project also involved collaboration with an Indian researcher – Assistant Professor Sonali Kusum from the Tata Institute of Social Sciences in Mumbai. The project sought to set up a learning platform on law and policy regarding surrogacy as a form of assisted reproduction in Sri Lanka. It also addressed the evidence gaps in relation to the regulation of surrogacy arrangements in Sri Lanka.

PART 1: OVERVIEW

1.1. BACKGROUND TO THE TOPIC

Globally, surrogacy as a reproductive practice is on the increase. At the same time, national laws governing surrogacy vary considerably – from extensive to non-existent, and from prohibitionist to permissive. Regarding the permissive jurisdictions, most allow surrogacy on an altruistic basis only, with commercial surrogacy being practised only in a handful of countries. As a result, intending parents often travel from jurisdictions prohibiting commercial surrogacy to those permitting it. Commonly, intending parents from developed countries have engaged in cross-border commercial surrogacy arrangements with surrogate mothers in developing countries. This has led to numerous abuses of the practice and justified concerns over the commodification of children and exploitation of women. They are particularly vulnerable in these jurisdictions due to poverty, subjugation, a lack of education and multiple forms of discrimination, including gender inequality. In response to this, India, Thailand and Nepal have closed their borders to cross-border commercial surrogacy arrangements and have regulated the practice of surrogacy within their territories (with Cambodia currently working on a regulation).

International commercial surrogacy networks swiftly move from country to country as laws change. Worryingly, there is evidence that Sri Lanka, due to its lack of regulation, may be the next target of cross-border commercial surrogacy intermediaries (e.g., surrogacy agencies and fertility clinics) in South Asia. Indeed, there are already numerous online platforms offering surrogacy services in Sri Lanka.[1] There are justified concerns that the cross-border commercial surrogacy market will develop in this country further through the recruitment of local women as surrogates, and the use of (in particular) Indian women as surrogates in Sri Lanka by surrogacy agencies seeking to circumvent the Indian ban on cross-border commercial surrogacy.[2] There is evidence that in South Asia sometimes in vitro fertilisation and embryo transfer are conducted in one state, and then the surrogate mother is moved to a second state for the birth (with the intending parent(s) coming from a third state). As the experience of India and other South Asian countries demonstrates, in the absence of an adequate legal framework the development of cross-border surrogacy in Sri Lanka will fail to protect the rights of the child and the parties to the surrogacy arrangement. Therefore, it is vital that Sri Lankan authorities adopt, as a matter of priority, a suitable legislative framework to regulate surrogacy arrangements.

In contrast, the UK has one of the world's most comprehensive regulations of surrogacy arrangements, embodied in the Surrogacy Arrangements Act 1985 ('1985 SAA') and the Human Fertilisation and Embryology Act 2008 ('2008 HFEA'). The regulation allows only altruistic surrogacy[3] and seeks to discourage foreign intending parents from entering into surrogacy arrangements in the UK.[4] The English and Scottish Law Commissions[5] are currently conducting a joint review of this legislation with a view to improving the legal framework.[6]

Against this background, this research project aspired to assist Sri Lankan authorities in regulating surrogacy arrangements by providing them with the opportunity to learn lessons from the UK. Ultimately, the project sought to prevent Sri Lanka from becoming

the new hub of cross-border commercial surrogacy in South Asia. As part of the project, the Sri Lankan team conducted research and prepared a report on surrogacy in Sri Lanka, and the UK team prepared a report on surrogacy regulation in the UK. The Country Reports have been collated in the present Project Report (Parts 2 and 3 respectively) and supplemented by a detailed record of the discussion conducted in the Project Workshop (Part 4) and an analytical section and recommendations for the regulation of surrogacy in Sri Lanka (Part 5).

1.2 RESEARCH OBJECTIVES

The project sought to achieve three main objectives:

1. *To carry out research on the current status of Sri Lankan law and practice pertaining to potential issues arising from surrogacy arrangements. This objective was fully accomplished through the preparation of the Sri Lankan Country Report (Part 2 below).*
2. *To provide platform for the exchange of experience among relevant South and South-East Asian countries concerning the approach to and/or regulation of surrogacy arrangements, including cross-border commercial arrangements. This objective was also fully accomplished. The Project Workshop[7] provided a platform for the sharing of the different country approaches to surrogacy regulation. Originally, it was planned that the Workshop would be an in-person event, however, it had to be moved online due to the ongoing Covid-19 pandemic. Nevertheless, the change in the format of the event was ultimately a positive step as it enabled a truly international participation, including speakers and discussants from the UK and several Asian countries, and approximately 30 registered participants from across the globe. The participants included representatives from the Sri Lankan Government and judiciary. As such, the Workshop enabled not only the exchange of experience between Sri Lanka, UK and India, but also other Asian countries.[8]*
3. *To raise awareness among relevant Sri Lankan stakeholders, especially policy makers, of the inadequacy of the existing legal framework to address issues*

[1] See e.g., IVF Centre Fertility, available at https://ivf.in.net/srilanka/surrogacy.html, and Find Surrogate Mother, available at https://www.findsurrogatemother.com/surrogate-mothers/sri-lanka.
[2] See S. Pitchard, 'Assisted reproduction and surrogacy bills passed by Indian Parliament', available at https://www.bionews.org.uk/page_161099.
[3] I.e., 'A surrogacy arrangement in which neither the woman who becomes the surrogate, nor any surrogacy agency involved, makes a profit, and the arrangement is not enforceable as a matter of contract law.' Law Commissions, 'Building families through surrogacy: a new law - A joint consultation paper' xiii, available at https://www.lawcom.gov.uk/project/surrogacy/.
[4] See 2008 HFEA, ss. 54(4)(b) and 54A(3)(b).
[5] The English Law Commission is 'the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed.' https://www.lawcom.gov.uk/. Scottish Law Commission fulfils the same function in relation to Scottish law. See https://www.scotlawcom.gov.uk/.
[6] See Law Commission, 'Surrogacy Project', available at https://www.lawcom.gov.uk/project/surrogacy/.
[7] See https://www.abdn.ac.uk/events/conferences/surrogacy-event-2021/index.php. For more details, see Part 4 below.
[8] See the Workshop programme at https://www.abdn.ac.uk/events/conferences/surrogacy-event-2021/programme-1724.php.

arising from cross-border surrogacy arrangements. This objective was achieved through a combination of avenues, in particular: the project website,[9] the Project Workshop, and the project video.[10]

[9] See https://www.abdn.ac.uk/law/research/reproductive-health-care-and-policy-concerns.php#panel1190.
[10] Titled 'Prohibiting Cross-Border Commercial Surrogacy in Asia: Focus on Sri Lanka' and available at https://www.youtube.com/watch?app=desktop&v=rospOOqbphM.

PART 2: SURROGACY IN SRI LANKA – COUNTRY REPORT

2.1. INTRODUCTION

Following medical innovations, Sri Lanka, in general, recognises the rights of infertile married couples to have children through assisted reproductive technologies (ART).[1] However, firstly, there is no proper law governing such practices, but it is regulated by the Sri Lanka Medical Council through a provisional code of practice on ART.[2] Secondly, neither the law nor medical practice explicitly recognises surrogacy as a strategy for a couple to have a baby. Despite the non-recognition of surrogacy as a legal practice in Sri Lanka, the literature reveals that Sri Lanka has become a hub of surrogacy[3] and even a destination for surrogacy-led migration.[4] There are even online platforms available to facilitate a meeting of intended parents and potential surrogate mothers.[5] Therefore, there is a clear gap between the law and surrogacy practice – an area unexplored in Sri Lanka. This research examines Sri Lankan laws such as criminal law, contract law and family law to find out whether these laws implicitly recognise or facilitate the practice of surrogacy and surrogacy arrangements.

2.2. LEGALITY OF SURROGACY ARRANGEMENTS

In Sri Lanka, there is neither explicit recognition nor a prohibition of surrogacy arrangements. However, a careful reading of the Sri Lankan Penal Code and moral standards may suggest that such arrangements are prohibited and even surrogacy contracts have no validity in the Sri Lankan context. This section analyses two issues, namely (1) whether and to what extent surrogacy is legal in Sri Lanka and (2) whether surrogacy agreements are valid in Sri Lanka.

2.2.1. Penal Code (Amendment) Act, No. 22 of 1995

The Sri Lankan Penal Code which was enacted in 1883 by English colonisers and is an example of the draconian Victorian traditions, even in the 21st century. Amendments were made to the Penal Code in 1995[6] and 1998[7] and attempted to address some unresolved issues relating to sexual offences and human trafficking. Even though these amendments did not directly address the issue of surrogacy, the Penal Code

---

[1] 'Code of Practice: Artificial Reproductive Technologies' (Sri Lanka Medical Council (SLMC), 2005) <https://web.archive.org/web/20090604211953/http://www.slmedc.lk/publications/AssistedReproductiveTechnologies.htm> accessed 12 December 2021.
<http://www.srilankamedicalcouncil.org/download/download/6/66db9284166164d13be1684c657835bc.pdf>

[2] ibid.

[3] The Lankan Guide To Surrogacy <Lhttps://cosmomag.lk/2019/09/17/the-lankan-guide-to-surrogacy/>

[4] Akm Ahsan Ullah and Faraha Nawaz, 'Surrogacy-Led Migration: Reflections on the Policy Dilemmas' (2020) 23 Public Administration and Policy: An Asia-Pacific Journal 157.

[5] 'Find Surrogate Mother, (Websites for Meeting Intended Parents and Surrogate Mothers)' <https://www.findsurrogatemother.com/intended-parents/sri-lanka> accessed 12 December 2021.

[6] Penal Code (Amendment) Act No 22 of 1995.

[7] Penal Code (Amendment) Act No 29 of 1998.

(Amendment) Act 1995, when introducing the issue of trafficking, touched upon the issue of adoption for commercial purposes. As a part of section 360 (c), some issues relating to surrogacy have been addressed.

For instance, section 360 (c) (1) (b) (iii) clearly states that it is prohibited to "recruit women or couples to bear children for the purpose of promoting, facilitating or inducing the buying or selling or bartering or the placement in adoption of any person for money or for any other consideration." Firstly, this section prohibits conceiving, being pregnant with and giving birth to a child of biological parents for the commercial adoption of the child. Secondly, this section implicitly prohibits recruiting a mother or a couple for either traditional or gestational surrogacy arrangements. This strand further extends by section 360 (c) (1) (b) which (ii) prohibits obtaining "an affidavit of consent from an expecting mother, for money or any other consideration, for the adoption of the unborn child of such woman." Accordingly, commercial surrogacy or baby trading is prohibited in Sri Lanka. Nonetheless, both of these sections are silent on surrogacy arrangements or adoption of babies which do not involve monetary benefits. This might be an indication that there is still room for altruistic surrogacy arrangements.

However, the main purpose of introducing section 360 (c) is to urgently remedy the problem of Sri Lanka's illegal baby trade, but not regulate other altruistic surrogacy arrangements. The legislature is intended to criminalise the trading of babies which is amounting to trafficking and potentially a violation of human rights. For example, the Sri Lankan government acknowledged the existence of illegal 'baby farms' especially in the 1980s which produced babies to sell to foreign couples who wished to adopt Sri Lankan children.[8] According to the BBC, in the 1980s alone, "up to 11,000 children may have been sold to European families, with both parties being given fake documents".[9] This is a reality today. For example, the Women and Child Bureau of the Police led an investigation into the selling of 30 babies and arrested a person who was running an organisation called CSC Nation Lanka on 22 December 2020. Investigations revealed that the accused had entered into agreements with expecting mothers to provide cash in exchange for their newborns.[10]

Overall, section 360 (c) was designed to prohibit illegal adoption arrangements which intend to bypass the provisions of the Adoption of Children Ordinance, No. 24 of 1941. As such, even in the event of an altruistic surrogacy arrangement intended parents and the surrogate mother have to undergo the procedure of adopting the child. Any other practices such as impersonating the mother or assisting in such impersonation at the time of childbirth[11] and knowingly permitting the falsification of any birth record or register by

---

[8] Karen McVeigh, 'There Were a Lot of Baby Farms': Sri Lanka to Act over Adoption Racket Claims' *The Guardian* (United Kingdom, 20 September 2020) <https://www.theguardian.com/global-development/2017/sep/20/baby-farms-sri-lanka-admits-adoption-racket-claims> accessed 16 December 2021.

[9] Azzam Ameen, 'Sri Lankan Baby Trade: Minister Admits Illegal Adoption Trade' *BBC NEWS* (21 September 2017) <https://www.bbc.co.uk/news/world-asia-41339520> accessed 16 December 2021.

[10] 'Man Arrested for Selling Nearly 30 New Born Babies' *NEWSWIRE* (22 December 2020) <https://www.newswire.lk/2020/12/22/31951-babies/> accessed 16 December 2021.

[11] Penal Code of Sri Lanka No. 11 of 1887 as amended (Penal Code) s 360 (c) (1) (b) (vi).

a person concerned with the registration of births are prohibited.[12] The punishment for offences committed under the section 360 (c) is between two and 20 years of imprisonment. Therefore, commercial surrogacy is a crime punishable by imprisonment in Sri Lanka. Also, whereas there is no explicit prohibition of altruistic surrogacy, there are no other means to recognise the rights of intended parents over a child other than through the adoption procedure.

2.2.2. Illegality of surrogacy contracts

It is evidence from the above analysis that in Sri Lanka it is prohibited to recruit a woman or a couple to bear a child for a monetary benefit. Any agreement between intended parents and a surrogate mother is prohibited as it becomes statutorily illegal. However, in the case of altruistic surrogacy, perhaps there is a possibility for a surrogacy contract. In Sri Lanka, unlike other common law countries, it is not essential to have a valuable consideration for a contract to be valid. It is sufficient to have a *justa causa* (just cause) or a reasonable cause for a contract.[13] This reasonable cause may include feelings such as love, affection and benevolence. At a glance, altruistic surrogacy agreements are valid even if they do not involve valuable consideration, i.e., something measurable by money. Nonetheless, there is a problem as to whether they are legal in the eyes of public policy or morality. As stated by Weeramantry, an eminent judge and scholar, the relationship between illegality of contracts and public policy or morality is an extremely complicated area of law. According to him:

"The area of legal prohibition overlaps but is not coincident with the area of moral prohibition, nor are its boundaries constant; and even as each age has its concepts of morality so also has each its standards of legality. What one age or society may censure another may applaud; and the law follows hard on the heels on morality to pronounce its condemnation or extend its approval."[14]

In general, illegality under common law on grounds of being contrary to public policy is based on the premise that "no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."[15] However, the question which arises here is whether surrogacy arrangements can be considered as illegal for the reason that they are contrary to public policy. Although the courts have developed a list of instances in which contracts become contrary to public policy, surrogacy agreements do not fall under any of these 'heads of public policy'.[16]

On the contrary, the fundamental rationale of an altruistic surrogacy agreement is that the surrogate mother agrees that the intended parents become the legal parents by

[12] ibid 360 (c) (1) (b) (iv).
[13] See for example, *Jayawickrema v Amarasuriya* [1918] 20 NLR 289 and *Public Trustee v Uduruwana* [1949] 51 NLR 193.
[14] CG Weeramantry, *Law of Contracts* (Stamford Lake 1967) 337.
[15] Lord Mansfield in *Holman v Johnson* [1775] 1 Crowp 341 at 343.
[16] These headings include agreements in restraint of marriage; agreements for voluntary separation between husband and wife; marriage brokerage contracts; agreements to pay damages on failure to fulfil a promise of marriage (by a 3rd party such as a parent); agreements relating to maintenance; collusive agreements between husband and wife and agreement relating to illicit cohabitation.

undertaking all responsibilities in relation to the child, and that the surrogate does not want any parental rights. However, such a parental rights transfer cannot be done in Sri Lanka as it is contrary to the provisions of the Adoption Ordinance and the Penal Code of Sri Lanka. So, even if the surrogates and the intended parents concluded an altruistic surrogacy agreement, it is not enforceable in Sri Lanka. In other words, such an agreement becomes futile with the application of laws. Accordingly, such an agreement may not be accepted as a legally valid document before a court in the case of a dispute between the surrogate and the intended parents.

2.3. RIGHTS OF THE SURROGATE CHILD

2.3.1. Establishing parentage

The Sri Lankan law recognises four clear pathways to establishing parentage. (1) Entering parents' names in the register of birth, (2) adopting a child through the court procedures, (3) validating a putative marriage thereby giving 'legitimacy' to children born to the couple before such legalisation, and (4) by establishing parentage through scientific evidence.

Registration of births and deaths

The births and deaths registration ordinance no. 17 of 1951 (as amended) provides for the registration of births and makes the certificate of birth prima facie (accepted as correct) evidence of the birth.[17] Details of the mother who gives birth to a child and the person who claims to be the father are required to be entered in the register. Where the mother and the man who claims to be the father are not married, the consent of both the mother and the man is necessary for such inclusion.[18] These provisions make sure that the woman who gives birth to a child is considered as 'the mother' and the man who claims to be the father of the child is considered 'the father' and where the mother is willing to accept him as the father of a child born to her. Where the birth mother is not married, the registrar has powers to enter on the certificate only the details of the birth mother. The details of the father can be entered only with the joint request of the mother and the person who acknowledges himself as the father and with the signature of that person or upon an order of a competent court.[19] The Registrar General cannot change the original name of the father on the birth certificate except upon court order.[20]

The law was amended in 1975 to appeal against subsequent alterations made in the birth certificate, including alteration of the names of the parents.[21] Accordingly, any person whose birth is in issue or their parents or any person aggrieved by any alterations made on the original particulars entered in the certificate, can make a written application to the

[17] Savitri Goonesekere, *The Sri Lanka Law on Parent and Child* (2nd edn, Gunesena 2002) 173.
[18] Births and Deaths Registration Act No.17 of 1951 s 21; Registrar General's Department Circular No. RG/MBD/01/2012, issued on 16/08/2016.
[19] ibid s 21 (2) (a), (b).
[20] ibid s 21 (3).
[21] An act to amend and consolidate the law relating to the registration of births, deaths, and still-births No 41 of 1975.

Registrar General to amend such alterations.[22] Accordingly, where the names of the parents of a person have been altered since the original entry was made, a party aggrieved by such an alteration can make a written declaration to the Registrar General[23] as per the procedure laid down in the ordinance.[24] On an application made following the preceding provisions of this section, for the amendment of an entry in a register of births, the Registrar General may, after due notice to such parties and persons as may be interested, and after due inquiry held by them or by an officer authorised by them, make such order whether in terms of the application or otherwise as the justice of the case may require.[25] The order made by the Registrar General shall be published as prescribed in the ordinance.[26] Any person aggrieved by the Registrar General's order may appeal to the district court against that order within 30 days of such publication of notice of the order.[27] A further appeal lies with the Court of Appeal.[28] Notwithstanding the right of appeal against an order of the Registrar General or of the district court, the order of the Registrar General shall be given provisional effect by the amendment of the registration entry to which the order relates but without prejudice to the duty of the Registrar General to make such further amendments as may be rendered necessary by the order of the district court or Court of Appeal upon any appeal, as the case may be.[29]

A birth certificate has a genealogical value as provided for in the Evidence Ordinance.[30] The courts of Sri Lanka have reiterated this.[31] So, the entries concerning the identity of the mother and father are relevant evidence of parentage.[32] The above-stated provisions of the births and deaths ordinance make way for a biological mother to have her name entered on the birth certificate of the child she gave birth to, and to have corrected any alterations made thereof against the law. In the absence of a specific legal provision to regulate surrogacy agreements, a person who agreed (informally) to carry a foetus for someone else can change her mind and refuse to give the baby when they are born and get their name entered on the birth certificate, which stands as prima facie (accepted as correct) evidence of maternity. It may be stated further that even though the entry regarding the father made on the birth certificate stands as prima facie evidence because of the presumption of legitimacy recognised in the evidence ordinance,[33] the genealogical value of the entry regarding the mother stands higher in the absence of such legal provision.

Presumption of legitimacy

[22] Births and Deaths Registration Act No.17 of 1951 s 27 A.
[23] ibid s 27 (1) A (c).
[24] ibid s 27 (2).
[25] ibid s 27 (3).
[26] ibid s 27 (4).
[27] ibid s 27 (5).
[28] ibid s 27 (6).
[29] ibid s 27 (8).
[30] Evidence Ordinance of Sri Lanka No. 14 of 1895 as amended. s 32(5).
[31] *MG Allis v AD Nandawathie* [1971] 75 NLR 191, *Piyasena v Kamalawathie* [1973] 77 NLR 406.
[32] *Fonseka v Perera* [1957] 59 NLR 364, at p 370.
[33] Evidence Ordinance of Sri Lanka No. 14 of 1895 as amended. s 112.

However, the Evidence Ordinance No 14 of 1845 (as amended) states that marriage is a clear proof of the paternity of a child born to a married woman during the state of marriage or within 280 days after the dissolution of the marriage, between the mother of the child and her husband, unless it can be clearly shown that the mother's husband had no access to her when the child could have been conceived, or that the husband of the mother was impotent.[34] In other words, where a child is born to a married woman during the state of the marriage or within 280 days after the marriage was dissolved, the law presumes that the 'husband' of the natural mother of a child is the father, unless and until the contrary is proven.

The presumption of legitimacy leads to a situation where a sperm donor or an intended father of a surrogate child loses paternity if he is not the husband of the biological mother. In such situations, an intended father who is also the sperm donor may contest the paternity of the child in court and with the court's permission, prove paternity using scientific/serological evidence. However, an intended father (in an informal surrogate agreement) who did not donate sperms will neither be able to prove paternity nor acquire paternity, as the law does not provide for such situations. The only possibility of acquiring legal parenthood for an intended father would be through adoption.

Judicial declaration of status

The Civil Procedure Code[35] provides for execution of a decree or court order to declare the status of a person.[36] This provision is rarely used. Yet, this provides jurisdiction on a court with civil jurisdiction to make a declaration of status independently of other claims[37] where the cause of action is "the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury."[38] This provision recognises a "right of a citizen to invoke the aid of the courts" and as recognised by the Supreme Court in *Asiz v Thondaman*, it is a right "that cannot be taken away by the rules of any association or body of persons" or "even by the legislature itself."[39] The judicial approach of utilising this provision is vague and restrictive[40] about establishing the status of persons as parent and child. Goonesekere says that the action for declaration of status can also be used to declare that a person is the legitimate or illegitimate child of their parents.[41] The Judicature Act of Sri Lanka[42] grants the jurisdiction of the family court[43] to hear and determine "claims in respect of declaration of legitimacy and illegitimacy [...] and applications for amendment of birth registration entries [...]."[44] Accordingly, the

[34] ibid.
[35] The Civil Procedure Code No. 2 of 1889.
[36] ibid s 217 (G).
[37] Goonesekere (n 17) 176–192.
[38] The Civil Procedure Code No. 2 of 1889 s 5. *Thiagarajah v Karthigesu* [1966] 69 NLR 73.
[39] *Asiz v Thondaman* [1959] 61 NLR 217.
[40] *In re Josephine Ratnayaka* [1921] 23 NLR 191, *Mallawa v Gunasekera* [1957] 59 NLR 157.
[41] Goonesekere (n 17) 178–179.
[42] The Judicature Act No. 2 of 1978.
[43] District Court acts as the Family Court. See Chapter V of the Judicature Act No. 2 of 1978.
[44] The Judicature Act No. 2 of 1978. s 24.

district court can determine the status of parent/s and child if such has been made an issue, provided that the child has been made a party to such action.[45]

This procedure may be used by the intended parents of a surrogate child to establish their parentage. However, a judgement of declaration of status, as provided for in the Civil Procedure Code, is not a judgment *in rem* as such a declaration can be challenged in other proceedings such as matrimonial actions, paternity disputes, and maintenance proceedings, and therefore, does not stand as a strong mode of establishing parentage of a surrogate child.

2.3.2. Adoption Ordinance

The Adoption of Children Ordinance of Sri Lanka provides for the adoption of children, for the registration as custodians of persons having the care, custody or control, of children of whom they are not the natural parents.[46] The court, upon an application by a person or persons whom the court deems suitable to adopt a child, may make an adoption order "with the consent of every person or body who is a parent or guardian of the child in respect of whom the application is made, or who has the actual custody of the child, or who is liable to contribute to the support of the child"[47] unless the child has been abandoned, deserted or neglected, or such person cannot be found or has been adjudged by a competent court to be of unsound mind, or is a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with.[48]

Foreign nationals can adopt children from Sri Lanka, provided that no Sri Lankan has made an application "to adopt the child in respect of whom the application is made";[49] spouses have jointly made the application; and the number of adoptions prescribed for the particular year has not been exceeded, and a home study report and police report has been duly submitted by the applicants.[50]

Adoption remains the only unfailing legal procedure available in Sri Lanka for a married couple to acquire parentage over a surrogate child.

2.3.3. Custody and guardianship of the child

The Sri Lankan law on parental rights over custody and guardianship of children is based on Roman-Dutch law and is documented in judicial decisions. The Sri Lankan courts have generally recognised the Roman-Dutch law concept of parental right to custody and guardianship of minors, with a preferential right of the father over legitimate children.[51]

---

[45] Goonesekere (n 17) 180–181.
[46] Adoption Ordinance No. 24 of 1941 as amended.
[47] ibid s 3(2).
[48] ibid s 3(3).
[49] ibid s 3(5)(a).
[50] 'Home study report' means a report on the mental health of the applicants, on their social, religious and financial background and on their suitability to adopt a child; 'police report' means a report on the conduct and activities of the applicants – a criminal records check.
[51] *Karunawathie v Wijesuriya* [1980] (2) SLR 14; *Rajaluxmi v Sivananda Iyer* [1972] 76 NLR 572; *Ivaldy v Ivaldy* [1956] 57 NLR 568*; Fernando v Fernando* [1957] 58 NLR 262; *Silva v Silva* [1943] 44 NLR 494.

The courts have paid attention to the welfare of the child.[52] However, the concept of "the best interest of the child" to be the deciding criterion was first recognised by Sri Lankan courts in *Muthiah Jeyarajan v Thushiyanthi Jeyarajan and others*[53] where the court stated that "both the modern Roman-Dutch law and English law were agreed on the principle that the interests of the child were paramount."[54] In this case, the court ruled that the custody of the child should be given to her maternal grandmother and mother. Even before this case, Sri Lankan courts have considered the concept of the best of interests of the child in the same line of cases. For instance, in *Samarasinghe v Simon and others*[55], Justice Nihill stated that, when granting a custody order, always consider whether such an order is detrimental to the best interests of the child.[56]

This concept has been statutorily recognised by the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007. Section 5 (2) of the ICCPR Act states that:

"In all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interest of the child shall be of paramount importance."

This concept also has been embraced by the Tsunami (Special Provisions) Act, No. 16 of 2005 which intended to make special provisions in respect of persons and property affected by the Tsunami that occurred on 26 December 2004. Sections 14 and 20 of this Act provide that the paramount consideration should be given to the concept of the best interests of the child in considering the suitability of an applicant to be a foster parent.

2.4. RIGHTS AND RESPONSIBILITIES OF THE SURROGATE MOTHER, INTENDED PARENTA AND DONORS

In Sri Lanka, parentage and its corresponding responsibilities and rights can be duly acquired only through adoption. Surrogacy remains an absent concept in Sri Lankan law. As a result, it is difficult to identify and analyse the rights and responsibilities of the surrogate and the intended parents. This may be further complicated in the case of gestational surrogacy where more parties such as surrogate mothers, intended parents and donors are involved. Moreover, as pointed out in section 2.2.2, those rights and responsibilities cannot be determined by a contract because such a contract is unenforceable if not illegal even in the case of altruistic surrogacy.

2.5. A WAY FORWARD

It is clear from the above analysis that the issue of surrogacy has not been addressed by Sri Lankan law despite its existence in the country. In the absence of a specific law to regulate surrogacy, the only option available for a couple seeking to have a child through

[52] *Fernando v Fernando* [1968] 70 NLR 534.
[53] [1999] 1 Sri L R 113.
[54] ibid, 116.
[55] [1941] 42 NLR 129.
[56] See also *Fernando v Fernando* [1968] 70 NLR 534, *Kamalawathie v De Silva* [1961] 64 NLR 252, *Weragoda v Weragoda* [1961] 66 NLR 83, *Dias v Kodithuwakku* [1999] 3 Sri L R 354.

a surrogate is through adoption. This may enable recognising the rights of the intended parents through a court procedure provided by the Adoption Ordinance.

PART 3: SURROGACY IN THE UNITED KINGDOM – COUNTRY REPORT

3.1 INTRODUCTION

The United Kingdom of Great Britain and Northern Ireland (UK)[1] consists of four constituent countries: England, Scotland, Wales and Northern Ireland. The UK is one of the few countries in Europe which permits the practice of surrogacy while recognising the importance of the best interests of children. As the assisted reproduction, particularly, subject matter under the Surrogacy Arrangements Act 1985,[2] Human Fertilisation and Embryology Act 1991(HFEA 1991),[3] and Human Fertilisation and Embryology Act 2008 (HFEA 2008) is considered as a reserved matter as respects Scotland and Northern Ireland.[4] As such, the legislation concerning surrogacy applies to the UK constituent jurisdictions equivalently.[5]

The UK, despite being a country that has a dualist approach in accommodating international conventions,[6] has no one enabling Act to incorporate the United Nations Convention on the Rights of the Child (UNCRC) [7] into its domestic laws. However, some

---

[1] The United Kingdom of Great Britain and Northern Ireland consists of four constituent countries: England, Scotland, Wales and Northern Ireland.

[2] Surrogacy Arrangements Act (SAA) 1985 Chapter 49.

[3] Human Fertilisation and Embryology Act (HFEA)1990 Chapter 37.

[4] 'Explanatory Note: Human Fertilisation and Embryology Bill (HL)': paras 18–23 <https://publications.parliament.uk/pa/cm200708/cmbills/070/en/08070x--.htm> accessed 20 August 2021.

[5] See, in particular, the Human Fertilisation and Embryology Act 1990 and the Human Fertilisation and Embryology Act 2008. As assisted reproduction is a reserved matter, surrogacy legislation 'is a matter reserved to Westminster, so the Scottish Parliament currently has no power to amend it: Scotland Act 1998, Sch 5, Part 2, Para 3.' Kenneth Norrie, 'English and Scottish Adoption Orders and British Parental Orders after Surrogacy: Welfare, Competence and Judicial Legislation' (2017) 29 Child and Family Law Quarterly 93, 93–95. The author is of the view that although *C v S* 1996 SLT 1387 was the only surrogacy case that is reported in the Scottish law reports, '[t]here have been more cases since. The National Records of Scotland show a handful of parental orders being made each year since the first in 2003. Between 2003 and 2008 there were 15 orders in total; between 2009 (when eligibility was extended to same-sex and unmarried couples) and 2014 there were 52 in total.' ibid.

[6] Nuala Mole and Alice Thornton, 'All Actions Concerning Children' [2018] Family Law Journal 1400.

[7] The UK signed the Convention on 19th April 1990 and ratified it on 16 December 1991. It has been argued that '[w]hilst progress has been made in UNCRC implementation across England, Wales and Scotland, full incorporation of the UNCRC has yet to be achieved in the UK.' 'Annual Conference 2017 – Post-Conference Briefing' (Rights of the Child UK Coalition 2017) <http://www.rights-of-the-child.org.uk/pdfs/ROCK_briefing_10.11.17_FINAL.pdf> accessed 27 December 2019. See also 'Consultation on Incorporating the United Nations Convention on the Rights of the Child into Our Domestic Law in Scotland -Analysis Report' (Presented to the Scottish Government by Arad Research 2019) <https://www.gov.scot/publications/childrens-rights-consultation-incorporating-uncrc-rights-child-domestic-law-scotland/> accessed 11 November 2020.; and 'The United Nations Convention on the Rights of the Child: How Legislation Underpins Implementation in England' (2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/2

measures have been taken by the respective governments of England & Wales and Scotland to implement the UNCRC through domestic laws. Particularly, Scotland has taken progressive steps to incorporate the UNCRC within its jurisdiction.[8] In this way, the UK has respected the obligation to uphold the best interests of the child principle.[9] Moreover, even though the European Convention on Human Rights (ECHR)[10] does not recognise the best interests of the child principle explicitly, there are provisions in the ECHR that refer to children directly[11] and indirectly.[12] The European Court of Human Rights (ECtHR)[13] has recognised the principle of the best interests of the child through interpretation of the ECHR provisions. As all State Parties to the ECHR have ratified the UNCRC, they are obliged to implement the UNCRC within their jurisdictions. Even as early as in 1993, the UNCRC was considered as the "strongest instrument of children's rights … existing in Europe."[14] The UK, as a party to these two important conventions, has the obligation, *inter alia*, to make sure that laws and practices adhere to the rights that are recognised in these conventions and in particular to the principle of the best interests of the child.[15]

In the absence of any international convention, the domestic law on surrogacy in the UK tackles issues arising from complex cross-border surrogacy arrangements. For example, in one of the reported cases, the intended parents from the UK obtained surrogacy

---

96368/uncrc_how_legislation_underpins_implementation_in_england_march_2010.pdf> accessed 27 December 2019.

[8] See Children (Scotland) Act 2020 recognises the child's right to be heard in legal proceedings. Moreover, Scotland has taken steps to bring an Act to incorporate the UNCRC through an enabling Act- 'United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill' <https://www.parliament.scot/bills-and-laws/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill> accessed 18 December 2021. However, the UK Supreme Court decided that there are provisions in the ACT which go beyond the legislative competence of the Scottish Parliament. See *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] Supreme Court UK 2021/0079.

[9] See Adrian L James, 'Children, the UNCRC, and Family Law in England and Wales' (2009) 46 Family Court Review 53.

[10] European Convention on Human rights (ECHR) 1950 (Rome, 4 XI).

[11] ibid, Article 5 – Equality between spouses – "spouses shall enjoy equality and responsibilities of a private law character between them, and in their relations with their children, as to marriage and in the event of its dissolution. This article shall not prevent states from taking such measures as are necessary for the interests of the children."

[12] William A Schabas, 'Article 8. Right to Respect for Private and Family Life', *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 391. It is emphasised that the ECHR has asserted that "the mutual enjoyment by parent and child of each other's company is 'a fundamental element of family life' within the meaning of Article 8 of the Convention."

[13] 'The European Court of Human Rights (ECHR) was set up in 1959. This is the supervisory mechanism created by the Council of Europe, based in Strasbourg, for overseeing compliance with the ECHR Convention obligations within 47 Council of Europe Member States that have ratified the Convention. Since1998 this court has been a full-time court composed of Chambers and a Grand Chamber.

[14] Eugeen Verhellen, 'Children's Rights in Europe' (1993) 1 International Journal of Children's Rights 357, 365.

[15] See generally, Jonathan Herring, 'The Human Rights Act and the Welfare Principle in Family Law - Conflicting or Complementary?' (1999) 11 Child and Family Law Quarterly 223.

services from an agency based in Israel, while the surrogate mother was an Indian and the egg donor originated from South Africa.[16] In another case, where the intended parents who had entered into a surrogacy arrangement had subsequently parted, the surrogate-born child, who was born in the State of Missouri, US, was subject to litigation in three jurisdictions: England, Florida and New York.[17] In this context, the main issue arising in an international surrogacy arrangement (hereafter 'ISA')[18] is the establishment of legal parenthood.[19]

The UK regulates the practice of surrogacy by protecting the interests of resulting children generally and also the interests of an individual child when there is a surrogacy dispute. As there is no international consensus defining the criteria for awarding legal parenthood,[20] different jurisdictions apply different rules to granting parenthood.[21] Regardless of domestic regulations, the complexities resulting from international surrogacy arrangements have a major impact on the interests of a child or children, as emphasised in a UK cross-border surrogacy case: "What it will mean to these children as they grow up and try to unravel and come to terms with their origins, no one can say. Much sadder is the fact, as I suspect, that no one has ever considered it."[22] The UK court, therefore, tends to protect the rights of the individual child. If a dispute highlights a conflict of interest between public policy as conceptualised through legislation and the interests/rights of the individual child as interpreted by the judiciary, the question remains as to what does the principle of the best interests of the child entail in such circumstances. This is a significant challenge that the UK courts face regularly in the adjudication of surrogacy disputes, especially in disputes arising from cross-border surrogacy arrangements: what is meant by the best interests of the children in the context of surrogacy agreements in legislation and how are the best interests of an individual child to be interpreted by the judiciary? These questions have also become the subject of

[16] *Z, B v C, Cafcass Legal as Advocate to the Court (Parental Order: Domicile)* [2011] EWHC 3181 (Fam) [2].

[17] *Y v Z, W v X (a minor by her Children's Guardian Ms Jacqueline Roddy)* [2017] EWFC 60 [1].

[18] 'The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project' (Hague Conference on Private International Law 2014) Prel. Doc. No 3 B <https://assets.hcch.net/upload/wop/gap2014pd03b_en.pdf> accessed 10 October 2015. Annexe A, Revised Glossary, which defines international surrogacy arrangement as "a surrogacy arrangement entered into by intending parent(s) resident in one State and a surrogate resident (or sometimes merely present) in a different State. Such an arrangement may well involve gamete donor(s) in the State where the surrogate resides (or is present), or even in a third State".

[19] The words 'parenthood' and 'parentage' are used here interchangeably.

[20] Katarina Trimmings and Paul Beaumont, 'Parentage and Surrogacy in a European Perspective' in Jens M. Scherpe (ed), *European Family Law*, vol III (Edward Elgar 2016).

[21] *Yamada v Union of India* [2008] Ind Law SC 15549 29 Sep 2008. *X & Y (Foreign Surrogacy) (Legal parenthood: Parental order)* [2008] EWHC 3030 (Fam). *Balaz v Anand Municipality* No 3020 Spec Civ Appl Oral Order Gujarat HC 11 November 2009.

[22] *W and B v H (Child abduction: Surrogacy) – (No 1)* [2002] 1 FLR 1008 [1].

academic criticism alongside "attempts at 'reform' led by the judiciary"[23] which are contradictory and lack coherence.

These criticisms indicate that the best interests of children as perceived in legislation may not always be applicable or do justice when the issues of an individual child's best interests are at stake due to unforeseeable or extraneous factors. Hence, the so-called "judicial reform" to protect the interests of the child has called for legislative reform of surrogacy at a domestic level in the UK, "with a view to bringing the law in line with views and needs of the families – and reflecting the best interests of the children",[24] "in light of the societal and medical changes that have occurred […]."[25]

Within this setting, the UK approach to the regulation of surrogacy should be explored and analysed. For this purpose, firstly, this report will consider how the current UK model of the regulation of surrogacy arrangements protects: a) the best interests of children (general approach) and b) the best interests of an individual child, considering the challenges that the court faces in balancing the rights of children and those of an individual child. Secondly, the report will consider the recent joint consultation paper of the English and Scottish Law Commissions to determine what policy changes are proposed to address how the best interests of children and the best interests of the individual child in the context of surrogacy arrangements are conceptualised.[26] Thirdly, this report highlights key findings from an investigation into the UK current and proposed approaches for protecting the best interests of children and the individual child in regulating surrogacy. The findings of this report may inform the lessons learned from the UK approach to regulating surrogacy arrangements in Sri Lanka.

3.2 PROTECTION OF THE BEST INTERESTS OF THE CHILD BEFORE THE LEGISLATIVE INTERVENTION

The judicial approach before the regulation of surrogacy in the UK explicitly interpreted the best interests of an individual child as the paramount consideration in any surrogacy arrangement. During the period when the UK discouraged the practice of Artificial Insemination by Donor (AID),[27] by treating the children resulting from such practice as

---

[23] Alan Brown, 'Two Means Two, but Must Does Not Mean Must: An Analysis of Recent Decisions on the Conditions for Parental Order in Surrogacy' (2018) 30 *Child and Family Law Quarterly* 23, 40.

[24] Kirsty Horsey and others, 'Surrogacy in the UK: Myth Busting and Reform' (Surrogacy UK: Information support Community 2015) Report of the Surrogacy Working Group on surrogacy Law Reform 11 <http://www.kent.ac.uk/law/research/projects/current/surrogacy/Surrogacy%20in%20the%20UK%20Report%20FINAL.pdf> accessed 16 February 2016.

[25] English Law Commission and Scottish Law Commissions, 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' para 1.5. https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/06/Surrogacy-consultation-paper.pdf accessed 22 December 2021.

[26] ibid.

[27] 'Human Artificial Insemination: Feversham Committee's Report' (1960) 379 <https://www.bmj.com/content/bmj/2/5195/379.full.pdf> accessed 24 October 2019. Recommendation 2(g) states: "while the practice of A.I.D. is strongly to be discouraged, it should not be declared criminal or be regulated by law."

illegitimate children,[28] a surrogacy case of *A v C,*[29] came before the court. In this case, a man had decided to pay a woman £3,000 to have a child through artificial insemination, contributing his gametes. He was considered as the father of the child under common law, with genes considered as the determining factor to establish parentage.[30] The birth mother refused to relinquish the child at birth. Initially, the court recognised the genetically-connected father's right to custody and responsibility of maintenance towards the child.[31] Nevertheless, the birth mother appealed against this decision and the Court of Appeal, following the rationale in *J v C*[32], considered the "welfare of the child" as the paramount consideration and granted sole custody of the child to the birth mother, barring any interference from the biological father.[33] At this stage, the UK court recognised the best interests of the child over any surrogacy agreement.

Eventually, the UK courts had to tackle the first cross-border surrogacy arrangement in the case of *Re C*,[34] (known as the "Baby Cotton" case),[35] in which American intended parents obtained the service of a surrogate mother in England. Mr Justice Latey observed that, "the baby's provenance is unusual, indeed novel"[36]; "the methods used to produce a child, as this baby has been, and the commercial aspects of it, raise difficult and delicate problems of ethical, morality and social desirability," (concerns over the welfare of children)[37] but "as the baby is already born [a]ll that matters is what is best for her now" (the best interests of the individual child).[38] As such, the court was of the view that "[F]irst and foremost, and at the heart of the prerogative jurisdiction in wardship, is what is best

---

[28] 'Family Law: Illegitimacy' (The Law Commission 1979) Working Paper No 74 para 10.1 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/08/No.074-Family-Law-Illegtimacy.pdf> accessed 24 October 2019. 'Family Law: Illegitimacy' (The Law Commission 1982) Law Com. No. 118 12.1 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/07/LC.-118-FAMILY-LAW-ILLEGITIMACY.pdf> accessed 24 October 2019.

[29] *A v C* [1978] 1978 8 Fam Law 170.

[30] Stephen Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press 2003) 540 argues that, "the law would not recognise social or psychological parentage as sufficient to constitute the legal relationship of parent and child: genetic factors alone determined the identity of a child's legal parents."

[31] 'Family Law: Illegitimacy' (n 28) para 10.5.

[32] *J v C* [1969] 1970 AC 668: this is a significant case of the custody of a child decided between biological parents who were foreign nationals and foster parents who lived in England. The court, as *parens patriae*, considered the interests of the child as the paramount consideration in this legal battle. Lord Guest said: " No evidence should be excluded simply because it may override the law of nature. The law of nature has different connotations at different times. If by the law of nature is meant that the blood tie should not be overruled by psychiatric evidence, that is wrong, because the welfare of the child is the paramount consideration." (pp. 686-687).

[33] *A v C* [1984] 1984 Fam Law 241 (Court of Appeal (Civil Division)).

[34] *Re C (A minor) (Wardship: Surrogacy)* [1985] FLR 846.

[35] This is the case that made the UK government set up an expert group led by Lady Warnock to review UK laws and practices concerning assisted reproductive technology. Michael Freeman, 'Does Surrogacy Have a Future after Brazier?' (1999) 7 Medical Law Review 1, 2.

[36] *Re C (A minor) (Wardship: Surrogacy)* (n 34) 846.

[37] ibid 847.

[38] ibid 848.

for the child or children concerned"[39] in the UK. Accordingly, after considering the facts that the intended father was the natural father and the birth mother did not want the child, and both intended parents were "excellently equipped to meet the baby's emotional needs,"[40] the court considered that it was in the child's best interests to commit the care and control of the child to the intended parents. In these cases, the court did not try to evaluate the UK's laws on parenthood or public policies concerning the practice of surrogacy. The main concern of the court was the best interests of the child.

In the same vein, in the case *of Re an adoption application (surrogacy)*,[41] the court considered how the adoption of the child could be considered legal if the child was born as the result of a traditional surrogacy arrangement and the intended parents had made payments to the surrogate mother, which arguably contravened adoption legislation. The court held that if the payments made by the intended parents to the natural mother did not include an element of profit or financial reward, then a surrogacy arrangement would not contravene section 50(1) of the 1958 Adoption Act. However, even if such payments had been made for reward, the court had the discretion to authorise payments retrospectively under section 50(3) of the 1958 Act. The court was of the view that if payments were not authorised, this would affect the status of the child, which in turn would lead to an absurdity, as the first concern of the Adoption Act is promoting the welfare of children.[42] Accordingly, the court considered the welfare of the child – this approach had already been developed through case law and gained recognition through the Children's Act 1989 – and both authorised the payments and granted an adoption order.

These cases prompt several observations. Firstly, unlike in the first case of *A v C*, in the latter two cases there was no disagreement between the parties over the surrogacy arrangement. Without disagreement, the authorities were able to intervene to protect the best interests of the individual child. Secondly, in all these cases, the courts, as a *parens patriae*, did not recognise the enforceability of the surrogacy arrangement but instead applied the best interests of the child principle as the decisive criterion in determining the parenthood or the custody of the child. All these cases illustrate that despite the absence of regulation on surrogacy or a general conceptualisation as to what is best for children in the context of surrogacy, the court always considered "the interests of the individual child" in reaching the final solution in a dispute arising from a surrogacy arrangement. The court considered such power as being "at the heart of the prerogative jurisdiction in wardship."[43] Indeed, the court was liberal in recognising the intention of the intended parents when determining parenthood in the best interests of the child. Although such a liberal approach may have been adopted because there was no dispute

[39] ibid 847.
[40] ibid 848.
[41] *Re Adoption Application (Payment for Adoption), Also known as: Adoption Application (Surrogacy) (AA 212/86)* [1987] 2 FLR 291.
[42] ibid 831.
[43] *Re C (A minor) (Wardship: Surrogacy)* (n 34) 847.

between the parties in the last two cases, it portrays the fine balance achieved by the court between the rights of children and the adults. However, the court noted that the path of surrogacy was not a primrose path and that there was a need for a clear policy on the regulation of the practice of surrogacy through legislation.[44] Thus, the need for a general approach to conceptualising the best interests of children in the context of surrogacy arrangements was made evident. Consequently, the UK adopted regulations concerning surrogacy arrangements and how to conceptualise the best interests of children in the context of surrogacy arrangements.

3.3 GENERAL APPROACH: PROTECTION OF THE BEST INTERESTS OF CHILDREN IN THE CONTEXT OF SURROGACY GENERALLY IN THE UK (LEGISLATIVE INTERVENTION)

The UK's approach to conceptualising what is in the best interests of children in the context of surrogacy arrangements has been an evolving endeavour, which can be observed by examining the laws introduced to determine the parenthood of children born as a result of surrogacy arrangements. Thus, the UK has taken a general approach to protecting the best interests of children resulting from surrogacy arrangements by establishing certain laws and policies.

3.3.1 The Warnock Report

At present, the practice of surrogacy in the UK is regulated through several pieces of legislation. This approach was influenced by the report of a committee commissioned by the UK government in 1982 and chaired by Baroness Mary Warnock (the 'Warnock Report').[45] In essence, the committee approached the issue of surrogacy as a practice that was wrong[46] and the "primacy of the interest of the child"[47] as a significant concern. The committee was of the view that generally people need some principles to govern the use of new medical techniques but that there was no universally agreed approach to how these techniques should be governed.[48] As a result, the report indicated the need for an international approach, highlighting an international policy gap concerning issues related to new medical techniques. Nevertheless, the committee was of the view that any international approach would be best formulated when individual countries had formed their views, and were ready to pool knowledge and experience.[49] The Warnock Report proposed adopting a domestic policy on surrogacy through legislative changes to areas

[44] *Re Adoption Application (Payment for Adoption)* [1987] 2 F.L.R. 291, per Latey J.
[45] 'Report of the Committee of Inquiry into Human Fertilization and Embryology (Warnock Report) 1984' <http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf> accessed 18 December 2021.
[46] Mary Warnock, 'Moral Thinking and Government Policy: The Warnock Committee on Human Embryology' (1985) 63 *The Milbank Memorial Fund Quarterly. Health and Society* 504, 511.
[47] 'Report of the Committee of Inquiry into Human Fertilisation and Embryology (Warnock Report) 1984' (n 45) paras 3, 8.6.
[48] ibid, paras 5 and 8.
[49] ibid, 1.8.

concerning medical technology in human fertilisation and assisted reproduction in the UK.

3.3.2 Surrogacy Arrangements Act 1985 and Human Fertilisation and Embryology Act 1990

Consequently, the UK introduced two main pieces of legislation for regulating surrogacy arrangements. Firstly, the Surrogacy Arrangements Act (SAA 1985) was enacted to regulate certain activities such as enforceability, negotiations, and advertisements in connection with surrogacy arrangements. Later the Human Fertilisation and Embryology Act (HFEA 1990) was enacted, containing provisions for the regulation of various practices concerning human embryos and gametes. It also established the Human Fertilisation and Embryology Authority and amended the SAA 1985. One of the main features of the HFEA 1990 was that it made provisions for determining the person(s), who, in certain circumstances, was to be treated in law as the parent of a child born through assisted reproduction[50] and provided a mechanism to apply for a parental order to establish the parenthood of a child born under a surrogacy arrangement. However, it has been argued that neither of these pieces of legislation were rationally constructed or properly thought through, but were instead (in the case of the SAA 1985) a response to a moral panic and (in the case of HFEA 1990) a hasty response to a constituent's problem.[51]

3.3.3 Brazier Report

Implementation of these regulations created several concerns, including the issue of payments made to surrogate mothers. To inquire about this policy gap, health ministers appointed a group of experts to review certain aspects of surrogacy arrangements in 1997. This expert group was led by Professor Margret Brazier[52] and a report (hereafter the 'Brazier Report')[53] was consequently published, containing the group's recommendations. The committee was mandated to review certain aspects of surrogacy arrangements, including payments for surrogate mothers. The Brazier Report recommended that the payments to surrogate mothers should be limited to actual expenses occasioned by the pregnancy and any such expenses should be statutorily defined through a new surrogacy act.[54] The report also recommended that any contravention of the ban on payments to surrogate mothers, other than expenses complying to those expressly defined[55] in the legislation, should result in ineligibility for a parental order, and suggested that in such an event the intended parents should apply to adopt the child.[56] However, critics claim that the report did not consider the best

[50] ibid, see introductory text.
[51] Freeman (n 35) 20.
[52] With Professor Alastair Campbell and Professor Susan Golombok.
[53] The Department for Health and Social Care, *Review for Health Ministers of Current Arrangements for Payments and Regulation: Report of the Review Team* (Cm 4068, 1998).
[54] ibid ii.
[55] ibid 5.25. The committee provided a list of such permitted expenses.
[56] ibid 4.48.

interests of the child as paramount but only as one consideration among others, such as the interests of the surrogate mother.[57] Even though the Brazier Report's recommendations were considered as, "jumping off point for a critical analysis of the current state of the law regarding surrogacy,"[58] they were never formally implemented.

3.3.4 Human Fertilisation and Embryology Act 2008

Subsequently, the Human Fertilisation and Embryology Act 2008 (HFEA 2008) was introduced, which amended the HFEA 1990 and SAA 1985. This followed the terms of the 1990 Act and made provisions for criteria to determine the parenthood of a surrogate child at birth[59] and for the post-birth transfer of parenthood to the intended parents by way of a parental order after satisfying relevant criteria.[60] All these rules implied what conceptualises the best interests of children generally. Nevertheless, the Act did not expressly specify that the best interests of the child principle should be considered in determining parenthood. Notably, section 13(5) of the HFEA 1990 required that a licensed treatment centre should consider the welfare of the child when providing treatment for a woman.[61] Based on this provision, an elaborated Code of Practice was published by the Human Fertilisation and Embryology Authority[62] specifying factors that should be considered by the licensed treatment centres to protect the welfare of the child before the conception. Accordingly, UK regulation initially considered the best interests of children by regulating surrogacy and considered the best interests of the child before conception. However, a gap remained over how the best interests of the individual child should be considered in parental order proceedings. To remedy this, the best interests of

---

[57] Freeman (n 35) 13 Freeman argues that 'Commendably, the first concern is the welfare of the child. The Report does not adopt a consistent line on this. In the discussion of the code of practice, as in the Executive Summary, the welfare of the child must be "the paramount concerned of all parties to the arrangement, the courts and all other agencies involved". Elsewhere in the report, we are told that the welfare of the child "must be accorded the highest priority." These are different standards. The paramountcy principle allows no space for other considerations.'

[58] Kirsty Horsey and Sally Sheldon, 'Still Hazy after All These Years: The Law Regulating Surrogacy' (2012) 20 *Medical Law Review* 67.

[59] Human Fertilisation and Embryology Act (HFEA) 2008.

[60] ibid 54.

[61] HFEA (1990), s 13(5) which states that, "A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth." See generally, Eric Blyth, 'The United Kingdom's Human Fertilisation and Embryology Act 1990 and the Welfare of the Child: A Critique' (1995) 3 *The International Journal of Children's Rights* 417. Section 13(5) was subsequently amended by the HFEA 2008 substituting the word father with the phrase 'supportive parenting'.

[62] 'Code of Practice: 1st Edition' (Human Fertilisation and Embryology Authority) para 3.10-3.17 <http://ifqtesting.blob.core.windows.net/umbraco-portal/1106/hfea-cop-1.pdf> accessed 20 June 2019. See the current version of this Code: 'Code of Practice: 9th Edition' 11 <https://portal.hfea.gov.uk/media/1520/2019-01-03-code-of-practice-9th-edition-january-2019.pdf> accessed 26 June 2020. 'The Code of Practice contains regulatory principles for licensed centres, and guidance notes which provides guidance to help clinics deliver safe, effective and legally compliant treatment and research' Welfare of the child concern is incorporated in part 8, pp 93-97. Part 8.9 -8.13 lists out the welfare of the child assessment process for surrogacy arrangements.

the child principle was later recognised as a policy for decision-making concerning parental order applications through a regulation passed under the main Act.[63]

3.3.5 Proposal for reforms

Nonetheless, the practice of surrogacy and implementation of surrogacy laws have brought challenges both to authorities and to parties involved in surrogacy arrangements, particularly in the case of cross-border surrogacy arrangements.[64] In 2015, the Surrogacy UK Working Group on Surrogacy Law Reform published an empirical study arguing that the law on surrogacy was out of date, being over 30 years old and in need of an update after a thorough review of social realities.[65] This called for a new conceptualisation of what the best interests of children are in the context of surrogacy. Despite the unavailability of precise data on surrogacy arrangements, the report quoted available statistics and argued that it was a myth to suggest that 'international' or 'cross-border' surrogacy had become commonplace for intended parents in the UK, although there was an increase in the number of intended parents who travelled internationally for surrogacy from the UK.[66] Arguments were put forward to promote domestic surrogacy, the principle of altruistic surrogacy[67] and to simplify the law on domestic surrogacy in the UK. Building on these proposals, the Law Commission in the UK had reviewed the surrogacy laws and tabled a joint consultation paper proposing a new law regulating surrogacy arrangements in the UK.[68] Although some stakeholders consider that a reform is unnecessary,[69] the Law Commissions are of the view that the current law as it stands does not promote the best interests of children generally.

---

[63] Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (HFER 2010).

[64] The UK government has published guidance for UK parents who resort to surrogacy abroad: 'Surrogacy overseas: Information for British nationals who are considering entering into surrogacy arrangements in foreign countries.' <www.gov.uk/government/publications/surrogacy-overseas> accessed 25 December 2018.

[65] Horsey and others (n 24) 11.

[66] ibid 18.

[67] 'The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project' (n 18) Annex A-Revised Glossary, which defines altruistic surrogacy arrangement as 'a surrogacy arrangement where the intending parent(s) pay the surrogate nothing or, more usually, only for her 'reasonable expenses' associated with the surrogacy. No financial remuneration beyond this is paid to the surrogate. This may be a gestational or a traditional surrogacy arrangement. Such arrangements often (but not always) take place between intending parent(s) and someone they may already know (e.g., relative or a friend).

[68] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25).

[69] ibid 1.42.

3.4 GENERAL APPROACH: CONCEPTUALISATION OF THE BEST INTERESTS OF CHILDREN IN SURROGACY THROUGH REGULATION

The main concern in a surrogacy arrangement is to establish legal parenthood.[70] In the UK, the problems caused by the attribution of legal parenthood in surrogacy arrangements have been identified as one of the most pressing areas of the law in need of reform.[71]

3.4.1 Establishment of legal parenthood in the context of surrogacy

In the context of surrogacy, the UK legislation recognises a two-stage approach, in which the parenthood of a surrogate-born child is determined. Firstly, it contains provisions to determine the parenthood of the child at birth, considering the biological relationship with the surrogate and the institutional relationship with the partner of the biological parent. Secondly, it enables the intended parent(s) to acquire parenthood through a post-birth parental order based on fulfilling the necessary criteria. However, when there is an issue with the parties or the parties are unable to satisfy the criteria for determining the post-birth transfer of parenthood of a surrogate-born child, the court applies the common law in establishing parenthood for that child.[72]

3.4.2 Legal parentage of a surrogate-born child at birth

The UK rules concerning surrogacy recognise the surrogate mother as the legal mother of the child and her consent is vital in transferring parenthood to the intended parents. The HFEA 1990[73] and 2008[74] explain who should be considered as parents when ART is used.[75] So, "[…] a woman who carries a child in pursuance of an arrangement— (a) made before she began to carry the child, and (b) made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or other persons" is considered the legal mother.[76] The HFEA 2008 declares that "the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs"[77] is treated as the mother of the child, regardless of "whether the woman was in the UK or elsewhere at the time of the placing in her of the embryo or the sperm and eggs."[78] This is clearly the depiction of the

[70] As a result of the regulation of surrogacy, different countries have introduced different parenthood models. See generally, Katarina Trimmings and Paul Beaumont, 'General Report on Surrogacy', *International Surrogacy Arrangements Legal Regulation at the International Level* (Hart 2013).
[71] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 1.44.
[72] ibid 1.42.
[73] HFEA (1990), s 27-30.
[74] HFEA, 2008, s 33-47.
[75] Accordingly, it has been argued that statutory provisions displace and override the common law position. *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 [33].
[76] Surrogacy Arrangements Act (SAA) 1985, s 1(2).
[77] HFEA (1990), s 27(1). HFEA, 2008, s 33(1).
[78] HFEA (1990), s 27(3). HFEA) 2008, s 33(3).

Warnock Report recommendation.[79] In the same vein, the British Nationality Act 1981, interprets the child's mother as the woman who gives birth to the child.[80] As such, in the context of surrogacy, the UK law recognises the birth mother as the legal mother of any child born following a surrogacy arrangement entered into within the UK or abroad, regardless of whether she has a genetic link to the child. Accordingly, until a parental order is made, the surrogate mother is the legal mother, and she has full responsibility for the child.[81]

When a genetic connection is established with the child, regardless of the mother's marriage to another party, the common law recognises the genetic father as the legal father. However, in a surrogacy arrangement, the question of paternity does not end with a consideration of the common law position.[82] The UK also recognises another parent regardless of whether a) the other parent is male or female or b) whether the other parent contributed their gametes: if the other parent has given consent to the surrogate mother to be treated, then the other party is considered as another parent of the child so born. The definition of "other parent" depends on whether the surrogate mother is married or not. The meaning of "father" is stated in sections 35-41 of the HFEA 2008 and section 28 of the HFEA 1990. Accordingly, the father's status is defined through the status and relationship that he has with the birth mother. Therefore, if a woman, regardless of whether she was in the UK or elsewhere, is a party to a marriage at the time of the placing of an embryo or sperm and eggs or her artificial insemination, and the sperm of the other party to the marriage is not used for the creation of the embryo, and he has consented to the artificial insemination, then he will be treated as the father of the child.[83] Accordingly, even though the surrogate child's mother's husband did not contribute his gametes to create the embryo, he will be treated as the father of the child as he was married to the birth mother of the child and had consented to the treatment. This has been criticised as being an unnecessary legal fiction.[84] Indeed, with the well-developed medical technology, determining the genetic relationship of the father is not a difficult task so that this provision does not add value in determining the best interests of children.[85] However, if

---

[79] "We recommend that legislation should provide that when a child is born to a woman following donation of another's egg the woman giving birth should, for all purposes, be regarded in law as the mother of that child, and that the egg donor should have no rights or obligations in respect of the child." 'Report of the Committee of Inquiry into Human Fertilization and Embryology (Warnock Report) 1984' (n 45) para 6.8.

[80] British Nationality Act 1981, s 59(9).

[81] Concerns have been raised that this situation may undermine the child's welfare when there is an emergency concerning the child's health as the intended parents who normally have the care of the child cannot give consent to medical treatment. Natalie Gamble, 'Children of Our Time' [2008] Family Law Journal 13 <www.ngalaw.co.uk/uploads/docs/538c9764e9053.pdf> accessed 28 May 2019.

[82] *Re G (Surrogacy: Foreign Domicile)* (n 75) para 33.

[83] Human Fertilisation and Embryology Act (HFEA) 2008, s 35.

[84] Kirsty Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' (2010) 22 Child and Family Law Quarterly 449, 451 argues that 'This is a wholly unnecessary legal fiction and, while reinforcing the notion that motherhood is determined by gestation, does not mirror the way that fatherhood following other forms of assisted reproduction.'

[85] Brenda Hale, 'New Families and the Welfare of Children' (2014) 36 Journal of Social Welfare and Family Law 26, 27 casts doubt on how this rule can be justified as being in the best interests of the child.

the surrogate mother is not married, there is no need to obtain the father's consent.[86] Moreover, if a woman is not married and a non-biological father claims paternity based on the reasons that he expressed his intention to become a father, then this would be problematic.[87] In this context, the House of Lords has highlighted the fact that when an unmarried man, who is not the biological father of the child, expresses his intention to become a father, then there is a need for more reliable safeguards regarding the child's legal parentage[88] and the best interests of the child.[89] This confusing situation is remedied by the HFEA 2008 through sections 36 and 37. Accordingly, if a man consents to the placement of an embryo or artificial insemination of sperm and eggs in an unmarried woman without contributing any gametes and gives a notice of consent to be treated as a father, then that person will be treated as the father of any child resulting from that treatment. So, by meeting agreed fatherhood conditions,[90] a man can be treated as a father to a child born under a surrogacy arrangement. Consent has become a serious concern in establishing parenthood in the UK.[91] In sections 42-47, the HFEA 2008 also states instances in which a woman can be considered as the other parent. These are instances where the birth mother is a party to a marriage or a civil partnership with another woman and where the intended mother has agreed to become a parent by fulfilling agreed female parenthood conditions.[92] Nevertheless, if the surrogate mother is not married and the intended father has a genetic connection to the child, the agreed fatherhood conditions will not apply as he is considered as the child's father under the common law rules. It is problematic how the UK law serves the best interests of children; parenthood can be recognised within a legally constituted unit, even if the person has not contributed gametes to create the child or has any intention to raise the child. Accordingly, UK law considers the gestational connection, the institutional connection and consent of the parties in determining the parenthood of the surrogate-born child at birth. Nevertheless, in the context of surrogacy, these determinations are not absolute. Regardless of the intended parents' genetic contribution to the making of the child, the legislation considers it is in the best interests of the child to recognise the birth mother as the legal mother. The UK legislation does not force the parents of a child, who the law considers as the parents, to relinquish the child if the child is conceived as a result of a surrogacy arrangement. However, there is a counterclaim that this law does not reflect the social realities and the new model of family creation in society.

An empirical study conducted in 2015 by the UK Working Group on Surrogacy Law Reform highlighted that even most surrogate mothers are of the view that intended

[86] *Re Q* (Parental Order) [1996] 1 FLR 369.
[87] In *Re (A Child) (IVF: Paternity of Child)* [2003] EWCA Civ 182.
[88] *In Re (A Child) (IVF: Paternity of Child)* [2005] UKHL 33 [26].
[89] ibid 35.
[90] Human Fertilisation and Embryology Act (HFEA) 2008, s 37.
[91] *Re P (Declaration of Parentage: PP Form Mistake), Also known as: P v Q* [2018] EWFC 74.
[92] Human Fertilisation and Embryology Act (HFEA) 2008, s 43–44.

parents should be the legal parent/s of the child born through surrogacy agreements[93] and surrogate mothers should not have the right to change their minds about giving the baby to the intended parents.[94] The study also recommended that the intended parents should be considered the legal parents of child/ren at birth and the legal parenthood should be transferred before birth. The Working Group was of the view that this would promote domestic surrogacy in the UK.[95] Furthermore, it suggested that surrogate mothers, intended parents and healthcare professionals should have more awareness about the journey of surrogacy. Subsequently, the Ministry of Health published two guidance notes on this matter to avoid complications in protecting the status of children after birth.[96] The proposed new UK law introduces changes to the interpretation of what the best interests of children (general approach) by recognising the intended parents as the legal parents at birth.[97] In this way, the legislator proposes a different conceptual interpretation of what should be perceived as the best interests of the children generally in the context of surrogacy arrangements. Moreover, the reform proposal recommends removing or limiting the significance of the post-birth welfare assessment and thereby brings a new interpretation to what the best interests of an individual child (individual approach) are in the context of surrogacy-related disputes. It suggests that an individual child's interests will be better promoted by placing suitable safeguards before conception and protecting the child's right to know their origins.

3.4.3 Post-birth transfer of legal parentage of a surrogate-born child

A surrogacy contract is not enforceable in the UK but the plans of the intended parents are recognised. Although intended parents are not considered the legal parents of the child at birth, legislation enables the intended parents to become parents through a parental order if they fulfil the conditions laid down in section 54 of the HFEA 2008 and the welfare needs set out in section 1 of the Adoption and Children Act 2002.[98] The "proceedings for a parental order are entirely statutory in origin"[99] and are governed by

---

[93] Horsey and others (n 24) 21.
[94] ibid.
[95] ibid 38–39.
[96] 'The Surrogacy Pathway: Surrogacy and the Legal Process for Intended Parents and Surrogates in England and Wales' (Department of Health & Social care, UK Government 2021) <https://www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales> accessed 20 December 2021. 'Care in surrogacy: Guidance for the Care of Surrogates and Intended Parents in Surrogate Births in England and Wales' (Department of Health and Social care, Government of the UK 2021) <https://www.gov.uk/government/publications/having-a-child-through-surrogacy/care-in-surrogacy-guidance-for-the-care-of-surrogates-and-intended-parents-in-surrogate-births-in-england-and-wales> accessed 20 December 2021.
[97] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 1.45.
[98] *Re A* (Parental Order) [2015] EWHC 1756 (Fam) [4].
[99] *G v G* [2012] EWHC 1979 (Fam) [4]. *M v J* Also known as: *DM v SJ (Surrogacy: Parental Order)* [2016] EWHC 270 [56]: Theis J was of the view that "[a] parental order was specially devised for surrogacy arrangements. It is a transformative order with the effect that the child is treated as though born to the applicants."

section 54 of the HFEA 2008 and by part 13 of the Family Procedure Rules 2010.[100] When a parental order is granted to applicant/s who satisfy the section 54 criteria, even a parent who is genetically unconnected to the child obtains a lifelong status as a parent and inalienable parental responsibility.[101] For this reason, the courts do not have statutory power to set aside a parental order; the court's power is restricted to "the revocation of the direction given to the Registrar General (see Family Procedure Rules 13.22 and paragraph (4) of the schedule 1 of the 2002 Act)."[102]

In the context of surrogacy, the determination of parenthood of a child at birth and post-birth has an impact on the best interests of the child. Accordingly, the HFEA 2008 conceptualises what the best interests of children are by recognising the surrogate mother as the legal mother[103] at birth and the intention of the intended parents to be legal parent/s if they fulfil the criteria in section 54. However, the court is not incapacitated or barred by this general conceptualisation of the best interests of children; the court can consider the best interests of the individual child and determine the legal parenthood of the child. Considering the debate over the compatibility of the surrogate mother being the legal mother at birth with the best interests of the child,[104] the Law Commissions' reform proposal suggests that there should be a new pathway to legal parenthood in surrogacy and interpretation of the best interests of the child in the context of a surrogacy arrangement. This introduces a new model of parenthood and interpretation of the best interests of the children in general, recognising the intended parents as the legal parents at birth.[105] The proposed model is distinct from the contract-based surrogacy model.[106] The new proposal considers the best interests of children as recognising the intended parents at birth unless the surrogate objects, which means that the intended parents do not need to apply for a parental order. Nevertheless, this proposal is only applicable to domestic surrogacy arrangements and not to international arrangements. The question arises of how such a proposed model for surrogacy regulation can protect the best interests of children generally and that of the individual child. This can be explored by considering in what ways the proposed changes will affect how the current law regulates the practice of surrogacy and how the court interprets section 54 to protect the interests of the individual child.

---

[100] Part 13 of the Family Procedure Rules – proceedings under section 54 of the Human Fertilisation and Embryology Act 2008.
[101] *G v G* (n 99) para 30.
[102] ibid 33.
[103] Hugh McLachlan and J Swales, 'Surrogate Motherhood: Beyond the Warnock and the Brazier Reports' (2005) 11 Human Reproduction & Genetic Ethics 12, argue that current legal position regarding surrogate motherhood is not a convincing approach.
[104] See generally, 'Choice' and the 'Best Interests of Children' – Claiming the Problem of Surrogate Motherhood in Susan Markens, *Surrogate Motherhood and the Politics of Reproduction* (University of California Press 2007) 50–76; Christine Overall, *Ethics and Human Reproduction: A Feminist Analysis* (Routledge 2013) 111–136.
[105] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 7.3.
[106] ibid 7.80.

3.5 INDIVIDUAL APPROACH: PROTECTION OF THE BEST INTERESTS OF THE INDIVIDUAL CHILD IN THE CONTEXT OF SURROGACY IN THE UK THROUGH JUDICIAL INTERVENTION

3.5.1 Significance of a parental order

The UK's legislative framework for establishing parenthood through a surrogacy arrangement – although considered highly restrictive[107] – impacts the child's best interests significantly. The Children and Family Court Advisory and Support Service (CAFCASS) National Office data[108] on applications for parental orders received from 2010 to 2018 show the increase in acquiring parenthood through surrogacy arrangements by the intended parents in the UK (See Table 1).

Year	Parental order applications received
2010	96
2011	131
2012	150
2013	168
2014	229
2015	304
2016	316
2017	279
2018	276

Table: 1 Parental order applications received.

The *Family Courts Statistics Quarterly*, published by the UK Ministry of Justice, also reveals that yearly there are more than 500 parental order applications made in the family courts in England and Wales.[109] However, not all these applications, have been successful. The majority of parental orders have been granted by the courts of England and Wales. In 2018, the courts granted 367 parental orders, while Scottish courts only granted 15 parental orders and five parental orders were granted by Northern Irish courts during the period from 1 April 2017 to 3 March 2018.[110] It has also been noted that the timeframe for obtaining a parental order may differ depending on where in the UK it is obtained.[111]

---

[107] Claire Fenton-Glynn, 'Surrogacy in England and Wales' in Jens M. Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019) 116.
[108] CAFCASS, 'Freedom of information request: statistics on parental order' (CAFCASS National Office, 2020) Gov/CAF 20-20.
[109] Ministry of Justice, National Statistics, 'Number of Children Involved in Public and Private Law (Children Act) Orders Made in the Family Courts in England and Wales, by Type of Order, Annually 2011 - 2016 and Quarterly Q3 2016 - Q3 2017, Table 4 in Family Court Statistics Quarterly July to September 2017' <https://data.gov.uk/dataset/a89d2f04-86ad-4f75-a4b1-8204dba8e0ed/family-court-statistics> accessed 21 December 2021.
[110] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 1.2.
[111] ibid 3.80.

Year	Parental order applications	Parental orders made in family courts
2011	635	117
2012	704	184
2013	674	158
2014	586	242
2015	481	331
2016	544	505
2017(Q1-Q3)	425	263

Table: 2 Parental orders made in family courts.

The application for a parental order itself upholds the best interests of the child, as it determines the status of the child. Therefore, it is important to take prompt action to apply for a parental order immediately after the birth of the child. The court has reiterated that when intended parents are not aware of the requirements and procedures for parental order applications, this will have a negative impact on children's long-term welfare.[112] Such delays or omissions may create uncertainties as to the legal parenthood of the child, the child's maintenance,[113] welfare responsibilities, inheritance rights of the child and the child's right to identity, all of which compromise the child's best interests. Moreover, when a parental order is not given, the nationality of the child remains in question as "[t]he grant of a parental order does not of itself confer citizenship although the evidence suggests that it is very unlikely to be denied if sought."[114] If a parental order is not applied for, children remain stateless and will not be able to apply for a passport.
In the context of cross-border surrogacy arrangements, however, an application for a parental order can be a daunting task due to further complexities, in particular, bringing the child to the jurisdiction and convincing the authorities that the applicants can fulfil the criteria for a parental order. This delay also affects the best interests of the child. One route for a child to enter the UK is covered by guidance issued by the UK Border Agency known as 'Inter-Country Surrogacy and the Immigration Rules', published in 2009. This document states:

> "If either of the commissioning couple has a genetic connection with the child, entry outside the Rules at the discretion of the Secretary of State may be

[112] *Re A*, Also known as: *A v X* [2015] EWHC 2080 [14].
[113] See Children Act 1989, s 15 states that sch 1 makes provision for financial relief for children.
[114] *X & Y (Foreign Surrogacy) (Legal parenthood: Parental order)* (n 21)[10]. See also 'Explanatory Memorandum to the Human Fertilisation and Embryology (parental orders) Regulations 2010 - No. 985, and The Human Fertilisation and Embryology (parental orders) (consequential, transitional and saving provisions) Order 2010 - No. 986' para 8.7 <http://www.legislation.gov.uk/uksi/2010/985/pdfs/uksiem_20100985_en.pdf> accessed 26 December 2018. As a result of responses to the consultation, and to ensure parity with adoption legislation, the Parental Order Regulations 2010 now ensure that where a parental order is made in the UK and one or both of the commissioning couple are British citizens, the child – if not already so – will become a British citizen.

possible, but such entry clearance will only be granted on condition that a section 30 parental order is applied for within six months of birth and where evidence suggests that such an order is applied for within six months of birth and where evidence suggests that such an order is likely to be granted."[115]

It will be difficult for the intended parent(s) to bring the child into the UK without evidence proving genetic connection with the child and if there is suspicion over how the child was born. So, a lack of support of the partner who has a genetic relationship with the child creates difficulties entering the UK.[116] This may be the case if intended parents have used a commercial surrogacy agreement in India,[117] and want to bring the child into the UK. The court adopted the same justification in the case of *X & Y (Foreign Surrogacy)*[118] considering the need for consent from the surrogate mother and concluded that a parental order could not be guaranteed. In this case, the court was asked by the parties whether there was a likelihood of a parental order being granted concerning a child born as a result of a commercial surrogacy agreement in India and which had not yet entered the UK. The court was of the view that without the child being in the country, the application could not be progressed.[119] Nevertheless, the court commented (although not as a conclusion) that as the parties had established the genetic link, section 30 (1)-(6) was fulfilled in this case.[120] However, the court held that granting entry according to the Guidance depended on the satisfaction of the entry clearance officer as to whether the rule was fulfilled by the applicants[121] and "whether such [the court's] observations are helpful to the clearance officer is a matter for that officer and for no one else."[122] In the case of *JB (A Child) (Surrogacy: Immigration)*,[123] the intended parents entered into a surrogacy agreement in India and the surrogate mother relinquished the child to the intended parents. The intended parents applied for a parental order while the child was staying with his paternal grandmother in India. The intended parents were unable to obtain a visa or British passport permitting the child to enter the UK. There were two issues before the court to be resolved. The first was whether the criteria under section 54

---

[115]'Inter-Country Surrogacy and the Immigration Rules', para 41<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/261435/Intercountry-surrogacy-leaflet.pdf> accessed 25 December 2018. New guidance on foreign surrogacy is published as 'Inter-Country Surrogacy and the Immigration Rules' but this does not contain information as specified in the 2009 guidance.

[116] *X v Z* [2018] EWFC 86 [16–19].

[117] *Re K (Minors: Foreign Surrogacy)* [2010] EWHC 1180 (Fam).

[118] *X & Y (Foreign Surrogacy) (Legal parenthood: Parental order)* (n 21).

[119] However, in the case of *JB (A Child) (Surrogacy: Immigration), Re Also known as: KB v RT* [2016] EWHC 760 (Fam) [58] the court considered whether the intended parent met the criteria of section 54 of HFEA 2008 for the parental order application for the child who was not present in the UK. It held that the Secretary of the State considers the entry clearance of this child under paragraph 297 of the Immigration Rules/and or under the terms of the Secretary of State's own policy allowing the entry to the UK of surrogate-born children subject to parental order applications.

[120] *Re K (Minors: Foreign Surrogacy)* (n 117) para 9.

[121] ibid 5.

[122] ibid 10.

[123] *JB (A Child) (Surrogacy: Immigration), Re Also known as: KB v RT* (n 119).

of the HFEA were satisfied. The second was whether the court could or should make a parental order when the child was outside the jurisdiction of the UK. The court observed that the intended parents were not British citizens and, therefore, the father could not obtain a British passport for the child by showing a genetic connection. The intended parents then applied for a child settlement visa under paragraph 297 of the Immigration Rules.[124] The UK law considers the surrogate's husband as the father of the child, the intended father regardless of any biological connection was not treated as the father; hence, the requirements of rule 297 were not met. Therefore, the application for a child settlement visa was refused. The child was granted an Indian passport. The court considered the Intercountry Surrogacy and the Immigration Rules issued in 2009 by the Home Office and observed that there was a concessionary arrangement in the context of children who are born outside the UK to non-British citizens who reside in the UK. Accordingly, if the intended parents can show that they are capable of meeting the requirements necessary to obtain a parental order under section 54 of the HFEA and satisfy "as many of the rules' requirements as they can", then children born from those parents may be granted entry clearance/leave to enter the UK for 12 months.[125] The court observed that the applicants were able to meet the criteria under section 54. Moreover, the court was of the view that as the surrogate's husband was not involved in the surrogacy arrangement, he could not be considered as the father under section 35(1) of HFEA 2008. Accordingly, the court held that the Secretary of State would consider the application for the child "to join his intended parents in the UK under paragraph 297 of the Immigration Rules and/or under the terms of the Secretary of State's own policy allowing the entry to the UK of surrogate-born children subject to parental order application."[126]

In short, the parental order is highly significant for the welfare of the child. However, in the context of ISAs, the state has the barrier point aiming to stop child trafficking through the practice of surrogacy and to prevent further uncertainties as to the status of the child when brought to the jurisdiction. Nevertheless, there is no data available on how many children are born through surrogacy arrangements or how many have come into the jurisdiction and remained without the intended parent(s) applying for a parental order. There are instances reported of intended parents having surrogate-born children without obtaining a parental order[127] due to a variety of reasons.[128] The Law Commission proposes a new pathway to protect the best interests of children, to recognise the intended parents

[124] 'Immigration Rules part 8: family members (Paragraphs A277 to 319Y)' <www.gov.uk/guidance/immigration-rules/immigration-rules-part-8-family-members> accessed 11 November 2020.
[125] *JB (A Child) (Surrogacy: Immigration), Re Also known as: KB v RT* (n 119) para 25.
[126] ibid 58.
[127] Horsey and others (n 24) 23.
[128] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 1.3. Reasons include 'lack of awareness, cost and an inability to fulfil the current eligibility requirements, particularly in international arrangements.'

as legal parents at birth, subject to the surrogate's right to object to the automatic acquisition of parenthood by the intended parents (regardless of whether the surrogacy arrangement is "traditional or gestational in character"),[129] and in such instances intended parents need not apply for a parental order.[130] However, the significance of a parental order will remain in the context of cross-border surrogacy arrangements[131] as the new pathway does not apply to international surrogacy arrangements or in cases when a dispute arises in a surrogacy arrangement.[132]

3.5.2 Post-birth best interest considerations in making a parental order

Considering children's welfare has been "the cornerstone of the family justice system of this jurisdiction for many years. We regard it as a touchstone in measuring the quality of other family justice systems. Article 3 of the (UNCRC) 1989 requires no less."[133] A parental order itself serves lifelong protection of a child's best interests.[134] Nevertheless, the challenges that the UK courts and administrative authorities face raise the question of whether the general legal position and policies that protect the best interests of children necessarily protect the best interests of an individual child.

Initially, considering the best interests of the individual child was not explicitly addressed in legislation. Later, apart from the requirements laid down in section 54 of HFEA 2008, the courts were directed to consider the best interests of the child principle by the Human Fertilisation and Embryology (Parental Order) Regulations 2010.[135] In particular, Regulation No. 985 provides that, "whenever a court is coming to a decision relating to the making of a parental order (under section 54 of the Human Fertilisation & Embryology Act, 2008)[136] in relation to a child,"[137] "the welfare of the child" should be the "paramount consideration" of the court.[138] Recently, after amending the HFEA 2008, section 54A, the 2010 Regulations were replaced by the Human Fertilisation and Embryology (Parental Order) Regulations 2018 (hereafter 'HFER 2018'). This statutory instrument (similar to its predecessor) recognises the significance of "the welfare of the child" as the paramount

[129] ibid 8.3.
[130] ibid 8.2.
[131] ibid 8.3. The Law Commissions are of the view that the new pathway should not be open to international surrogacy arrangements.
[132] ibid 8.5 and 8.6: "The parental order route will be available for those arrangements that do not meet the requirement of the new pathway, or that cannot do so".
[133] *Osman v Elasha Also known as: Re E (Abduction: Non-Convention Country)* [2000] Fam 62 (Court of Appeal (Civil Division)) 70.
[134] Even though it has been argued that "the welfare of the child was never once mentioned in any governmental or parliamentary statement about parental orders. They were designed to address adults' wishes rather than children welfare." McK Norrie (n 5) 96.
[135] HFER 2010 No. 985.
[136] ibid sch 1, reg 2. as modified the s 1(4) of the Adoption and Children Act 2002.
[137] ibid sch 1, reg 2. as modified the s 1 of the Adoption and Children Act 2002.
[138] HFER 2010 No. 985.

consideration of the court.[139] Accordingly, the Regulations make provision for a modification of the ACA 2002[140] and Adoption Children (Scotland) Act 2007.[141]
However, the Law Commissions are of the view that the post-birth welfare assessment is not necessary and any welfare considerations should be raised and completed before the child's birth and before a surrogacy agreement is signed.[142] Accordingly, they propose a new interpretation of the best interests principle through recognising a change in the establishment of parenthood and disregarding the post-birth assessment of the welfare principle concerning the individual child. Nevertheless, the Law Commissions propose that if the surrogate mother objects against the intended parents acquiring parenthood, then the case exits the new pathway and as there will be a surrogacy dispute, the court will have to carry out the welfare considerations. For this purpose, the Law Commissions question whether section 1(3) of the Children Act 1989 and 1(4) of the ACA 2002 should be amended to provide for the court to consider additional factors when deciding whether to make a parental order.[143] The new pathway does not apply to international surrogacy arrangements, and also if the domestic arrangement departs from the new pathway, then the court has to consider the best interests of the individual child. So, post-birth determination of the best interests of the child will not lose its significance within the UK law on surrogacy. Even though there is guidance for welfare determination in the Children's Act 1989, the uniqueness of the practice of surrogacy requires conceptualising the best interests of the child through a welfare checklist which reflects international human rights standards.

Recognition of the best interests principle as a right

The concept of the best interests of the child is recognised as a three-fold concept: a right, an interpretative principle and a rule of procedure. In England and Wales, the paramountcy principle recognised in section 1(2) of the 2002 Act, and the checklist set out in section 1(4) guides the court in exercising its powers to make parental orders under section 54 of the 2008 HFEA.[144] "Section 1 of the ACA 2002 sets out that the paramount consideration for the court is the lifelong welfare needs of each child, with regard to the

[139] The Human Fertilisation and Embryology (Parental Orders) Regulations 2018 (2018 No 1412) sch 1, regulations 2, s 1 and 2. modification suggests in 2002 Act appear as follows: "whenever a court or adoption agency is coming to a decision relating to the adoption of 'the making of a parental order in relation to' a child. The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life."
[140] Adoption and Children Act 2002 s 1 (2) is modified by the HFER 2018, reg 2, sch 1 para 2.
[141] Adoption and Children (Scotland) Act 2007 s 14(3) is modified by the HFER 2018, reg 3 and sch 2 para 2.
[142] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 8.8.
[143] ibid 8.116.
[144] *Re D (Children) (Surrogacy: Parental Order)* [2012] EWHC 2631 (Fam) [19].

welfare considerations set out in section. 1(4)."[145] As such, the court is mandated to consider the best interests of the child as its paramount consideration.

In Scotland, the Adoption Children (Scotland) Act 2007 also recognises "the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration."[146] There is no checklist as to the assessment of a child's welfare in the 2007 Act. Therefore, the courts have to consider all the circumstances of the case.[147] Nevertheless, the Act provides:

> The court or adoption agency must, so far as is reasonably practicable, have regard in particular to:
> (a) the value of a stable family unit in the child's development,
> (b) the child's ascertainable views regarding the decision (taking account of the child's age and maturity),
> (c) the child's religious persuasion, racial origin and cultural and linguistic background, and
> (d) the likely effect on the child, throughout the child's life, of the making of a parental order.[148]

There are two observations to consider in respect of the recognition of the best interests principle as a right in the context of surrogacy in the UK. Firstly, adopting the welfare principle in cases before 2008 HFEA suggests that as there is a valid public policy behind the prohibition of commercial surrogacy, the welfare of the individual child was not considered the paramount consideration: "given that there is a wholly valid public policy justification lying behind section 30(7) of the 1990 Act, welfare considerations cannot be paramount but, of course, are important."[149] This suggests that when there is a clear public policy protecting the welfare of children, the welfare of an individual child cannot be considered as paramount. However, even though the public policy on commercial surrogacy has not been changed, after 2010, the court considers the welfare of the individual child as a paramount consideration.

The second observation is that recognising the best interests principle as the court's paramount consideration has highlighted the difference between protecting the best interests of children as a public policy and protecting the rights of an individual child as a principle. The best interests of the child are recognised as a right, which has the effect of "lifelong" welfare based on any decision made concerning the individual child. The court observed, related to the adoption of the 2010 HFEA Regulations, that, "the policy purpose is to ensure parity with adoption legislation; that clearly is sound policy given the like

---

[145] *Re G (Parental Orders)* [2014] EWHC 1561 (Fam) [53].
[146] Adoption and Children (Scotland) Act 2007, s 14(3).
[147] ibid 14(2).
[148] Adoption and Children (Scotland) Act 2007 s 14 (4), as applied and modified by the 2018 Parental Regulation, reg 3 sch 2 para 2.
[149] *X & Y (Foreign Surrogacy) (Legal parenthood: Parental order)* (n 21) para 20.

effects of each order on child and the applicants."[150] According to Mr Justice Hedley, legislators have given "lifelong" perspective to the welfare concept by importing the principle, through the 2010 HFEA Regulations in the context of surrogacy arrangements.[151] As such, the court is mandated by legislation to consider the best interests of the child in granting a parental order.[152] As a result, in parental order proceedings, even if the requirements under section 54 are satisfied, the court has to go on to consider whether each child's welfare needs will be met by the court making a parental order.[153] In the case *Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports),* the significance of the consideration of the welfare of the child was highlighted as follows:

> "As the welfare of the child has to be considered from a lifelong perspective rather than just through childhood and the court must have regard to the welfare checklist as set out in section 1 of the ACA 2002: the welfare of the child is no longer simply one consideration among many, but rather the consideration which should override all others."[154]

Accordingly, the court should adopt the "lifelong" perspective of welfare: "it seems reasonable that the court should adopt the 'lifelong' perspective of welfare in the Adoption and Children Act 2002 rather than the 'minority' perspective of the Children Act 1989."[155] What the court suggests by this is that as the parental order confers a permanent status on a child, the court should not consider only current circumstances, but should consider factors that would affect the individual child "lifelong". Accordingly, the court is directed to make a parental order to uphold the best interests of the individual child over general public policies. However, the main shortcoming of this provision is that the criteria that are listed to be considered by the court in deciding a parental order do not provide adequate guidance in the context of surrogacy. The Law Commissions propose a new set of criteria to be included as the welfare consideration in the context of surrogacy with an understanding of the context and conflicts of interests in a surrogacy arrangement.[156]

Recognition of the best interests principle as a rule of procedure

The best interests also encompass procedural justice. As such, assessing and determining the best interests of the child requires procedural guarantees.[157] The consideration of the

---

[150] *Re IJ (A Child) (Foreign Surrogacy Agreement: Parental Order)* [2011] EWHC 921 [8].
[151] Mark Hedley, 'The Legal Implications of International Surrogacy Agreements: A View from the Bench in England and Wales' in M Jens Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019) 139.
[152] HFER 2010 No. 985 sch 1, Regulation 2. as modified the s 1(4) of the Adoption and Children Act 2002.
[153] *Re G (Parental Orders)* (n 145) para 53.
[154] *Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports),* Also known as: *Re X v Y, L (Children)* [2015] EWFC 90 [61].
[155] *X & Y (Foreign Surrogacy) (Legal parenthood: Parental order)* (n 21) para 20.
[156] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 8.116.
[157] 'General Comment No. 14 (2013) (UNCRC) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para1) CRC/C/GC/14, Adopted by the committee at sixty-second session (14 January – 1 February 2013)' IA 6c.

best interests of the child should not only be considered from the perspective of the vulnerability of the child (protectionist approach) but also from the perception that the child is a rights-holder (rights-based approach), and their rights should not be compromised or taken away at the expense of the actions and decision of adults. For this purpose, to uphold the best interests of the child practically, there should be procedural guarantees which protect the child's right as an autonomous rights-holder. As a general rule, since the minor does not have the *locus standi in judici*, they cannot institute or defend any legal proceedings by themselves. Therefore, in England and Wales, the Children's Act 1989 contains provisions to appoint a *guardian ad litem* in any specified proceedings to safeguard a child's interests.[158] It is important to protect the interests of the child, who is the silent stakeholder of the surrogacy arrangement, by appointing an independent legal representative. When disputes arise from surrogacy arrangements, any adult claim may affect the interests of the child and therefore, the interests of the child should be independently promoted.[159] Apart from this, when there is an application for a parental order, the court will appoint a parental order reporter (POR).[160] The court defines a POR as "an officer of the service or a Welsh family proceedings officer appointed to act on behalf of a child who is the subject of parental order proceedings."[161] Practically, the court will ask CAFCASS to provide a POR. The main role of the POR is to investigate whether criteria under section 54 of the HFEA are satisfied and assess the best interests of the child in the circumstances.[162] However, it is suggested that consideration of welfare by an independent authority would be more effective if commenced before the conception or birth of the child. As such, pre-birth best interests determination is important in protecting the best interests principle as a procedural right in the context of surrogacy, which is absent in the UK context. Moreover, when there is a foreign element to a case, the court has often obtained expert legal opinion as to the current law concerning the foreign country.[163] This would have been effective if there had been a mechanism of pre-approval of international surrogacy arrangements through a court. Moreover, whenever a case for a surrogacy arrangement comes before the court, there should be an expedited resolution by a judge who has expertise in the area. Mr Justice McFarlane has suggested that these cases should be considered of similar complexity and importance to those of intercountry adoption, saying that, "in my view [there are] strong grounds for any parental order application that involves an international element being transferred to one of the nominated intercountry adoption country courts or to the High Court at the first

[158] Children Act 1989, s 41.
[159] *G v G* (n 99) para 14.
[160] Part 13 of the Family Procedure Rules – proceedings under s 54 of the Human Fertilisation and Embryology Act 2008, Regulation 13.5 (1)(a)(iii).
[161] ibid, regulation 13.1 (2).
[162] *Re A (Parental Order: Domicile),* Also known as*: A v SA* [2013] EWHC 426 (Fam) [2013] 2 WLUK 378 [2014] 1 FLR 169 [2013] Fam Law 675 (Family Division) [5].
[163] *Re G (Surrogacy: Foreign Domicile)* (n 75) para 4.

directions hearing."[164] Judges must be aware of the surrogacy laws; if not, any determination without knowledge of the law will undermine the best interests of the child. In the case of *G v G,* the court considered that the parental order concluded by the family judge suffered from several procedural flaws. However, the court acknowledged the reason for such a knowledge gap:

> "Although I have expressed blunt criticism of the procedure there, I recognise that, whilst I have become familiar with the law relating to surrogacy, few, if any, circuit judges will have encountered it and when, as here, they do, they are likely to find, as here, that it appears entirely with not a lawyer in sight."[165]

Therefore, there is a consideration of work allocation, especially with surrogacy cases. The Family Court (Composition and Distribution of Business) Rules 2014 provide guidance according to which surrogacy cases should be heard before which judge.[166] The case of *Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports)*[167] also provides guidance on parental order procedure and recommends allocating cases to certain courts and judges.[168] This is one of the important considerations in upholding the best interests of the child through enhancing the rule of procedure. Moreover, judges have also taken measures to protect the privacy of the child by placing restrictions on the reporting of surrogacy cases. This indeed provides protection for the child's right to identity as well as their privacy.[169]

Recognition of the best interests principle as an interpretative legal principle

There is no universal definition of the principle of the best interests of the child; however, most countries recognise the standard of the best interests of the child as one of the legal principles in law. This is the case also in the UK where the best interests of the child principle in the context of a surrogacy arrangement is recognised in legislation. Accordingly, the UK court is bound to consider the standard of the best interests of the child in interpreting the provisions of HFEA and solving surrogacy disputes. A decision that is taken considering this standard affects a child's entire life, as it determines the child's legal status. Therefore, as Hedley J observed in the context of surrogacy arrangements, legislators have given a "lifelong" perspective to the welfare concept by

---

[164] ibid 52 (c).
[165] *G v G* (n 99) para 45.
[166] Family Proceedings Senior Courts of England And Wales Family Court, England And Wales: The Family Court (Composition and Distribution of Business) Rules 2014 No. 840 (L. 13).
[167] *Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports)* (n 154).
[168] ibid [73]: especially, it provides that cases in London should be allocated to Justices Pauffley, Theis or Russell.
[169] *Cumbria CC v X* [1990] 1 WLUK 71 Times, June 25, 1990 [1990] CLY 3204. *R (on the application of TT) v Registrar General for England and Wales* [2019] EWHC 2384 (Fam). See also *Re W(Minors)* [1991] 1 WLUK 534 [1991] FCR 419 Guardian, October 31, 1990 [1990] CLY 3171. Re W (Minors) (Surrogacy) [1991] 1 FLR 385 [1991] 1 WLUK 485 [1991] Fam Law 180 [1991] CLY 2586 (Family Division). *Mandy Case, Robert Case v News Group Newspapers Limited* 2007 WL 1058399 (Queen's Bench Division). *S v H* [2015] EWHC 3313 (Fam) [2015] 10 WLUK 647 (Family Division).

importing that principle, through the HFEA 2008.[170] As such, the court is mandated by legislation to consider the best interests of the individual child (individual approach) in granting a parental order.[171] The court was of the view that "[…] like an adoption, a parental order both confers lifelong status on the applicant and deprives those who until then had parental status of that status on a lifelong basis."[172] The court does not explicitly recognise the difference between the general approach to the best interests of the children as a policy and the individual approach to the best interests of the child as a principle. However, when there is a dispute, this difference cannot be ignored. The court's discretion in granting the parental order cannot override the underlying policy (protection of children generally) of the principal Act, but when courts exercise their discretion under the main Act, the first consideration should be the "paramountcy of the welfare of the child".[173] So, recognition of the best interests of the child as an interpretive legal principle is subject to severe criticism which will be examined in the following section.

3.5 COURTS' INTERPRETATION OF CRITERIA UNDER SECTION 54 OF THE HFEA 2008 AND CONSIDERATION OF THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

The court's interpretation of section 54 demonstrates the challenges the UK faces in the absence of an international consensus on regulating the practice of surrogacy and given the need to balance public policies concerning the protection of children generally and the rights of an individual child in the context of domestic and cross-border surrogacy arrangements. There is much academic literature concerning critique of court interpretations of section 54.[174] Among them, one of the main arguments is that the court has disregarded the general public policies for the regulation of surrogacy.

This view is supported by a number of academics.[175] However, a counter view has also been presented concerning the interpretation of the criteria in section 54, which claims that the majority of these "[…] conditions are absolute, with no scope at all for the court to make a parental order when it is not satisfied."[176] Further, some conditions under

---

[170] Hedley (n 151) 139.
[171] HFER 2010 No. 985, sch 1, Regulation 2. as modified the s 1(4) of the Adoption and Children Act 2002.
[172] *G v G* (n 99) para 33.
[173] See the below section for a detailed analysis of how an individual child's interests are upheld by the UK courts.
[174] See generally Katarina Trimmings, 'Cross-Border Surrogacy' in Paul Torremans (ed), *Cheshire, North & Fawcett's Private International Law* (Oxford University Press 2017); Gamble (n 81); Michael Wells-Greco, 'United Kingdom', *International Surrogacy Arrangements* (Hart 2013); Kathryn Cronin and Jemma Dally, 'Parentage, Parental Orders and Surrogacy Arrangements-International Case Practice' [2018] International Family Law Journal 131; Horsey and Sheldon (n 58); Claire Fenton-Glynn, 'The Regulation and Recognition of Surrogacy under English Law: An Overview of the Case-Law' (2015) 27 Child and Family Law Quarterly 83. Fenton- Glynn (n 107); Claire Fenton-Glynn, 'Re-Interpreting Section 54 HFEA: How Far Is Too Far?' [2016] Family Law Journal 656; Norrie (n 5); and Brown (n 23).
[175] Brown (n 23). Amel Alghrani and Danielle Griffiths, 'The regulation of surrogacy in the United Kingdom: the case for reform' 29 Child and Family Law Quarterly 165.
[176] McK Norrie (n 5) 110.

section 54 give discretion to the court, but that "discretion is affected by consideration of welfare."[177] Indeed, some of these judicial efforts were to ensure that children should not be deprived of family life.[178] These arguments can be examined through the case law concerning the court's interpretation of section 54 of the HFEA. While there is a tension between public policy and the welfare of the child, this report considers it is inevitable, as balancing the best interests of children generally against the best interests of the individual child is a difficult task. This report recognises the validity of the above argument that judicial discretion is affected by consideration of a child's welfare and this study illustrates and suggests that the decided cases clearly show how the UK courts have used the best interests of the child principle as an interpretative principle to fulfil the conditions under section 54 without harming the general policy behind the main Act or rights of the individual child concerning legal parenthood; the courts have justified their rulings with well-developed principles in law within their *parens patriae* jurisdiction. Undeniably, these principles guide other jurisdictions when there is a disparity in law concerning the establishment of parenthood in an international surrogacy arrangement.

3.6.1 The consent of the gestational mother and the "other person who is a parent of the child"– sections 54(6) and 54A(5)

One of the main requirements of regulating international surrogacy is to recognise the relationship between the gestational mother and the child. In the UK, to make a parental order, the court must be satisfied that the surrogate mother, and (if there is one) any other parent of the child (who is not an applicant), have consented freely, with the full understanding of what is involved and agreed unconditionally to the making of the order.[179] If the surrogate mother is married at the time of the treatment and even if the embryo carried by her was not created with the sperm of her husband, and regardless of whether she lives in the UK or elsewhere, her husband will be treated as the father of the child.[180] If the surrogate mother is not married, then the other parent is determined according to the genetic connection or the expressed intention of the other parties. Obtaining the other parent's consent to uphold the best interests of the child was not considered a significant requirement. The court has disregarded the other parent's consent in the case where the surrogate's husband played no part in the conception.[181] This rationale was followed by an international surrogacy case of *AB v CT*.[182] The court held that even though the surrogate was married at the time when the surrogacy took place, the evidence confirmed that there was no involvement of her husband in the surrogacy arrangement. Therefore, the court held that as the surrogate's husband did not

[177] ibid.
[178] Mary Welstead, 'Familial Relationships: Judicial Discretion v a "bright Line" Rule' [2017] Family Law 65.
[179] Human Fertilisation and Embryology Act (HFEA) 2008, ss 54(6) & 54A(5).
[180] ibid 35.
[181] *Re G (Surrogacy: Foreign Domicile)* (n 75).
[182] *AB v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12 (Family Court).

consent to the surrogacy arrangement, his consent to the parental order was not necessary.[183] In a similar way, *JB*[184] following *Re G* and *AB v CT* held that as the context shows that the surrogate mother's husband had played no part in the surrogacy arrangement, he could not be considered as the father according to section 35(1) of the HFEA 2008.

Nevertheless, obtaining the surrogate mother's consent is an important feature of the HFEA which promotes the main policy objective of the Act, that is "whilst gratuitous surrogacy is not unlawful, a surrogacy agreement is unenforceable."[185] The reason behind this rule is recognition of the relationship between the child and the surrogate mother and that her consent to transfer legal parenthood promotes the best interests of the child. Thus, the transfer of legal parenthood depends on the surrogate mother's consent. It has also been argued that "the obtaining of the necessary consents is a condition precedent that must be satisfied before the court can turn its attention to the welfare of the child."[186] Moreover, the consent should not be obtained less than six weeks after the birth of the child and if obtained, such consent is ineffective.[187] The court always considers it important to obtain the consent of the surrogate mother after the birth, because "a surrogate mother is not merely a cipher. She plays the most important role in bringing the child into the world. She is a 'natural parent' of the child."[188] This study agrees with this view and considers that it has rightly been held that:

> "The act of carrying and giving birth to a baby establishes a relationship with the child which is one of the most important relationships in life. It is therefore not surprising that some surrogate mothers find it impossible to part with their babies and give consent to the parental order. That is why the law requires that a period of six weeks must elapse before a valid consent to a parental order can be given."[189]

The court reiterates the importance of obtaining consent from the surrogate mother and it requires that the parties should take all reasonable attempts to satisfy this requirement.[190] If the intended parents take reasonable steps to locate the surrogate mother but are unsuccessful in their attempt, the court can disregard this requirement.[191] However, the court is very cautious in disregarding a surrogate mother's consent in such instances, and must elaborate on the facts that have been taken into consideration in applying the exception. Moreover, if the surrogate mother cannot be found or if she is married and her husband who is required to give consent cannot be found or if either are

---

[183] ibid 47 & 48.
[184] *JB (A Child) (Surrogacy: Immigration), Re* Also known as: *KB v RT* (n 119) para 50.
[185] *G v G* (n 99) para 27.
[186] Norrie (n 5) 102.
[187] Human Fertilisation and Embryology Act (HFEA) 2008, ss 54(7) & 54A(6).
[188] *Re D (Children) (Surrogacy: Parental Order)* (n 144) para 25.
[189] ibid.
[190] *Re WT* [2014] EWHC 1303 (Family Division).
[191] *LB v SP* [2016] EWFC 77 [19–20]: it was reported that when trying to locate the surrogate mother her address was given to the intended parent, which was an address in Nepal.

incapable of giving consent, then the court can disregard the requirement to obtain consent.[192]

There are also instances where the surrogate mother refuses to give consent for the parental order to be granted. The English court has been of the view that "[…] the natural process of carrying and giving birth to a baby creates an attachment which may be so strong that the surrogate mother finds herself unable to give up the child. Such cases call for careful and sensitive handling by the law."[193] Unlike in adoption, in parental order proceedings the court is unable to dispense with the consent of the surrogate mother.

There is a concern that the requirement for a surrogate mother's consent to the grant of a parental order is one of the reasons that UK parents opt for international surrogacy arrangements; they may fear that the surrogate mother will change her mind.[194] Nevertheless, in the context of ISA, even if the country of birth of the child considers the intended parents as the legal parents, the UK law deems the surrogate mother as the legal mother of the child[195] and her consent to the making of the parental order must be obtained.[196] The court has made it clear that the "statutory requirement for consent is a fundamental element of surrogacy law in this country [and] that a parental order should normally only be made with the consent of the woman who carried and gave birth to the child. This applies equally whether the surrogate mother is present in this jurisdiction, or another one."[197] Thus, the difficulty in obtaining the consent of a surrogate mother in an international context is equally apparent. In the UK, intended parent/s can obtain a declaratory judgment.[198] However, there is no automatic recognition of foreign judgments if such judgements are obtained from another country according to the law of that country.[199] In the context of ISA, the general procedure is that the intended parents must apply to the British Consulate in the state where the child was born for the child to be registered as a British citizen. The child will then child be issued with a British passport or emergency travel documents to allow the child to leave the country of birth with the intended parents. For this purpose, the intended parents have to produce the surrogacy agreement, that is documents confirming: payment for the service of surrogacy, 'no objection' from the surrogate mother to grant an exit visa for the child, that the surrogate mother relinquishes the child to the intended parents and no objection to granting of

---

[192] Human Fertilisation and Embryology Act (HFEA) 2008, ss 54(7) & 54A(6).

[193] *Re TT, also known as CW v NT, (a child, by her guardian Joanne Farnsworth*) [2011] EWHC 33 (Fam) [1].

[194] Helen Prosser and Natalie Gamble, 'Modern surrogacy practice and the need for reform' (2016) 4 Journal of Medical Law and Ethics 257, 262.

[195] Human Fertilisation and Embryology Act (HFEA) 2008, s 33(3).

[196] *LB v SP* (n 191) para 13.

[197] *AB v CT (Parental Order: Consent of Surrogate Mother)* (n 182) para 54.

[198] *Re Z (A Child) (Surrogate Father: Parental Order), Also known as: Z (A Child) (Human Fertilisation and Embryology Act: Parental Order), Re, Z (A Child) (Surrogacy: Parental Order)* [2015] EWFC 73 [2]'Following Z's birth, the father obtained a declaratory judgment responsibilities for Z and establishing the father's sole parentage of Z.'

[199] In comparison to intercountry adoptions. See 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption Art. 23.

British citizenship to the child. In an ISA context, therefore, if the surrogate mother's consent is not obtained timely and in the requisite form, the child and the applicant have to face hardships and delays in obtaining a parental order in the UK. If the surrogate mother's consent has not been obtained through the prescribed form, A101A (agreement to the making of a parental order), the court can consider any separate agreement which confirms the surrogate's consent to relinquish the child to the intended parents according to rule 13.11 (1) Family Procedure Rules 2010.[200] These signed documents should also be translated into the surrogate mother's language and should be notarised in accordance with the Rule 13.11 (4) Family Procedure Rules 2010. Moreover, according to the Family Procedure (Adoption Rules) 2005/2795 "any form of consent executed outside the United Kingdom must be witnessed by specified persons, including notary public, and in those circumstances the court has the power to accept this as evidence of consent."[201] Moreover, according to Part 13 of the Family Procedure Rules 2010, for the respondent to be served with the application for a parental order, the "rule 13.6 provides [that] the applicants must, within 14 days before the hearing [...] serve on the respondents (a) application; (b) a form for acknowledgement of service; and (c) a notice of proceedings." As such, obtaining the consent of the surrogate mother and, if she is married, then from her husband is mandatory. Moreover, mere consent after a child's birth is not sufficient. The court has emphasised the need to obtain the consent of the surrogate mother before granting the parental order:

> "I was satisfied that the qualifying conditions set out in sections 54(1) — (7) were satisfied in this case. I take the liberty, however, of underlining the six-week requirement for consent in section 54(7), which parallels our adoption legislation: this will often require a second consent to be obtained as the overseas law may require consent at or before birth or handing over of the child."[202]

Obtaining a surrogate mother's consent is not an easy task in an international context. In the case of *R v T*[203], Mrs Justice Theis alerted the prospective parents to this and provided guidance to avoid such difficulties in the future.[204]

The UK does not recognise a foreign judgment considering the establishment of parenthood. So, the requirement of obtaining consent cannot be dispensed with by proving that such consent was given in foreign legal proceedings. Sometimes, the intended parents need to be more cautious in establishing parenthood abroad, as this may violate UK law. For example, in *Re G*[205] a same-sex couple resorted to a commercial surrogacy arrangement in Iowa in the US and the twins were born and intended parents each had a biological connection to one of the children. The intended parents followed

[200] *Re A, Also known as: A v X* (n 112) para 31.
[201] *Re WT* (n 190) para 29.
[202] *Re IJ (A Child) (Foreign Surrogacy Agreement: Parental Order)* (n 150).
[203] *R, S v T (Surrogacy: Service, Consent and Payments)* [2015] EWFC 22
[204] ibid 2.
[205] *Re G (Parental Orders)* (n 145).

the legal procedure in Iowa to establish parenthood. They first obtained the consent of the surrogate mother, and the children were released into the custody of the intended parents. Then the applicants established the biological connection with the children, filing the documents with the district court and the birth certificates were changed removing the names of the surrogate mother and her husband and replacing them with the names of each biological father. Finally, each intended father obtained a decree of adoption concerning the other child who was not biologically connected. As a result, in Iowa, the applicants had equal parental rights to both children. The last step that was taken by the intended parents became an issue when they applied for a parental order in the UK. The court had to consider whether the intended parents were in breach of section 83 of the ACA 2002.[206] The court observed that the intended parents acted in good faith and complied with all relevant authorities both in the US and UK. Consequently, the court considered whether the s 54 criteria were fulfilled. The court observed that this was indeed the case and then went on to consider the welfare requirements under sections 1 and 1(4) of the ACA 2002. The court held that the parental order should be made to protect the child's welfare needs.[207]

In all these circumstances, while the court was mindful of general public policy and obtaining the surrogate mother's consent, the court also considered the significance of protecting the interests of the individual child. There are instances when the court has opted for a parental order when the surrogate mother could not be found. However, there are also instances when the court has refused to make a parental order, for example, when applicants resorted to commercial surrogacy in Georgia and failed to obtain the consent of the surrogate mother.[208] In that case, the court decided to follow the order in *JP v LP*[209] and refused to make a parental order. However, considering the best interests of the child under the Children Act 1989, the court ordered that the child should remain a ward of the court and made a shared residence order.[210]

Surrogate mother's objection/change of mind and subsequent action which impacts on the best interests of the child

The requirement for consent of the surrogate mother is an important criterion to obtain the parental order. However, it also provides for checks and balances to protect not only vulnerable children but also vulnerable surrogate mothers from possible exploitation. The

[206] ibid 7. Theis J of the view that, "There are, of course, very important policy considerations that underpin s. 83 ACA 2002 to regulate entry of children into this jurisdiction who have been the subject of foreign adoption, and who have not gone through the requisite procedures. That is set out very clearly in the relevant Convention provisions. Whether it was intended to cover the situation that arose in this case in the context of a surrogacy arrangement where an application is made for a parental order may be open to debate." See also *Re Q (A Child) (Parental Order: Domicile), Also known as: CC v DD* [2014] EWHC 1307 (Fam) [36].

[207] See also *Re A (Parental Order)* (n 98).

[208] *Re D (A Child)* [2014] EWHC 2121.

[209] *JP v LP (Surrogacy Arrangement: Wardship)* [2014] EWHC 595.

[210] *Re D (A Child)* (n 208).

court has considered this matter in the case of *Re Z*.[211] In this case, the intended parents, a same-sex couple, met the surrogate mother via the internet and entered into a surrogacy arrangement. Conception took place in a clinic in Cyprus and two embryos were placed in the surrogate mother's uterus. The court highlighted that there was no screening of suitability of either the surrogate or the commissioning parents.[212] The surrogate mother was a vulnerable young woman in her early twenties with learning difficulties, who lived on a limited income. There was a miscarriage, and the surrogate mother hid the fact that one child survived. The intended parents learnt about this prior to the birth. However, before the child's birth, the surrogate mother refused to consent to relinquish the child. Subsequently, the intended parents launched legal proceedings against the surrogate mother claiming that she behaved deceitfully, and it was not in the best interests of the child to let them live with her. The surrogate mother objected to the parental order and claimed that the intended parents used her and treated her in an "unsympathetic and demeaning" way. The court considered the best interests of the child and granted the custody of the child to the surrogate mother. In the Court of Appeal, the decision was confirmed.[213] The court observed that regardless of genetic connection, the surrogate mother was considered as the legal mother of the child in the UK. Moreover, to make a parental order, the surrogate mother should consent with full understanding. The court was of the view that "[g]iven the difficulties that [X surrogate mother] has in comprehension and the limitations to her cognitive abilities, it is questionable whether she had a full understanding of the process at any stage."[214] Therefore, the court was of the view that section 54(6) had not been met and therefore the court refused to make the parental order.[215] Considering the lifelong interests of the child, the court held that the child should remain with the birth mother and made a temporary child arrangements order allowing the applicant to contact the child. Moreover, considering the practicality and the best interests of the child, the court also made a parental responsibility order conferring parental responsibility on the birth mother's husband, whom the court considered as a "psychological parent".[216] This is another example of how the law relating to surrogacy in the UK, as it stands today, protects vulnerable women and children. If the surrogate mother had not been considered as the legal mother at birth, the court would not have had any power to order that the surrogate mother should remain the legal mother, regardless of the genetic connection, in which case possible damages might simply have been a compensation to the surrogate mother.

---

[211] *Re Z (A Child) (Surrogacy Agreements: Child Arrangements Orders), Also known as: Re A v X, M (A Child)* [2016] EWFC 34.
[212] ibid 2.
[213] *Re Z (A Child) (Surrogacy Agreements: Child Arrangements Orders), Also known as: Re A v X, M (A Child)* (n 211).
[214] ibid 7.
[215] ibid 84.
[216] ibid 127.

In a different case, the court observed that there were unique considerations in applying the welfare principle in a surrogacy dispute as opposed to a conventional case of separated parents.[217] Nevertheless, at the same time, the court concluded that the welfare principle "applied with full force in such cases" as "the more unusual the facts, the greater the need to keep the child at the heart of the decision."[218]

Welfare considerations have led the court to different decisions in different cases, depending on the circumstances of the case. For example, in *Re AB (Surrogacy: Consent),* a surrogate mother and her partner objected to the making of the parental order and the court was of the view that "their rationale for refusing their consent was due to their own feelings of injustice, rather than what is in the children's best interests."[219] Nevertheless, the court did not make a parental order, demonstrating that the court followed the general approach of the best interests of the children rather than the individual approach to the principle. The court considered the requirement of "consent of the surrogate mother," adhering to the policies of the main Act. However, when the surrogate's action became prejudicial to the child's status through the surrogate's action of fraudulence,[220] or desire to gain financial benefits,[221] or to harm the child's identity or privacy,[222] the court considered the best interests of the child, took action to protect the interests of the child and disregarded the surrogate mother's lack of consent when making child arrangements or an adoption order.

Surrogate mother's denial of the existence of the surrogacy agreement

There are instances when the surrogate mother not only refuses to consent but refuses to accept that there is a surrogacy agreement between the parties. In the case of *H v S,*[223] two men (H and B) claimed that there was an agreement between them and the surrogate mother to have a child through surrogacy and to raise that child as co-parents, also letting the surrogate mother play a role in the child's life. The surrogate mother rejected this claim arguing that no such agreement existed, although H had acted as the sperm donor, and sought take on the role as the child's main parent and carer. She also rejected B playing any parental role in the child's life. The court held that there was no dispute about the law that applies, but the court was concerned with the welfare of the child:[224]

> […] it is not the function of this court to decide on the nature of the agreement between H, B and S and then either enforce it or put it in place. It is the function of the court to decide what best serves the interests and welfare of the child throughout her childhood.[225]

---

[217] *Re H (A Child) (Surrogacy Breakdown)* [2017] EWCA Civ 1798 para 4.
[218] ibid.
[219] *Re AB (Surrogacy: Consent), Also known as: C v E* [2016] EWHC 2643 (Fam).
[220] *Re N (A Child) Also Known as: Re P (Surrogacy: Residence)* [2008] 1 FLR 177.
[221] *Re W (Minors) (Surrogacy)* [1991] 1 F.L.R. 385.
[222] *Re MW (Adoption: Surrogacy)* [1995] 2 FLR 759.
[223] *Re M (A Child), Also known as: H v S (Disputed Surrogacy Agreement)* [2015] EWFC 36.
[224] ibid 125.
[225] *Re M (A Child), Also known as: H v S (Disputed Surrogacy Agreement)* [2015] EWFC 36.

Accordingly, the court, considering the welfare of the child, made a child arrangements order giving both the biological father and his partner parental responsibility and ordered the surrogate mother limited supervised contact with the child. The court also placed some restrictions on the birth mother regarding the dissemination of information on the proceedings in social media[226] and whenever the child's privacy might be at stake.[227]

Surrogate mother's consent and the best interests of the child/ren: Analysis

The consent of the surrogate mother is an important consideration in making a parental order. Indeed, recognition of the surrogate mother's relationship with the child protects the interests of children against child trafficking and abuse. Moreover, such recognition upholds the child's individual interests as it recognises "relational welfare" and protects both the interests of the child and the surrogate mother. Recognition of the surrogate mother's relationship is the key provision in conceptualising the best interests of children for determining legal parentage and protecting individual interests, as the legislation does not take away the surrogate mother's rights towards the child.

There are several contributing reasons for recognising the surrogate mother as the legal mother. First, surrogacy distorts the relationship between a mother and child, and conceiving a child to give him/her to someone else has been considered as "the wrong way to approach pregnancy."[228] Second, such an agreement is damaging to the child's bond with the carrying mother, which is considered to be strong.[229] Third, where a child is obtained through a commercial agreement, it is considered as degrading the status of the child to that of commercial goods.[230] Fourth, vulnerable women may be used to breed children for people who have power and wealth.[231] Fifth, pregnancy is not without risks and could result in mothers being depressed and susceptible to hysterectomy or death. The state's oversight, therefore, is also concerned with their citizens engaging in a high-risk trade to earn money or such a woman being forced to part with a child she has given birth to against her will; such acts demean the position of a woman as a mother. " [...] Motherhood"' cannot be divorced from gestation, because reproduction has to do with

[226] ibid 38 - 40 and 137.
[227] *S v H* [2015] EWHC 3313 (Fam) 20–21.
[228] 'Report of the Committee of Inquiry into Human Fertilization and Embryology (Warnock Report) 1984' (n 45) para 8.11.
[229] ibid.
[230] David M Smolin, 'Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children' (2016) 43 Pepperdine Law Review 265.
[231] Varada Madge, 'Gestational Surrogacy in India' in Sayantani DasGupta and Shamita Das Dasgupta (eds), *Globalization and Transnational Surrogacy in India: Outsourcing life* (Lexington Books 2014). Jennifer Lahl, 'Gestational Surrogacy Concerns: The American Landscape' in E Scott Sills (ed), *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues* (Cambridge 2016).

the use not merely of one's sexual organs, but one's embodied self as a whole."[232] All these factors collaboratively have a major impact on the best interests of the child. On the one hand, just as recognising the birth mother is significant for the child's right to know their origin and identity, so is recognising the relationship between the surrogate mother and the child. Children's welfare is perceived as "relationship-based welfare,"[233] thereby conceptualising the best interests of children generally by stating there is a need to recognise the relationship of the child with the surrogate mother. This "relationship-based welfare" also justifies that when there is a legitimate claim from the intended parents, the legal parenthood should be recognised through a parental order considering the best interests of the child. Against this background, a relational approach to surrogate motherhood has been proposed by recognising multifaceted relationships and the contribution all parties have with the child.[234] This approach is endorsed in this report and proposes that, as surrogacy occurs in a complex social context, a relational model of surrogacy should be adopted which can deal with the multidimensional determination of motherhood and parenthood, and the rights and roles of the parties involved. It is suggested here that the current UK approach complies with the "relational approach" which conceptualises the best interests of children devising a parenthood model that recognises the significance of the birth mother's relationship and the intention of the intended parents, but subject to the determination of the best interests of the individual child.

The cases discussed in this section show that where the surrogate mother refused to give consent in parental order proceedings, the court respected the HFEA 2008 Act and instead dealt merely with parental responsibility. Accordingly, it either made a child arrangements order and gave physical custody of the child to the surrogate mother[235] or the intended parent(s).[236] Alternatively, in rare cases, the court sought to transfer legal parenthood and, to achieve that, made an adoption order in favour of the intended

---

[232] Tatiana Patrone, 'Is Paid Surrogacy a Form of Reproductive Prostitution?' (2018) 27 Cambridge Quarterly of Healthcare Ethics 109, 120. See also Gila Birnbaum, 'Surrogacy, Autonomy and the Surrogate Mother' [1997] UCL Jurisprudence Review 100.

[233] Herring, 'The Human Rights Act and the Welfare Principle in Family Law - Conflicting or Complementary?' (n 15) 232. Jonathan Herring, 'Forging a Relational Approach: Best Interests or Human Rights?' (2013) 13 Medical Law International 32. Jonathan Herring, 'Farewell Welfare' (2005) 27 Journal of Social Welfare and Family Law 159.

[234] Pauline Everett, 'A Relational Defence of Surrogate Motherhood' (Doctoral theses, Durham University 2011) <http://etheses.dur.ac.uk/4464/> accessed 20 June 2020.

[235] *Re TT, also known as CW v NT, (a child, by her guardian Joanne Farnsworth)* [2011] EWHC 33. Re *Z (A Child) (Surrogacy Agreements: Child Arrangements Orders),Also known as: Re A v X, M (A Child)* [2017] EWCA Civ 228.

[236] *Re H (A Child) (Surrogacy Breakdown)* [2017] EWCA Civ 1798. *Re AB (Surrogacy: Consent), Also known as: C v E* [2016] EWHC 2643. *Re X (A Child) ((Private Surrogacy Arrangement: Summary Dismissal of Renewed Application to Reopen Living Arrangement)* [2016] EWFC 54. *Re X (A Child) (No 2) (Private Surrogacy Arrangement: Contact with Birth Family)* [2016] EWFC 55. *Re N (A Child) Also Known as: Re P (Surrogacy: Residence)* [2008] 1 F.L.R. 177. *Re M (A Child), Also known as: H v S (Disputed Surrogacy Agreement)* [2015] EWFC 36.

parent.[237] There is also an example of the court disregarding both the surrogate mother and the intended parents wishes and placing the child for an independent adoption.[238] The court made all these decisions considering that such a decision reflected the best interests of the child.

The UK law protects surrogate mothers. However, there is a concern over whether such protection is needed. The recent Law Commissions' joint consultation paper cited Baroness Mary Warnock's recent expression regarding this:

> "Our law [on surrogacy] now seems to be unduly protective of the surrogate, too much based upon the assumption that she is open to exploitation, which was certainly the assumption that informed" [the Warnock Report]."[239]

At present, in the context of surrogacy in the UK, it is assumed that recognition of gestational parenthood over other types of parenthood would best serve the interests of children. However, one of the main concerns that have been raised against obtaining the surrogate mother's consent after birth is that it unfairly affects the rights of the genetic intended parents and the certainty in the child's life. For this reason, it has been argued that these situations could be avoided by removing the requirement of obtaining the surrogate mother's consent after the birth of the child.[240] Proposed instead is placing a better pre-conception framework with adequate safeguards and conferring parenthood of a surrogate-born child on the intended parents at birth.[241] The Law Commissions have proposed that the intended parents should become the legal parents of the child at birth with no need for them to apply for a parental order.[242] It proposes that the surrogate mother should not be the legal parent of the child at birth for the "new pathway" and therefore, obtaining the surrogate mother's consent is not necessary (regardless of whether the surrogacy arrangement is traditional or gestational).[243] The surrogate mother's consent only becomes relevant when she chooses to exercise her right to object. The proposal states that such an objection should be made in writing to both the intended parents and to anybody responsible for the regulation of surrogacy arrangements.[244] Moreover, she will only have 21 days following the birth of the child[245] to exercise her right to object to the acquisition of legal parenthood by the intended parents.[246] The proposal also suggests that if the surrogate mother exercises her right to object to the acquisition of legal parenthood by the intended parents, the surrogacy arrangement

---

[237] *C v S* 1996 S.L.T. 1387. *Re MW (Adoption: Surrogacy)* [1995] 2 FLR 759.
[238] *Re A* [2014] EWFC 55.
[239] M Warnock, 'Foreword: the need for full reform of the law on surrogacy' (2016) 4 Journal of Medical Law and Ethics 155, 156, cited in 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 1.19.
[240] Alghrani and Griffiths (n 175) 181.
[241] ibid.
[242] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 8.2.
[243] ibid 11.23.
[244] ibid 8.26.
[245] ibid 8.27.
[246] ibid 8.23.

should exit the new pathway and the intended parents would need to go to court to obtain a parental order.[247] Such an objection "will have the effect of legal parenthood reverting to her, subject to a later transfer of parenthood by way of a parental order."[248] Nevertheless, it is proposed by the Law Commissions that, unlike under the current regulation, the court would have the power to dispense with the consent of the surrogate mother[249] in parental order proceedings if the child is living with the intended parents and if the court decides that it is best that the child should live with the intended parents.[250] The proposal leads the court to be more supportive of the intended parents, if as proposed, there will be a list of factors to assess the best interests of the child which prioritises the "intention" of the intended parents. It can be argued that, ultimately, this diminishes the significance of the surrogate mother's right to object and undermines her position. Moreover, given the "inequality of arms", it is very unlikely that the surrogate mother would attempt a legal battle when the law does not confer any legal rights towards the child on her. Therefore, disregarding or statutorily undermining the consent of the surrogate mother should be carefully considered. It should be noted that this change will apply to international surrogacy arrangements.[251] Therefore, problems over legal parenthood in the context of international surrogacy will continue to arise and, indeed, the majority of cases that come before the courts arise from international surrogacy arrangements. The need for an international convention will therefore remain even after the adoption of a new law within the UK.

3.6.2 Applicant/s' status – sections 54(2) and 54A

Initially, only married heterosexual couples could apply for a parental order.[252] The assumption that the best interests of the child could only be protected within a two-parent family was heavily criticised as it could go against the individual's right to procreation[253] and would not represent the social realities of how families are being created.[254] Later, this was changed by section 54 of HFEA 2008. Accordingly, an application for a parental order could be made by two people[255] who must be either husband and wife, civil partners

---

[247] ibid 8.29.
[248] ibid 7.104.
[249] With regard to the surrogate mother's spouse/civil partner, it is proposed that (s)he should not be considered as the legal parent at birth and therefore there would be no need to obtain their consent. ibid 8.9.
[250] ibid 11.51.
[251] ISAs will not qualify for the "new pathway". ibid 8.3.
[252] HFEA (1990) s 30(1). This section was repealed by the HFEA 2008.
[253] Elaine E Sutherland, '"Man Not Included" – Single Women, Female Couples and Procreate Freedom in the UK' (2003) 15 Child and Family Law Quarterly 155.
[254] Rebecca Probert, 'Families, Assisted Reproduction and the Law' (2004) 16 Child and Family Law Quarterly 273, 274 argues that, as a result of the consideration of welfare principle, "the families being created by assisted reproduction may be even more traditional than one might at first assume."
[255] Human Fertilisation and Embryology Act (HFEA) 2008, s 54(1).

of each other or living as partners in an enduring relationship[256] and not within prohibited degrees of relationship.[257] Failure to fulfil these requirements would result in a refusal of the application for a parental order, and a single applicant could not apply for a parental order even after this change. In 2018, the HFEA was amended and now a single intended parent can also apply for parental orders.[258] Two main provisions deal with the status of the applicant in the HFEA 2008. Section 54 contains a provision concerning two applicants, while section 54A, which was inserted into the Act in 2018,[259] contains a provision relating to a parental order application where there is one applicant.

Two applicants

As explained above, initially, it was assumed that to protect the interests of the child, there should be two applicants in parental order proceedings. Generally, courts have adopted a purposive interpretation of the requirement of two applicants. Accordingly, a parental order was granted in favour of applicants living in separate homes but who were in a committed relationship,[260] to applicants who were married but their relationship was platonic and not romantic,[261] and to an applicant when the second applicant, who was also the biological father of the child, had died before the court made any determination as to the parenthood of the child – born of an international surrogacy arrangement.[262] The court correctly pointed out that the concept of identity included legal recognition of the relationship between children and parents, hence, the court is bound to accept a purposive interpretation of section 54.[263] When there was an issue as to the separation of the intended parents, the court has always considered the best interests of the child. In the case of *G v G,*[264] a parental order was obtained in respect of a surrogate-born child by the intended parents. However, after the separation of the intended parents, the genetically-connected parent requested the court to set aside the parental order. The court considered, among other factors but most importantly, the impact on the welfare of the child if the parental order was discharged. The court held that, even though it had the jurisdiction to entertain an application to revoke a parental order, it would not reject the application to set aside the parental order as the consequences that followed would

---

[256] *Re F (Children) (Thai Surrogacy: Enduring Family Relationship), Also known as: P v Z* [2016] EWHC 1594 (Fam). *Re A (Parental Order)* (n 98). Mary Welstead, 'Familial Relationships: Judicial Discretion v a "bright Line" Rule' [2017] Family Law 65 argues that regarding the interpretation of 'enduring family relationship' the judges have taken a very liberal approach and shown ability to understand the complexities of 21st-century family life. They have either used the discretion permitted to them by the statute or where necessary, have used, or 'threatened' to use, the HRA 1998, to ensure that the law is convention compliant and find the existence of 'an enduring family relationship' in many different circumstances.

[257] Human Fertilisation and Embryology Act (HFEA) 2008, s 54 (2).

[258] The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, s 2(5).

[259] ibid.

[260] *M v J Also known as: DM v SJ (Surrogacy: Parental Order)* [2016] EWHC 270 (Fam).

[261] *Re X (A Child) (Foreign Surrogacy)* [2018] EWFC 15.

[262] *A v. P (Parental Order)* [2011] EWHC 1738 (Fam).

[263] ibid 27 and 28.

[264] *G v G* (n 99).

not be in the best interests of the child.[265] In *X v Z,*[266] which concerned a surrogacy arrangement involving Ukraine, the intended parents had separated before the birth of the child and the intended father was genetically related to the child, while there was no genetic connection between the intended mother and the child. As the genetic father did not wish to be involved in the proceedings, the court considered the status of the intended mother to have a legal relationship with the child.[267] Accordingly, the court highlighted that there is a gap in the current surrogacy law:

> […] there appears to be a lacuna in the statutory framework as the HFEA 2008 does not envisage a situation whereby a gestational surrogate is unmarried and the progenitor (Y) indicates, albeit after the embryo transfer (if he knew about or consented to the transfer in December 2016) but before the birth, that he no longer wishes to be a legal parent.[268]

Theis J was of the view that the child was born in Ukraine and was under the care of the intended mother, who was a resident of the UK, and she did not have habitual residence in Ukraine, even though the child had to stay with the intended mother a longer period than expected due to administrative challenges in bringing the child to the UK. Therefore, Article 16 (3)[269] of the 1996 Hague Convention[270] did not apply and the intended mother's parental responsibility for the child in Ukraine did not subsist on arrival in the UK.[271] Consequently, the court considered that, even though the intended mother, who did not have any genetic connection with the child, could not apply for a parental order as a sole parent, she could apply for an adoption order. The court believed that an adoption order could give the child security and stability by securing a long-term relationship with the intended mother. So, the court granted the adoption order according to section 51(3)(b) ACA 2002.

These cases suggest that the court had considered the best interests of the individual child when it interpreted the provisions concerning the applicant's status even though the general policy was to recognise that two persons should be recognised as the intended parents. However, the UK law does not now require two applicants to be intended parents. The best interests of children principle are conceptualised to recognise even a single parent.

---

[265] ibid 44.
[266] *X v Z* [2018] EWFC 86.
[267] ibid 57.
[268] ibid 54.
[269] The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996, Article 16 (1).
[270] ibid.
[271] *X v Z* [2018] EWFC 86 [2018] para 45.

Single parent

Originally, a single parent could not apply for a parental order.[272] There were cases where single parents were unable to apply for a parental order under the HFEA, but were able to apply for an adoption order subject to the provisions of the Adoption of the Children Act 2002.[273] In the case of *Re Z,*[274] the court rejected a parental order application made by a sole parent who had a genetic connection to the child. The applicant argued that the "two people" requirement in section 54(1) goes "against two cardinal principles of 21st-century family law: that there should be no discrimination against the increasingly different kinds of family which society is creating: and that the child's welfare remains the court's paramount consideration."[275] Therefore, the applicant argued that section 54 should be "read down" in accordance with section 3(1) of the Human Rights Act 1998.[276] The court was of the view that the legislative intent behind this provision was based on the rationale that parental responsibility was "[…] likely to be better handled by a couple than a single man or a woman"[277] and "the principle that only two people – a couple – can apply for a parental order has been clear and prominent." However, in the case of *Re Z (A Child) (No.2)*,[278] the court found that the distinction between single parents and a couple amounted to a violation of the right to non-discrimination (Art.14) and the right to private life enshrined in Article 8 of the ECHR and, therefore, sections 54 (1) and (2) of the HFEA 2008 were incompatible with the ECHR and issued a declaration of incompatibility, pursuant to section 4(1) of the 1998 Human Rights Act.[279] Nonetheless, even after *Re Z*, the court was not prepared to grant a parental order in favour of a sole

---

[272] *Re B v C (Surrogacy: Adoption)* [2015] EWFC 17.

[273] ibid. In Scotland, the Adoption and Children (Scotland) Act 2007.

[274] *Re Z (A Child) (Surrogate Father: Parental Order), Also known as: Z (A Child) (Human Fertilisation and Embryology Act: Parental Order), Re, Z (A Child) (Surrogacy: Parental Order)* [2015] EWFC 73.

[275] ibid 20.

[276] Human Rights Act (HRA) 1998, s 3(1) states: "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."

[277] *Re Z (A Child) (Surrogate Father: Parental Order), Also known as: Z (A Child) (Human Fertilisation and Embryology Act: Parental Order), Re, Z (A Child) (Surrogacy: Parental Order)* [2015] EWFC 73, para 16 The court quoted the response of Dawn Primarolo, Minister of State Department of Health, recorded in the Hansard (HC debates) 12 June 2008, Columns 248 -249. See also 'Human Fertilisation and Embryology Bill [Lords]: Session 2007 – 08' (2008) Public Bill Committee Debates 12 June (morning) 2008 cols 246–249 <https://publications.parliament.uk/pa/cm200708/cmpublic/human/080612/am/80612s02.htm> accessed 19 November 2019. 'Report of the Committee of Inquiry into Human Fertilization and Embryology (Warnock Report) 1984' (n 45) para 2.10 and 2.11 The committee considered the argument that, as a matter of sex equality, "if single women are not totally barred from parenthood, then neither should single men be so barred." Nevertheless, the final view of the committee was that "…it is better for children to be born into a two-parent family, with both father and mother, although we recognise that it is impossible to predict with any certainty how lasting such a relationship will be."

[278] *Re Z (A Child) (Surrogate Father: Parental Order),* (No2) [2016] EWHC 1191. This is the sequel to a judgment handed down on 7 September 2015: *In re Z (A Child) (Surrogate Father: Parental Order*) [2015] EWFC 73. See also Katarina Trimmings, 'Application for a Parental Order by a Single Commissioning Father Refused by the High Court' (2016) 38 Journal of Social Welfare and Family Law 91.

[279] Joint Committee on Human Rights, 'Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018' (The Parliament of the United Kingdom 2018) 3 <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/645/645.pdf> accessed 2 April 2018.

applicant. In particular, in the case of *F v S,*[280] the child was born to the British applicant following a legally recognised surrogacy arrangement entered into between the applicant, who was the biological father, and the surrogate mother in Oregon in the US. As a result, the child was considered as a British national by descent[281] and entitled to live permanently in the UK. However, the court refused to make a parental order as the applicant was the sole parent. However, the court made a child arrangements order conferring parental responsibility on the biological father. This decision gained wide academic criticism and it was argued that the law on parental orders in the UK was discriminatory.[282] Moreover, it was argued that the innovative judicial approach that had been adopted in respect of the extension of time limit[283] was not followed in this case and, therefore, the courts' rulings in surrogacy cases were contradictory as, in this case, the court not only ignored the genetic connection,[284] but also disregarded the just outcome of the case considering the welfare of the child as followed in *Re X,* with regard to the time limit.[285] The same issue arose in the case of *M v F.*[286] The problem was that only the intended mother applied for a parental order. Considering the law at that time, the court did not make a parental order but, considering the welfare of the child, the court approved the continuation of the wardship and granted the care and control in respect of the child to the applicant.[287] Nevertheless, the court was hopeful that this law would be changed, and the applicant would be able to apply for a parental order as a sole parent in the future.[288] Consequently, following the declaration of incompatibility made in *Re Z (No2),* the government introduced a new section to the HFEA 2008, and 54A was inserted through the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018.[289] The standard restricting a single parent from obtaining a parental order was removed as it violates the rights of the applicant and the child. Therefore, now a sole applicant can obtain a parental order in the UK. Accordingly, UK law conceptualises that it would not prejudice the interests of children if the intended parent is a single parent.

There is no prior eligibility requirement to enter into a surrogacy agreement under the UK law. The only instance when the status of the applicant/s comes into question is when

[280] *F v S* [2016] EWFC 70.
[281] British Nationality Act 1981, s 2 (1).
[282] Alghrani and Griffiths (n 175) 175.
[283] See Human Fertilisation and Embryology Act (HFEA) 2008, s 54 (3).
[284] Brown (n 23) 35 questions that 'if it is "inappropriate" for a couple to "adopt their own children", why is it not similarly inappropriate for a single applicant to have to do so?'
[285] Alan Brown, 'Two Means Two, but Must Does Not Mean Must: An Analysis of Recent Decisions on the Conditions for Parental Order in Surrogacy' (2018) 30 Child and Family Law Quarterly 23, 39 argues 'Notwithstanding my criticisms of the decision in Re X, set out above, it is apparent that Munby J sought what he perceived as a 'just' outcome, based upon the best interests of the child, in ignoring the clear statutory language of 'must', in section 54(3), and granting the parental order. Therefore, it is somewhat surprising that he did not adopt a similarly 'just' approach to the statutory language of section 54(1) in Re Z.'
[286] *M v F, Sm, A (By His Guardian)* [2017] EWHC 2176.
[287] ibid 23.
[288] ibid 22.
[289] The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 No. 1413, s 2 (5) 1.

they apply for a parental order. This is considered to be one of the shortcomings in the UK surrogacy laws as there is no pre-vetting of parties to a surrogacy arrangement. Nevertheless, the Law Commissions' consultation paper proposes that the UK should introduce eligibility and screening requirements[290] for intended parent/s. This is a commendable proposal as it upholds the interests of the resulting children and would be able to avoid conflicts after the birth of the child.

3.6.3 Genetic link – sections 54(1)(b) and 54A(1)(b)

It has been claimed that there is a powerful urge among people to preserve their genes through a new generation, but this desire cannot be eased through adoption.[291] Nevertheless, surrogacy is a way to achieve that desire. There is an argument that, if this is one of the reasons for resorting to surrogacy, then there should be a genetic connection to the child. Indeed, international discourse suggests that there should be a genetic connection with at least one intended parent to protect the interests of children as the biological parentage is considered a component of a child's identity.[292] In the UK, there is a requirement that the gametes of at least one of the applicants are used to bring about the creation of an embryo, if two applicants are requesting the parental order.[293] When only one applicant requests a parental order, the gametes of the applicant should be used to bring about the creation of the embryo,[294] so requiring the genetic connection of the applicant to the child in issuing a parental order. The legislator considered as a general approach to protecting the best interests of the children, that there should be a genetic connection between the applicant and the child. Nevertheless, there are instances that the court refused to consider the genetic link as a sole consideration in determining the best interests of the child and ordered that the child should remain with the surrogate mother.[295]

Regardless of the court's general approach to the best interests of the child, when there was a concern as to the individual child's welfare, the court was flexible in interpreting this requirement to protect the best interests of the child in the particular instance. There is also an argument that "a genetic link to their parent does not appear to be crucial to the realisation of children's well-being."[296] The Law Commissions consultation paper

---

[290] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 8.8.

[291] 'Report of the Committee of Inquiry into Human Fertilization and Embryology (Warnock Report) 1984' (n 45) para 2.2.

[292] *Mennesson v France,* [2014] Appl No 6519211 (European Court of Human Rights, Fifth Section) [100]. See also *Paradiso and Campanelli v Italy (GC)* [2017] Appl No 2535812 (European Court of Human Rights, Grand Chamber).

[293] Human Fertilisation and Embryology Act (HFEA) 2008, s 54 (1).

[294] Human Fertilisation and Embryology Act (HFEA) 2008, s 54A(1)(b) .

[295] *Re Z (A Child) (Surrogacy Agreements: Child Arrangements Orders), Also known as: Re A v X, M (A Child)* [2016] EWFC 34 para 114.

[296] Katherine Wade, 'The Regulation of Surrogacy: A Children's Rights Perspective' (2017) 29 Child and Family Law Quarterly 113, 119. One of the widely cited cases in this regard is the South African case of *AB and Another v Minister of Social Development As Amicus Curiae: Centre for Child Law (40658/13)* [2015] ZAGPPHC 580; [76 and 84] where Basson J argued that the requirement of genetic link not only constituted

suggests removing the requirement which stipulates that the applicant should have a genetic connection with the child in cases where the intended parents are medically unable to contribute gametes for conception.[297] However, the report suggests that the requirement of a genetic link should be maintained for international surrogacy arrangements.[298] One of the arguments supporting the provision for requiring a genetic link with the child is to uphold the interests of the child. If there is no such requirement, people may desire to have designer babies and child trafficking would be an inevitable consequence. Moreover, when there is no genetic connection to the child, there could be an assumption that people can exploit these children for various purposes.[299] There are also concerns about the rights of the intended parents who cannot contribute genetically to the child.[300] This report argues that the requirement of a genetic link protects the best interests of children. Particularly, in an international context, one of the means to tackle child trafficking is to recognise this requirement at the international level.

3.6.4 Child's home – sections 54(4)(a) and 54A(3)(a)

According to sections 54(4)(a) and 54A(3)(a), at the time of the application and the making of the parental order, the child's home must be with the applicants or applicant, respectively. One of the main reasons behind this rule is to protect the best interests of children and protect them against trafficking or illegal adoptions. The provisions do not specify that the child's home should be in the UK. However, the court has had to tackle the issue of assessing the welfare of the child when the child is out of the UK's jurisdiction.[301] In particular, in the case of *Re A,*[302] the intended parent, who had not abandoned his domicile in the UK, resorted to a surrogacy arrangement and applied for a parental order. Even though the intended parent and the child lived in South Africa, a parental order was granted as the court was satisfied that the child's home was with the applicants in South Africa. In the case of *DM v SJ,*[303] the court was of the view that, even though the intended parents did not live together full-time and the intended father had to split his time between two households, it did not mean that the child did not have her home with the intended father. The doctor's report also suggested that the time the applicants spent together was substantial enough to say that the child's home was with

discrimination against a certain sub-class, but also constituted "an insult to all those families that do not have a parent-child genetic link".

[297] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 12.49.

[298] ibid 12.35-12.57.

[299] See e.g. *Re C (A minor) (Adoption Application)* [1993] 1 FLR 87 (Family Division) and Lambeth LBC v O, E (by her guardian) [2011] EWHC 3453 (Fam).

[300] Horsey and others (n 24) 34. However, see the ECtHR view on the status of intended parents who do not have genetic connection with the child expressed in the case of *Paradiso and Campanelli v Italy (GC)* [2017] Appl No 2535812 (Grand Chamber Judgment, European Court of Human Rights).

[301] *Re K (Minors: Foreign Surrogacy)* (n 117).

[302] *Re A (Parental Order)* (n 98) para 5.

[303] *M v J Also known as: DM v SJ (Surrogacy: Parental Order)* [2016] EWHC 270.

both the applicants. The court also endorsed the view, following previous decisions in surrogacy cases,[304] and an ECtHR decision,[305] that "family life existed between two parents and their children even though the parents had never married, did not cohabit and lived in separate houses."[306] Accordingly, the court considered that, for the lifelong welfare of the child, a parental order should be issued in this instance. The court maintained a rationale that "the concept of home must and should be construed flexibly"[307] and, therefore, it should be considered that the child's home was with the applicants, regardless of the fact that the child's time was split between the applicants and their homes, and thereby satisfied the requirement of section 54(4)(a).[308] Because, even though the parents lived apart, the court was of the view that there was a *de facto* family life established between the children and the intended parents.[309] Moreover, a purposive interpretation should be given to this provision so as to protect the right to family life as enshrined in Article 8 of the ECHR which also protects the right to a private life that encompasses the child's right to identity[310] "as a lifelong member of the applicant's family".[311] Therefore, a parental order should be made in these circumstances "which is so manifestly in the best interests of the child".[312] It is suggested here that, in considering the circumstances of the applicants, the court rightly gave a purposive interpretation to the term "child's home" in order to protect the child's individual interests without affecting the public policy.

3.6.5 Domicile of intended parents – sections 54(4)(b) and 54A(3)(b)

The requirement of a UK domicile to apply for a parental order is one of the important criteria to protect the interests of children, particularly aimed at the prevention of child trafficking and forum shopping, in order to establish legal parenthood. Before regulation, earlier cases illustrate[313] that the UK court was flexible in granting care and control of a child born in England to a foreign couple. Unlike other jurisdictions which permit surrogacy, in the UK, there is a clear restriction on obtaining a parental order considering

---

[304] *Re X (A Child) (Parental Order: Time Limit), Also known as: X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 [66–68]. *Re A, Also known as: A v X* (n 112) paras 43, 44, 46–48.
[305] *Kroon and Others v the Netherlands (Application No 18535/91)* [1994] ECHR 35, (1994) EHRRR 263 [1994] 10 WLUK 312 [1995] 2 FCR 28 (European Court of Human Rights) [31–33].
[306] *M v J Also known as: DM v SJ (Surrogacy: Parental Order)* [2016] EWHC 270 (Fam) para 44.
[307] *JB (A Child) (Surrogacy: Immigration), Re Also known as: KB v RT* (n 119) para 41.
[308] *Re X (A Child) (Foreign Surrogacy)* [2018] EWFC 15 para 9. See also *Re N (A Child), Also known as: K v L* [2019] EWFC 21 para 5 where Theis J, adopting a purposive interpretation to "child's home", stated: "…even though the applicants have been living in separate home…N has always been with one of them since then and as a result her home has been with them, albeit divided between two properties." *LB v SP* (n 191). *A v B* [2015] EWHC 1059 (Fam).
[309] Mrs Justice Theis in *Re A, Also known as: A v X* (n 112) para 48.
[310] ibid 47, 67–69.
[311] *LB v SP* (n 191) para 50.
[312] *Re X (A Child) (Foreign Surrogacy)* [2018] EWFC 15 para 3.
[313] *Re C (A minor) (Wardship: Surrogacy)* (n 34).

the domicile[314] of the applicants. So, only applicant/s who is/are domiciled in the UK or the Channel Islands or the Isle of Man can apply for a parental order.[315] Accordingly, the UK law requires at least one of the applicants to be domiciled in the British Isles to apply for a parental order from the UK courts. Intended parents who are not domiciled in the UK may face challenges when seeking to establish legal parenthood and take the child away from the UK.

The case of *Re G*[316]is one of the leading cases on this point. It provided clear guidance on this issue and alerted covert surrogacy facilitators in the UK. In this case, the intended parents, who were Turkish nationals and domiciled in Turkey, applied for a parental order in respect of a child born in the UK through a surrogacy arrangement. The court was advised that the total social work and legal cost for this case were just short of £35,000 and that this cost had to be borne by the British taxpayer.[317] The court was informed that many parental orders where the applicants were not domiciled in the UK had been made before this case. As such, the court hoped that the publication of this judgment would see an end to such unlawful parental orders being made.[318] The court considered that the intended parents' Turkish domicile presented "an insurmountable hurdle" to their success in obtaining a parental order from the UK court.[319] The court observed that the intended parents, who obtained the services of the British Surrogacy Agency and Childlessness Overcome Through Surrogacy (COTS), should also shoulder part of the responsibility for this dispute as it had not taken the correct approach in commissioning this surrogacy arrangement.[320] The court also explained that taking children who were born in the UK for adoption was prohibited.[321] The court also noted that agencies like COTS were not "covered by any statutory or regulatory umbrella and are therefore not required to perform to any recognised standard of competence."[322] Therefore, the court observed that COTS facilitating the arrangement to take the children out of the country without legal permission was a matter of a grave concern. However, the court, in considering the best interests of the child, had to find a way out to determine the legal status of the child. Hence, it had to identify the most effective legal structure to facilitate the intended parents to take the child to their home country. The court considered the possibility of a) a residence order in favour of the intended parents with permission to take the child out of jurisdiction, b) a special guardianship order, c) a

[314] See generally *Dicey, Morris and Collins on the Conflict of Laws: Fifth Supplement*, vol 1 (Sweet and Maxwell 2018) Chapter 6.
[315] Human Fertilisation and Embryology Act (HFEA) 2008, ss 54(4)(b) and 54A(3)(b).
[316] *Re G (Surrogacy: Foreign Domicile)* (n 75).
[317] ibid 4.
[318] ibid 6.
[319] ibid 15.
[320] ibid 23.
[321] Adoptions and Children Act 2002.
[322] *Re G (Surrogacy: Foreign Domicile)* (n 75) para 29.

Hague Convention Adoption[323] Order,[324] and d) orders under the inherent jurisdiction. However, the court did not follow any of these options and, finally, made the order under section 84 of Adoption and Children Act 2002 (ACA),[325] having obtained an assessment report from the local authority in accordance with the Family Procedure (Adoption) Rules 2005, rule 29. Considering the best interests of the child under section 1 of ACA 2002, an order was granted giving parental responsibility to the intended parents to facilitate the child's subsequent adoption by the intended parents in Turkey.[326] The court held that, even though it was not illegal for foreign intended parents who are not domiciled in the UK to enter into surrogacy arrangements in the UK, those arrangements should be discouraged as, first, they cannot obtain a parental order under HFEA and second, such arrangements become the financial responsibility of the British taxpayer; therefore, the court warned that if these kinds of situations were to come before the court in the future, it may, under rule 110 of The Family Procedure (Adoption) Rules 2005, "make orders as to the costs as it thinks just".[327]

The case of *CD v GH*[328] concerned an application for a parental order with two children who were born according to a gestational commercial surrogacy arrangement entered into in Illinois, in the US, by the applicants. The crucial issue was satisfying the criteria under section 54 with regard to domicile. Both applicants were born in Germany and their domicile of origin was in Germany. One of the applicants argued that she had acquired a domicile of choice in England and, even though the parties had not lived in this jurisdiction for any length of time, she had not abandoned her domicile of choice and retained it when the parental order application was heard. The court considered all the principles discussed in previous cases and added that "these cases together make it clear that it is the nature of purpose of the residence, along with a person's future intentions that should be considered when determining domicile status."[329] Moreover, the court stressed the significance of the 'intention' of the parties in determining domicile and stated that "it is not just the physical absence, but you need to have the intention to cease to reside there as well."[330] The court observed that the intended mother moved to England in 2003 and lived with the intention of living in the UK permanently. It was revealed that the applicants had their family home in the UK and the intended parent became a British citizen in 2013. She had to move to Germany because her husband could not find a job in England and, even though she lived in Germany, they had been looking for employment

[323] The 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption concluded on 29 May 1993.
[324] The court did not opt for the Hague Convention order as the child did not have the habitual residence in the UK during the proceedings. (See Adoptions with a Foreign Element Regulations 2005, regulation 50[b] *Re G (Surrogacy: Foreign Domicile)* (n 75) paras 43–44.
[325] Adoption and Children Act 2002.
[326] *Re G (Surrogacy: Foreign Domicile)* (n 75) paras 46–50.
[327] ibid 52 a & f.
[328] *AB v GH* [2016] EWHC 63 (Fam).
[329] ibid 18.
[330] ibid.

opportunities in the UK. They also had several investment properties in Manchester, and they were looking for a replacement property in the UK for the family home which was sold due to other reasons. Moreover, the court also noted that the parties felt that they were very comfortable in educating their children as to their origin if they lived in England rather than in Germany where there is a negative public perspective about surrogacy. The court emphasised that this is "another strong motivational factor, despite her physical absence, to retain her clear intention to live permanently and indefinitely in this jurisdiction".[331] Accordingly, considering these facts, the court held that the intended mother had established her domicile of choice in England and she had not abandoned that domicile.[332] However, this flexibility was not maintained by the court in the case of *Y v Z*.[333] The intended parent, who lived in the UK and only contacted the child through Skype, applied for a parental order in the UK. Considering all the facts, the court observed that, even though the applicant had a number of connections to London, evidence showed that he had retained strong financial and family ties in his domicile of origin. Therefore, the court concluded the applicant's domicile of origin was continuing despite his more temporary residence in other jurisdictions. Therefore, the parental order application was rejected as the applicant had not established that he had a domicile of choice in the UK at the time of the parental application

Even though the UK permits surrogacy, it does not allow persons who are not domiciled in the UK to apply for a parental order in respect of a child born either in or out of the UK. The law conceptualises that the best interests of children are better protected by not allowing foreign parents to apply for a parental order when they have entered into a surrogacy arrangement in the UK. Nevertheless, there is no prohibition on foreign persons entering into surrogacy arrangements in the UK.

The UK court's construction of domicile of a person as to whether they have acquired the domicile in the UK as a domicile of choice or whether they have abandoned their domicile of origin, depends on the particular circumstances of the case. It is indeed very difficult to ascertain with a specific degree of certainty. Nevertheless, the court has been flexible in interpreting the domicile of applicants to protect the interests of the individual child. Even though the Law Commissions recognise jurisdictional basis as one of the criteria for recognising the parenthood of a child born out of surrogacy, it suggests that "although there must be some connection to this jurisdiction to justify the application of the law, domicile is not the only available legal test. The test of habitual residence could be used".[334] Hence, the proposed new law conceptualises that a person who has habitual residence in the UK can enter into a surrogacy arrangement. However, the Law Commissions consider that such a change would also bring a risk of making the UK an

[331] ibid 30.
[332] ibid 31.
[333] *Y v Z, W v X (a minor by her Children's Guardian Ms Jacqueline Roddy)* [2017] EWFC 60. See also *Y v Z, W v X (a minor by her Children's Guardian Ms Jacqueline Roddy)* [2017] EWFC 83.
[334] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) 12.11.

attractive destination for surrogacy for foreign intended parents. Therefore, it proposes that the habitual residence requirement should be introduced as an alternative to domicile with additional requirements imposed together with a test such as a certain period to recognise the habitual residence[335] or any other restrictions that would limit the foreign intended parents from removing the child from the UK. Recognising habitual residence as a connecting factor has its own shortcomings. It is argued that "recognising parenthood in the country of habitual residence – which does not grant citizenship – without ensuring the child's legal standing in the country of the parents' nationality might create an actual limping status, where the parenthood is partially recognised and effective".[336] A problem arises whether, when the UK law recognises that the intended parents should be treated as the legal parents at birth without requiring them to apply for a parental order, foreign intended parents can be refused to take the child out of the jurisdiction when failing to fulfil the residence requirement? Then the court surely will have to consider the best interests of the child. It can be argued that the proposed law conceptualises the best interests of children and there is no harm in allowing foreign intended parents to enter into a surrogacy arrangement in the UK as it is not prohibited. Moreover, since under the new pathway to parenthood, the proposed law does not require a parental order to establish legal parenthood in domestic surrogacy arrangements, intended parents will be treated as the legal parents at birth. As a result, intended parents will not face a problem like the Turkish parents in the case of *Re G*[337] to take the children out of the jurisdiction, as the intended parents will be treated as the legal parents of the surrogate-born child.

3.6.6 Time limit – sections 54 (3) and 54A(2)

Another requirement that intended parent/s have to fulfil to obtain a parental order is the deadline. A parental order should be applied during the period of six months beginning with the day on which the child is born.[338] There are instances that the court rejected the parental order application due to a lapse of the statutory time limit.[339] The court was of the view that "there is no provision within the Act to provide for a discretionary extension to the statutory time limit."[340] The court also considered the policy behind such rule and stated that "[…] the policy and purpose of parental order is to provide for the speedy consensual regularisation of the legal parent status of a child carer following a birth resulting from a surrogacy arrangement."[341] However, in more recent case law this time

[335] ibid 12.13 & 12.14.
[336] Sharon Shakargy, 'Choice of Law for Surrogacy Agreements: In the in-between of Status and Contract' (2020) 16 Journal of Private International Law 138, 154.
[337] *Re G (Surrogacy: Foreign Domicile)* (n 75).
[338] Human Fertilisation and Embryology Act (HFEA) 2008, ss 54(3) and 54A(2).
[339] See *JP v LP (Surrogacy Arrangement: Wardship)* [2014] EWHC 595.
[340] ibid 29.
[341] ibid 30.

restriction was relaxed by the court considering the best interests of the child.[342] The main reasons for such a delay, as reported in case law, were the unawareness of the timing and the procedure that was involved. In *Re A, also known as: A v X,*[343] an application for a parental order was made by the intended parents 17 months after the elapse of the six months. However, the court followed the ruling of Mr Justice Munby in the case of *Re X (A child) (Parental Order: Time Limit)*[344] and held it was important to "read down" the criteria in section 54 (3) of the HFEA 2008 to give effect to the rights enshrined in the ECHR, in particular Article 8.[345] Accordingly, the court highlighted that the intended parents acted in good faith all the time and their delay in applying for a parental order was due to lack of information available at that time. Moreover, if the parental order was not issued, detrimental consequences would follow, and it would not be in the best interests of the child. Therefore, the court proceeded to issue the parental order regardless of the lapse of time when the application was made.[346] As such, even though the legislation conceptualised that it is in the best interests of children to have a speedy confirmation as to their legal parenthood within a time-bound parental order, in considering the rights of the individual child, the court followed a very amenable approach to the time limit. Accordingly, post-*Re X* case law illustrates that the court has been flexible in constructing the time limit provision. In this report, this approach is considered reasonable as it protects the best interests of the child concerned. The Law Commissions consultation paper proposes to abolish this criterion[347] as it rightly considers that this rule cannot be justified in terms of upholding the best interests of children.

3.6.7 Commerciality of the surrogacy agreement – sections 54(8) and 54A(7)

The SAA 1985[348] explains that even though a surrogacy arrangement is not legally enforceable in the UK,[349] negotiating surrogacy arrangements on a commercial basis is an offence.[350] In the case of *JP v LP*, the court highlighted that the parties sought the services of solicitors (paid services) to prepare a surrogacy agreement (commercial agreement) and, in that context, the solicitors were committing a criminal offence as negotiating surrogacy services on a commercial basis is an offence in the UK.[351]Apart

[342] *Re X (A Child) (Parental Order: Time Limit), Also known as: X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135. Katarina Trimmings, 'Six month deadline for applications for parental orders relaxed by the High Court' (2015) 37 Journal of Social Welfare and Family Law 241.
[343] *Re A, Also known as: A v X* (n 112).
[344] *Re X (A Child) (Parental Order: Time Limit), Also known as: X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam).
[345] *Re A, Also known as: A v X* (n 112) para 64.
[346] ibid 64–66.
[347] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 11.19.
[348] Surrogacy Arrangements Act (SAA) 1985, s 1(5).
[349] ibid 1(A).
[350] ibid 2.
[351] *JP v LP (Surrogacy Arrangement: Wardship)* [2014] EWHC 595 (Fam) 7.

from this, commercial surrogacy is discouraged by incorporating another main requirement in section 54 in granting a parental order, that is:

> "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 section (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** [emphasis added].[352]"

The main policy argument against commercial surrogacy is that of the protection of children:

> "It is clearly a policy decision that commercial surrogacy agreements should not be regarded as lawful; equally there is clearly a recognition that sometimes there may be reasons to do so. It is difficult to see what reason Parliament might have in mind other than the welfare of the child under consideration."[353]

In this quote, even though the court considered the public policy as protecting the welfare of the individual child, it should be understood as protecting the welfare of the children who may have been born as a result of surrogacy arrangements. Accordingly, the UK law conceptualises that commercial surrogacy agreements go against the best interests of children. Moreover, the court must be satisfied that no money or other benefits (other than for expenses reasonably incurred) have been given or received by either of the applicant or the applicants acting capriciously to any form of economic inducements. However, if the court retrospectively authorises these payments, then such an action will not be a bar to the making of a court order. The problem arises as to whether the discretion given to the court is absolute. Case law shows that the court has developed several principles to be applied in authorising such payments and has taken into consideration the principle of the best interests of the child.
The main challenge that UK courts face in the context of commercial surrogacy arrangements is making a final striking of the balance between public policy considerations as to the protection of children (general approach) and upholding the best interests of the individual child (individual approach). Hedley J has described this difficult balancing process as follows:

---

[352] Human Fertilisation and Embryology Act (HFEA) 2008, ss 54(8) and 54A(7).
[353] *X & Y (Foreign Surrogacy) (Legal parenthood: Parental order)* (n 21) para 20.

> "I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e., the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order [...] If public policy is truly to be upheld, it would need to be enforced at a much earlier stage than the final hearing [... the] application."[354]

The court has granted parental orders to uphold the best interests of the child even though the parties have failed to satisfy the court that they did not engage in commercial surrogacy. One such example is the *Re L*[355] case, which was decided in 2010. In this case, it appeared that payments made to the surrogate mother by the applicants went beyond reasonable expenses. However, considering the best interests of the child, the policy concerns against commercial surrogacy were disregarded. As the "welfare is no longer merely the court's first consideration but becomes its paramount consideration, [...] the effect of that must be to weight the balance between public policy considerations and welfare [...] decisively in favour of welfare."[356] Moreover, "[t]he welfare of the child is no longer simply one consideration among many, but rather the consideration which should override all others."[357] So, where there is a conflict between public policy and the welfare of the child, a difficult balancing exercise has to be performed by the court:

> "[...] if there is a conflict the welfare of the child should not be sacrificed on the altar of public policy. But, in my view, there is a real risk that recognizing the welfare of the child as an overriding consideration may have the consequence of undermining the public policy. The question, therefore, is how to approach the problem of authorisation while giving proper weight to both aspects of these considerations."[358]

Nevertheless, according to Hedley J:

---

354 Hedley J in ibid 24.
355 *L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam).
356 ibid 9 and 10.
357 *Re A & B (parental Order)* [2015] EWHC 911 [38].
358 *C v S* 1996 S.L.T. 1387, 1399.

> "It will only be the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making. […] if it is desired to control commercial surrogacy arrangements, those controls need to operate before the court process is initiated, i.e. at the border or even before."[359]

Ultimately, these balancing tasks should be done, as the court noted, "on a case-by-case basis by judicial decision".[360] The court will need to take account of the circumstances of the case. This shows that, even though there is a general approach to public policy considerations with regard to surrogacy arrangements, individual considerations of the case are as important.

The principles that are to be applied by the court when exercising its discretion whether to authorise payments in surrogacy cases exceeding reasonable pregnancy-related expenses and thereby balancing the best interests of children against the best interests of the individual child have been summarised in the case of *Re WT*[361] as follows:

(1) the question whether a sum paid is disproportionate to 'reasonable expenses' is a question of fact in each case.[362] What the court will be considering is whether the sum is so low that it may unfairly exploit the surrogate mother, or so high that it may place undue pressure on her with the risk, in either scenario, that it may overbear her free will.

(2) the principles underpinning section 54 (8), which must be respected by the court, is that it is contrary to public policy to sanction excessive payments that effectively amount to buying children from overseas.

(3) however, as a result of the changes brought about by the Human Fertilisation and Embryology (Parental Orders) Regulations 2010, the decision whether to authorise payments retrospectively is a decision relating to a parental order and in making that decision, the court must regard the child's welfare as the paramount consideration.

(4) as a consequence it is difficult to imagine a set of circumstances in which, by the time an application for a parental order comes to court, the welfare of any child, particularly a foreign child, would not be gravely compromised by a refusal to make the order. As a result: "it will only be in the clearest case of the abuse of

---

[359] *L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam) para 10.
[360] *X & Y (Foreign Surrogacy) (Legal parenthood: Parental order)* (n 21) para 29.
[361] *X & Y (Foreign Surrogacy) (Legal parenthood: Parental order)* (n 21). *Re S (Parental Order)* [2009] EWHC 2977. *L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam). *Re IJ (A Child) (Foreign Surrogacy Agreement: Parental Order)* (n 150). *Re X and Y (Parental Order: Retrospective Authorisation of Payments)* [2011] EWHC 3147 *(Fam)*.
[362] In the case of *X & Y (Foreign Surrogacy) (Legal parenthood: Parental order)* (n 21) para 22 the court was of the view that 'the whole basis of assessment will be quite different in say urban California to rural India.'

public policy that the court will be able to withhold an order if otherwise welfare considerations support its making", per Hedley J in Re L (Commercial Surrogacy) [2010] EWHC 3146 (Fam), [2011] 2WLR 1006, at paragraph 10.

(5) where the applicants for a parental order are acting in good faith and without 'moral taint' in their dealings with the surrogate mother, with no attempt to defraud the authorities, and the payments are not so disproportionate that the granting of parental orders would be an affront to public policy, it will ordinarily be appropriate for the court to exercise its discretion to give retrospective authorisation, having regard to the paramountcy of the child's lifelong welfare.[363]

The problem of commerciality of surrogacy arrangements has arisen before the courts in both domestic and international surrogacy cases. Following the above principles, the courts, having balanced the public policy considerations and the welfare considerations, have consistently granted parental orders to intended parents who had been involved in commercial surrogacy arrangements. For example, *In the Matter of C (A Child)*[364] the court was of the view that the sum paid was greater than the "expenses reasonably incurred", nevertheless, as the intended parents had acted in good faith throughout and considering the welfare of the child, the court authorised this payment and made the parental order.[365]

3.7 CROSS-BORDER COMMERCIAL SURROGACY

With the balancing exercise leaning in favour of the child's welfare, the UK, although prohibiting commercial surrogacy, has given a green light to commercial surrogacy in other countries. Accordingly, it has been argued that the UK[366] has accepted commercial surrogacy through the back door. As such, the reported surrogacy cases in the UK suggest that the majority of parental order applications involving commercial surrogacy cases concern cross-border commercial surrogacy arrangements. Before the ban on foreign

[363] *Re WT* (n 190) para 35. *Re D (Children) (Surrogacy: Parental Order)* (n 144) para 37.
[364] *In the Matter of C (A Child)* [2002] EWHC 157 (Fam).
[365] ibid.
[366] Also other countries such as Canada. See Kristin Lozanski, 'Transnational surrogacy: Canada's contradictions' (2015) 124 Social Science and Medicine 383.

surrogacy, India[367] and Thailand[368] were the main destinations for UK intended parents. Also, the US[369] has been a very popular destination offering international surrogacy for UK intended parents. Alarmingly, the vulnerabilities of women and children in Ukraine[370] and the Republic of Georgia,[371] make these countries also common destinations for foreign surrogacy arrangements. There are also instances that the UK intended parents resorted to surrogacy in Russia[372] and South Africa.[373] In one instance, it was reported that a child was born for UK intended parents to an Indian surrogate mother in Nepal.[374] This case demonstrates the connection between cross-border

[367] *LB v SP* (n 191): the court authorised a payment of £21,764 that had been made to a registered commercial surrogacy clinic in India. *Re WT* (n 190): in this case, it was reported that the intended parents had spent nearly $28,000 for the surrogacy arrangement and other additional payments in India. *Re K (Minors: Foreign Surrogacy)* (n 117). *AB v CT (Parental Order: Consent of Surrogate Mother)* (n 182): in this case, the intended parents paid about £16,000 to obtain surrogacy services in India. The court held that, "the children's welfare demands that the court exercises its discretion to authorise payment." Moreover, the intended parents made an *ex-gratia* (goodwill) payment to the surrogate mother in this case. The court was of the view that this payment was a generous and compassionate gift whereby the intended parents appreciated the surrogate's commitment towards the child including the difficult labour. *Re D (Children) (Surrogacy: Parental Order)*(n 144). *Re A, Also known as: A v X* (n 112) in this case, it was reported that a couple who resorted to surrogacy in India had paid about £16,500 to the clinic and the intended parents believed that about £1,650 would be given to the surrogate as per the information that they read in a newspaper article in India.

[368] *Re F (Children) (Thai Surrogacy: Enduring Family Relationship), Also known as:* P v Z [2016] EWHC 1594 (Fam).

[369] For example, in *Re G (Parental Orders)* (n 145): a set of twins born in Iowa. Two payments were made by the intended parents, firstly, a payment of $20,750 to the surrogacy agency, secondly, a payment of $38,950 to the surrogate mother for carrying the twins. The UK court authorised these payments. See also *J v G (Parental Orders)* [2013] EWHC 1432. *Re Z (A Child) (Surrogate Father: Parental Order), Also known as: Z (A Child) (Human Fertilisation and Embryology Act: Parental Order), Re, Z (A Child) (Surrogacy: Parental Order)* [2015] EWFC 73: in this case, the intended parents from the UK resorted to commercial surrogacy and paid about $12,000 to the surrogacy agency and $33,737 to the surrogate mother. *Re P-M (Parental Order: Payments to Surrogacy Agency)* [2013] EWHC 2328*). Re C (A Child) (Parental Order)* [2013] EWHC 2408. *Re W* [2013] EWHC 3570. *Re G (Parental Orders)* (n 145). *AB v GH* [2016] EWHC 63. *F v S* [2016] EWFC 70. *Re S (Parental Order)* [2009] EWHC 2977. *L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146.

[370] See for example, *X v Z* [2018] EWFC 86; *X & Y (Foreign Surrogacy) (Legal parenthood: Parental order)* (n 21). *R, S v T (Surrogacy: Service, Consent and Payments)* [2015] EWFC 22: in this case, the intended parents resorted to commercial surrogacy in Ukraine and a problem arose with the payments made to the surrogate mother. The intended parents had made payments to the clinic, but there was no evidence to indicate how much the surrogate got paid. The clinic also refused to provide any information concerning payments made to the surrogate mother. However, as there was credible evidence that the applicants acted in good faith and had not made any attempts to defraud the authorities, the court retrospectively authorised the payments made under the surrogacy arrangement. *Re IJ (A Child) (Foreign Surrogacy Agreement: Parental Order)* (n 150): in this case regardless of the applicants having resorted to a commercial surrogacy agreement in Ukraine, the court, considering the best interests of the child, granted the parental order.

[371] For example, *Re D (A Child)* (n 208).

[372] See for example, *Re C (A Child) (Parental Order), Also known as: AB v DE* [2013] EWHC 2413. In this case, the court noted that about half of the total fee paid by the intended parents went to the agency. Neverthless, considering the principles for authorisation the payments, the court retrospectively authorised all the payments made for the surrogacy arrangement and made the parental order.

[373] For example, *Re A (Parental Order)* (n 98).

[374] *Re X (Foreign Surrogacy: Child's Name), Also known as: CH v SM* [2016] EWHC 1068.

surrogacy and the trafficking of women and children. Even though a country like India prohibits international surrogacy, Indian fertility clinics continue functioning and offering services to foreign intended parents, while moving Indian surrogate mothers to other jurisdictions. Therefore, a ban on foreign commercial surrogacy in some countries promoted trafficking in women into different countries where commercial surrogacy is practised in a very discreet manner.

So, regardless of national bans on commercial surrogacy arrangements, citizens of those countries resort to commercial surrogacy outside the jurisdiction. In accentuating the effect of this Hedley J stated: "[…] if you were sufficiently determined and sufficiently wealthy you could simply circumvent the domestic restriction on surrogacy by relying on the welfare needs of the child."[375]As such, a uniform approach is needed to protect the victimised individual child as well as the children as a group who are the silent and non-consenting stakeholders of these arrangements. Thailand, India and Cambodia[376] have now regulated commercial surrogacy arrangements. However, when one country closes its doors to commercial surrogacy, another country will open its gate.[377] Against this backdrop, Clare Fenton-Glynn argues: "[…] while an international convention in this area should be the ultimate aim, England cannot rely on the hope of such an instrument coming to pass to avoid the problems inherent in its own domestic legislation." She proposes that the UK should amend its domestic laws and require parents who intend to get the services of a surrogate mother outside the jurisdiction of England to get the court's permission to enter such a contract.[378]

> "The payment for surrogacy has become one of the key issues concerning [the] rights of children and women. There is an argument that legislation should provide a definition of a reasonable payment for the service provided by the surrogate.[379] The Brazier Report included such a proposal and listed allowable expenses.[380] However, this was criticised on the ground that 'Brazier is too readily dismissive of the distinction between payment for the purchase of a child and payment for a

---

[375] Hedley (n 151) 140.

[376] Bun Sengkong and Will Jackson, 'As surrogacy industry expands, legal and ethical issues mulled.' [2016] *The Phnom Penh Post* <http://www.phnompenhpost.com/national/surrogacy-industry-expands-legal-and-ethical-issues-mulled>accessed 10 October 2016; Will Jackson and Vandy Muong, 'US firm begins to market Cambodia-based surrogacy service' [2016] *The Phnom Penh Pos*t <http://www.phnompenhpost.com/national/us-firm-begins-market-cambodia-based-surrogacy-service> accessed 10 October 2016; Will Jackson and Bun Sengkong, 'UN opposes commercial surrogacy' [2016] *The Phnom Penh Post* <http://www.phnompenhpost.com/national/un-opposes-commercial-surrogacy> accessed 10 October 2016.

[377] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 3.101. It has been reported that Kenya, Nigeria, Ghana and Greece have been emerging surrogacy destinations.

[378] Claire Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24 Medical Law Review 59, 75. Wells-Greco (n 194) 379 also argues that 'tackling the issues at an earlier stage is surely a better approach than leaving breaches of the law to be discovered only after a child is born…'

[379] This suggestion has been acted on by the Law Commission in its joint consultation paper. See 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) Chapter 15.

[380] Brazier, Campbell and Golombok (n 53) 48 Para 5.25 .

> potentially risky, time-consuming and uncomfortable service.'[381] This criticism is in line with the view that is prevalent in the UK – i.e. that, in the context of surrogacy, 'altruism' should be the norm,[382] and that it this norm upholds the best interests of the child.[383] However, if this is the case, then this norm should be strictly upheld and not compromised allowing it to be 'littered with exceptions'".[384]

As mentioned above, the UK courts have on numerous occasions retrospectively authorised payments made to commercial surrogacy agencies[385] outside the jurisdiction. The process of retrospective authorisation involves a fine balancing exercise, during which the court has to take account of the individual circumstances of the case. In a cross-border surrogacy case, the court will have to take account of the complexities that arise from the varied legal approaches to surrogacy in different jurisdictions, and consider, for example, whether the refusal of the parental order application would 'maroon' the child stateless and/or parentless, making it a "legal orphan".[386] The ad-hoc nature of such decisions and the resultant undermining of the public policy against commercial surrogacy show that the current approach is highly unsatisfactory. Indeed, to tackle the issues that arise in particular from commercial cross-border surrogacy, there is a need to adopt a more robust solution that would be adopted at the international rather than the domestic level.[387]

Importantly, Mr Justice Moylan has endorsed a need for an international approach and says:

> "[…] surrogacy arrangements being subject to varying degrees of domestic regulation, from significant regulation to none at all, and also because of the existence of significant differences in the effect of such domestic regulation. There is, in my view, a compelling need for a uniform system of regulation to be created by an international instrument in order to make

---

[381] Freeman (n 35) 9.

[382] Horsey and others (n 24) 6 argues that 'we must guard the principle of altruistic surrogacy in the UK- surrogacy as a relationship not a transaction.'" The Law Commission takes a different view on this and states that rather than taking the labels commercial and altruistic surrogacy it aims at reforming the UK law on payment in surrogacy arrangements. The recommendations have been introduced in chapter 14 and 15. 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 2.18.

[383] Horsey and Sheldon (n 58) 77.

[384] Margaret Brazier, 'Can You Buy Children?' 11 Child and Family Law Quarterly 345.

[385] Additionally, there are other categories of payments, which are not caught by s 54(8) and have not received much attention from the courts, for example medical expenses and payments to egg donors. See *Re C (A Child) (Parental Order)* [2013] EWHC 2408 (Fam), para 15, per Theis J.

[386] *X & Y (Foreign Surrogacy) (Legal parenthood: Parental order)* (n 21) para 10.

[387] Alternatively, it has been suggested that a solution at the regional (i.e., European) level could be adopted in the form of a prohibition of for-profit surrogacy arrangements. See 'Children's Rights Related to Surrogacy, Draft Recommendation Adopted by the Committee on Social Affairs of the Council of Europe Parliamentary Assembly (PACE), Adopted on 21 September 2016' Explanatory Memorandum by the rapporteur, Ms De Sutter <http://website-pace.net/documents/19855/2463558/20160921-SurrogacyRights-EN.pdf/a434368b-2530-4ce4-bbc0-0113402749b5> accessed 15 October 2016.

> available an appropriate structure in respect of what can only be described as the surrogacy market."[388]

Indeed, the need for an international convention which conceptualises both the best interests of children and sets out the approach to protect the best interests of the individual child is significantly important, in particular as domestic regulation alone cannot offer a solution to issues arising from international commercial surrogacy arrangements, as demonstrated by the UK experience.

3.8 UPHOLDING THE BEST INTERESTS OF THE CHILD IN THE CONTEXT OF SURROGACY ARRANGEMENTS – UK APPROACH

Before the regulation of surrogacy arrangements, the UK law recognised the best interests of the child principle as the paramount consideration for making decisions about surrogacy disputes. This was highlighted by the Warnock Committee, which acknowledged the inherent power of the court in upholding the best interests of the child:

> "The courts do, however, have jurisdiction over children, which is quite separate from and independent of the law of contract. Where a court has to consider the future of a child born following a surrogacy arrangement, it must do so in accordance with the child's best interests in all the circumstances of the case, and not according to the terms of any agreement between various adults. The child's interests being the first and paramount consideration, it seems likely that only in very exceptional circumstances would a court direct a surrogate mother to hand over the child to the commissioning couple. The present state of the law makes any surrogacy agreement a risky undertaking for those involved."[389]

Consequent legislation has complied with the above in its recommended approach to the establishment of parenthood in the context of surrogacy. Accordingly, legislative provisions were introduced regulating surrogacy arrangements and conceptualising the best interests of children in the context of surrogacy. Accordingly, the following traits can be observed concerning the general approach to conceptualising the best interests of children in the context of surrogacy in the UK:

- The surrogacy contract is not enforceable, and any surrogacy arrangement should not be a commercial arrangement.
- The surrogate mother is recognised as the birth mother of the child and her consent is required to transfer the parenthood.

[388] *Re D (A Child)* (n 208) para 1.
[389] 'Report of the Committee of Inquiry into Human Fertilization and Embryology (Warnock Report) 1984' (n 45) para 8.6.

- Recognition of the intention of the intended parent/s (post-birth transfer of legal parentage of a surrogate-born child).
- Recognition that there should be a genetic connection between the child and the applicant or at least one of the applicants when there are two applicants.
- It is in the best interests of children to restrict the eligibility for applying for a parental order in the UK to applicants who are domiciled in the UK.
- It is in the best interests of the children to establish the parenthood within the stipulated time.

As a general approach, the legislation considers that the surrogate mother should be the legal parent of the child at birth. Nevertheless, it has introduced an innovative way of transferring legal parenthood through a parental order, although this has not changed the basic norms of parenthood,[390] but rather empowered the court to transfer parenthood if the intended parents fulfil the eligibility criteria set out in section 54. The regulation on surrogacy did not remove the inherent judicial power to consider the best interests of the child, and eventually this was affirmed through a regulation.
Within this backdrop, at present, the judiciary is faced with the problem of upholding the best interests of children as a policy mandated by the national laws, and the protection of the individual child upholding the principle of the best interests of the child within the court's inherent power, which is confirmed through a regulation under the main HFEA legislation. Within this context, the UK court's approach to upholding the best interests principle can be analysed through three different categories of cases. The first set represents cases where the eligibility criteria of section 54 were satisfied and a parental order was issued. The second set, although negligible in number, are cases where parental order was refused by the court. In the third set of cases, the courts issued a parental order considering the best interests of the individual child, even though the eligibility criteria of section 54 were not satisfied. This is the most controversial set of cases, because the decisions raise the question whether the best interests of children as conceptualised by the legislation have been disregarded. The following sections analyse these three distinct categories of cases.

3.8.1 The first set of cases: the best interests of children (general approach) is endorsed by the court

First, the court has issued a parental order, with the section 54 eligibility criteria having been satisfied. There is a general assumption that the UK courts have never refused to

[390] But there is a criticism that recognising the surrogate's husband as the other parent does not fit into any model of parenthood.

make a parental order in a surrogacy case where the conditions were fulfilled. This view was also expressed in the Law Commissions consultation paper:

> "In all surrogacy cases to date, where the conditions have been met, however, the welfare of the child has required that the parental order be made. That is to say, that we are not aware of any decision where the court, having the power to do so, has refused to make the parental order solely on the basis of the child's welfare."[391]

It could be argued that this view suggests that the court recognises the conceptualisation of the best interests of children through the legislation. The court was careful not to consider any concerns other than the eligibility criteria set out in the legislation. Therefore, the court did not step outside of the general policy framework of the surrogacy legislation; the Law Commissions used this reason to justify its argument that "a post-birth welfare assessment is not needed."[392] This shows that, in these cases, the court gave due recognition to the primary legislation on surrogacy. Almost all the disputes that have arisen in the context of surrogacy arrangements touched on an eligibility criterion. All these eligibility criteria conceptualise what the best interests of children should entail in the context of surrogacy arrangements. Moreover, these general criteria have also acted as a coordinating wire to protect the best interests of the individual child. For example, recognising the surrogate mother's relationship and rights towards the child protects the rights of an individual child when there is a surrogacy dispute.

3.8.2 The second set of cases: is there an impact on the best interests of the child if a parental order is not made?

The second set of cases, considerably negligible in number, provide examples of instances where the court refused to make a parental order. This again shows that the court respected the general policy of protection and upholding of the best interests of children. Refusal reasons included: being unable to obtain the surrogate's consent,[393] the applicant being the sole applicant,[394] a change of status in the intended parents,[395] being unable to

---

[391] 'Building Families through Surrogacy: A New Law. A Joint Consultation Paper' (n 25) para 7.67.
[392] ibid 7.73.
[393] For example see, *Re D (A Child)* [2014] EWHC 2121 (Fam): the court ordered a shared residence order and made the child a ward of court. *Re A* [2014] EWFC 55: the court made a care and replacement order and the local authority arranged an adoption plan.
[394] *Re Z (A Child) (Surrogate Father: Parental Order), Also known as: Z (A Child) (Human Fertilisation and Embryology Act: Parental Order), Re, Z (A Child) (Surrogacy: Parental Order)* [2015] EWFC 73. *F v S* [2016] EWFC 70: the court granted child arrangement order. *M v F, Sm, A (By His Guardian)* [2017] EWHC 2176 (Fam): the child was made a ward of court and care and control was given to the applicant.
[395] *X v Z* [2018] EWFC 86, the intended mother, who was separated from the intended father who had a genetic connection with the child, applied for a parental order. The court refused to grant the parental order but granted an adoption order.

fulfil the requirement of domicile,[396] and the lapse of time.[397] Moreover, in the context of an international surrogacy arrangement, when the child is not in the UK, the court expressed its reluctance to assess the welfare of the child and to make a parental order.[398] When the court cannot consider making a parental order, due to unfulfillment of criteria listed in section 54 or for any other reason, the court will consider other arrangements that will best serve the welfare of the child. For example, the court may grant an adoption order,[399] child arrangements order[400] or a special guardianship order. However, these orders would either not secure the same level of protection of the child's rights and interests or have the same legal effect as a parental order. Adoption[401] and parental orders[402] are two methods by which parenthood can be transferred in the UK. A child arrangements order or a special guardianship order do not establish a legal parent-child relationship. When an adoption order is made instead of a parental order, the child's genetic connection is not recognised through it. On the other hand, a child arrangements order or special guardianship order would not confer parenthood on the intended parents. If the court opted for a child arrangements order, the surrogate mother would remain as the legal mother and there would not be a lifelong legal bond created between the intended parents and the child. In this case, the court has to consider the paramountcy principle in s1(1) of the Children Act 1989 and the welfare checklist contained therein under s 1(3). The welfare consideration under the Children Act 1989 is not considered as a "lifelong" consideration. In a case where the court was unable to make a parental order, it described the advantages of a parental order (over a child arrangements order) as follows:

> "The absurdity of the law not recognising the first and second respondent as the mother and father of these children is plain. The losers are predominately the children who do not have their biological parentage recognised in law.[403] Without an order [parental order] he would be left in something of a legal vacuum, without full legal membership of any family anywhere in the world."[404]

In many instances of surrogacy disputes, the court granted an adoption order.[405] The adoption order and the parental order are designed to transfer parenthood and the legal

---

[396] *Re G (Surrogacy: Foreign Domicile)* (n 75): the court granted parental responsibility to the intended parents with the aim of facilitating the child's subsequent adoption by the intended parents in Turkey. *Y v Z, W v X (a minor by her Children's Guardian Ms Jacqueline Roddy)* [2017] EWFC 60.

[397] *JP v LP (Surrogacy Arrangement: Wardship)* [2014] EWHC 595. This case dealt with informal surrogacy arrangement. The court granted a special guardianship order in favour of the genetically not connected intended mother who was separated from the child's genetically connected intended father.

[398] *Re K (Minors: Foreign Surrogacy)* (n 117) para 6.

[399] For example, *X v Z* [2018] EWFC 86.

[400] *F v S* [2016] EWFC 70. As the applicant was a single parent, a parental order was not issued.

[401] Applicable in England and Wales (Adoptions and Children Act 2002) and Scotland (Adoption and Children (Scotland) Act 2007).

[402] Human Fertilisation and Embryology Act (HFEA) 2008, s 54.

[403] *AB v CD* [2018] EWHC 1590 [74 & 75].

[404] *Re C (A Child) (Parental Order), Also known as: AB v DE* [2013] EWHC 2413 (Fam) para 34.

[405] For example, *X v Z* [2018] EWFC 86*: the* intended mother who was separated from the intended father who had the genetic connection with the child applied for a parental order. The Court refused to grant the parental order but granted an adoption order.

effects of both orders are the same. As Hedley J states: "[…] the law parallels adoption law, and surprisingly so, since like an adoption, a parental order both confers lifelong status on the applicant and deprives those who until then had parental status of that status on a lifelong basis."[406] It has therefore been rightly argued that the distinctions are less significant between an adoption order and a parental order.

Adoption orders, although creating a legal relationship between the intended parents and the child, have not been considered by courts as the most suitable solution or "bespoke" order[407] as they do not give a clear picture as to the children's genetical connection and biological origin and the identity of the surrogate-born child. In *Re Q*, Theis J elaborated on the importance of granting a parental order over recognising an adoption order made abroad, as it meets the child's lifelong welfare needs. Particularly, unlike a mere declaration or adoption order, a parental order determines the parentage of the child and it reflects the child's true identity.[408] In the case of *AB v CT,* the court reiterated the welfare advantages of a parental order, as compared to an adoption order, highlighting the submissions of the applicants and stating that a parental order confirms the status of the child and the relationship of the child with the applicants, which in turn protects the child's identity.[409] There is, therefore, a tendency in the UK courts, when considering the best interests of the child and regardless of failure to fulfil certain requirements under section 54 of the HFEA, to prefer a parental order over an adoption order or a child arrangements order:

> "I agree a parental order and the consequences that flow from it are, from a welfare perspective, far more suited to surrogacy situations. They were specifically created to deal with these situations. Put simply, they are a more honest order which reflects the reality of what was intended, the lineage connection that already exists and more accurately reflects the child's identity. An adoption order in these situations leaves open the risk of a fiction regarding identity that may need to be resolved by the child later in life. The effect of an adoption order according to S. 67 (1) ACA 2002 of treating the child 'as if' the child was born as a child of the adopter or adopters is not reality; the child is born with a biological connection to one of the applicants. However, there may be circumstances where a parental order is not an option, for example, where the biological parent is single."[410]

Therefore, the courts opt for an adoption order only in exceptional circumstances. It has been argued from the intended parents' perspective that making an adoption order instead of a parental order is inappropriate when there is a genetic connection to the child, "as they are putting such individuals in the nonsensical situation that they are seeking to

---

[406] *G v G* (n 99) para 33.
[407] *Re A, Also known as: A v X* (n 112) para 88.
[408] *Re Q (A Child) (Parental Order: Domicile), Also known as: CC v DD* (n 206) para 40.
[409] *AB v CT (Parental Order: Consent of Surrogate Mother)* (n 182) para 70.
[410] *A v C* [2016] EWFC 42 [71].

adopt their own children".[411] This is equally true from the child's perspective, as an adoption order does not reveal the true identity or origin of the child. Nevertheless, where the granting of a parental order is not possible, the welfare of the child is better protected by an adoption than a child arrangements order. However, it is better if the adoption order is made with the safeguards of the child's right to obtain the information regarding the gestational mother and other genetic relationships.

3.8.3 The third set of cases: is recognising the best interests of the child through regulation merely a 'gap jumper'?[412]

The third set, in contrast, deals with cases where the court has granted a parental order regardless of the applicants falling short of fulfilling the requirements of section 54 of the HFEA.[413] However, the court did not override the policy behind the principal Act.

The UK law recognises the principle of the best interests of the child through legislation and in the case law. As the court has always applied the UK law ("the *lex fori* approach)[414] in disputes concerning cross-border surrogacy arrangements, a child who is born outside of the UK for UK intended parents is also protected through the UK courts' interpretation of the principle of the best interests of the child. Both parental orders and adoption orders must be made considering the welfare of the child as the court's paramount consideration. However, it has been argued that welfare is not relevant to every question before the court, as welfare does not determine the very competency of the adoption application or the parental order application.[415] It has been also argued that the parental order mechanism was designed to address adults' wishes rather than children's welfare.[416]

The court's discretion in making a parental order is not wide. Although there is no rule describing the pre-arrangement, the process of the surrogacy arrangements, or suitability of persons who can enter into a surrogacy arrangement, when issuing a parental order, there are conditions which stipulate the suitability of the applicant(s) that must be fulfilled to apply for a parental order. Nevertheless, application of the principle of the best interests of the child has provided the court with some flexibility in assessing the section 54 criteria in surrogacy arrangements. Most cross-border surrogacy cases in

---

[411] Alghrani and Griffiths (n 175) 175.

[412] Inspired by the word 'Gap jumper': 'Portable connecting leads often provided at locations where there are a number of current rail gaps due to a complex junction. The leads are provided with a plug at one end to allow connection with a receptacle box on a train, and with contact shoes at the other end to allow them to be placed on the current rails. If a train becomes 'gapped', the gap jumper is used to connect a car on the train to nearby current rails. They are awkward to use and need care to restart the train without dragging the leads or running over them. Sometimes called 'gap leads.' London Underground Glossary.<http://www.trainweb.org/tubeprune/dictionary.htm> accessed 11 November 2020.

[413] Previously, this law was contained in HFEA (1990) s 30.

[414] Wells-Greco (n 194) 385 argues that the legislation and case law suggest that the 'the UK approach is consistent in all cases: the court applies *lex fori*.'

[415] Norrie (n 5) 94.

[416] ibid 96.

the UK have required the court to balance the conflicting state interests of protecting children (in particular aiming to prevent commercial surrogacy) and protecting an individual child's interests in a given case. These issues impact on the determination of the child's status, especially legal parenthood. As Theis J stated: "[t]he consequences of what I have to decide is of fundamental importance to the parties and children, as it concerns orders which determine who the legal parents of these young children are."[417] Most of the cases decided upon considered the interests of the child and there are only a few cases where custody of the child was not awarded to the intending parents. However, the problem arises that the present application of the principle of the best interests of the child may be a 'gap jumper' which fails to offer a consistent approach. Hence De Sutter notes:

> "The application of the "best interests of the child" principle by states confronted with individual children born abroad of international for-profit surrogacy arrangements generally leads to acceptable – though not expeditious – outcomes even in states which prohibit some or all forms of surrogacy domestically, via adoptions, parental orders, humanitarian leave to remain etc. However, there is no legal certainty as these states do not want these case-by-case solutions to be seen as an endorsement of international surrogacy arrangements which may lead to their further proliferation."[418]

On the other hand, some critique the application of the best interests of the child as inappropriate in the context of surrogacy arrangements in the UK, arguing that a special approach to interpreting the best interests principle will distort the law and general social policy issues will be trumped by individual cases:

> "Best interest is not a trump card, a grundnorm, a high-level principle. In domestic legal systems, it is a statutory rule that needs to be interpreted consistently with other – equally valid – statutory rules. The rule of law demands no less. The best interests principle in international law, encapsulated by Article 3 of the UN Convention on the Rights of the Child, is an aspiration and a guide to state action: it is an important reminder that judicial, legislative and administrative bodies should always keep children at the forefront of their attention. It is no more than that and treating it otherwise denies state legislatures the power to adopt good social policy, compromising thereby the welfare of children in general by favouring the individual child."[419]

---

[417] *AB v CT (Parental Order: Consent of Surrogate Mother)* (n 182) para 1.
[418] 'Children's Rights Related to Surrogacy, [Doc 14140] Draft Recommendation Adopted by the Committee on Social Affairs of the Council of Europe Parliamentary Assembly (PACE), Adopted in 21 September 2016' Explanatory memorandum by the rapporteur, MS De Sutter, paragraph 26.
[419] Kenneth McK Norrie, 'Surrogacy in the United Kingdom: An Inappropriate Application of the Welfare Principle' in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge University Press 2016) 179.

There is a rigorous criticism over how the courts have interpreted section 54 of HFEA. It has been argued that the interpretation is conflicting and contradictory.[420] For example, Norrie has commented on an inappropriate application of the welfare principle in the UK as follows:

> "These decisions illustrate the dangerous subjectivity of 'welfare' [...] in my view the fact that the focus is on the child's best interests has blinded the courts to the requirement to follow statutory language, which risks disrupting the balance of interests struck by parliament through all the limitations in s.54."[421]

Commenting on decided cases, Brown also questions:

> "Notwithstanding my criticism of the decision in *Re X*, set out above, it is apparent that Munby [J] sought what he perceived as a 'just' outcome, based upon the best interests of the child, in ignoring the clear statutory language of 'must', in section 54(3), and granting the parental order. Therefore, it is somewhat surprising that he did not adopt a similar 'just' approach to the statutory language of section 54(1) in *Re Z*."[422]

Brown raises a valid point, in both circumstances: if a parental order had not been granted, the child would have borne the consequence. However, the court's discretion to consider the best interests of the child is not absolute. An argument can be put forward that the court's discretion in granting the parental order cannot override the policy of the principal Act, but when courts exercise their discretion under the main Act, the first consideration should be the "paramountcy of the welfare of the child." This can be explained by considering that cases fall within categories two and three discussed above. The court has differentiated the law that contains technical rules on making parental orders and embodies substantive concerns. A time limit is a technical issue, whereas awarding legal parenthood in favour of a single person when there is a clear policy behind the requirement that there should be two applicants is a substantive concern that the court cannot disregard. Substantive rules create rights whereas procedural rules support the protected rights. If a procedural rule becomes an impediment to substantive rights, it can be bypassed in order to protect the right. The judiciary cannot create rights, however. This can be clearly explained where the legislation provides that an applicant can be two persons within an "enduring family relationship". The judges have used discretion to interpret this phrase to ensure that children will not be deprived of their family life.[423] If the legislation did not recognise the "enduring family relationship" the court would not have interpreted the two applicant criteria in this way.

On the other hand, there are conditions under section 54 where the courts have expressly been given discretion. For example, even though there is a clear public policy against the

---

[420] Brown (n 23) argues that the court has provided contrasting and contradictory reasoning for justifying their decisions in interpreting criteria stipulated in section 54 of HFEA 2008.
[421] Norrie (n 419) 177–178.
[422] Brown (n 23) 39.
[423] Welstead (n 178).

commerciality of a surrogacy arrangement, considering the complex situation, the Act gives discretion to the court to authorise such payments. In such cases, the court does not invent the policy, but rather productively exercises its discretion through well-established principles in order to retrospectively authorise the payment. When there is authorisation or approval of the payment, the court has followed certain principles and the legislation itself has given the power to the court to authorise payments. Thus, the UK approach of interpretation of the best interests of the child does not amount to creating a new law but following well-settled principles of adjudication given the benefits of procedural mishaps to protect the interests of the individual child. Interestingly, Norrie comments on the application of the best interests of the child as follows:

> Which of the conditions contained in section 54 of the 2008 Act is so absolute that the failure to fulfil it means that there is indeed no other legal option? [...] it is clear the great majority are absolute, with no scope at all for the court to make a parental order when it is not satisfied, with adoption remaining the only option to achieve a transference of parenthood [...] How that discretion is exercised is affected by considerations of welfare, but that cannot be the determining factor of whether the condition is satisfied or not. There is only one condition – six-month time limit – that has been held to be governed by the child's welfare.[424]

The one condition, time limit, which is heavily criticised is actually a procedural requirement and one the Law Commissions' consultation paper seeks to abolish. This proves that the court has only stretched the law in certain circumstances, using discretion given by the legislature, without altering the basic structure of the policy of the regulation of surrogacy. Further, the discretion was not unrestricted but directed by the "welfare of the child." There are several instances when the court has refused to make the parental order: firstly, when there is an issue as to domicile, in which case the court has taken a clear approach in this regard, secondly, when there is an issue as to the consent of the surrogate, in which case the court has also taken a clear view. It appears that the UK judiciary has worked well to protect the rights of the child within these particular challenging situations.

Nevertheless, there is an issue over whether overall the UK law as it stands today upholds the best interests of the child. This report suggests that the answer is 'no'.[425] The reason is related mainly to the safeguards and protection measures that the legislature has failed to put into place for when persons enter into surrogacy arrangements. As already discussed, there are instances when the surrogacy arrangement has gone wrong due to the actions of the parties. It is therefore necessary that the UK legislator introduces

---

[424] Norrie (n 5) 110.

[425] Barbara Connolly, 'The Best Interests of the Child v the Right to Procreate: Or How Far Does the Law on Surrogacy Protect the Best Interests of the Child?' [2016] International Family Law Journal 111, 115 argues that current UK law on surrogacy 'not only inhibits individual procreative freedom but does not always promote the best interests of the child.'

protective measures applicable before the persons enter into the surrogacy arrangement. One view proposes that the law should introduce pre-birth orders.[426] Moreover, there should be a mechanism to address issues that emerge through international commercial surrogacy arrangements. Indeed, the proposed amendments to the law do not provide sustainable solutions to issues arising from such arrangements, as the new pathway does not apply to cross-border surrogacy agreements. The majority of reported cases deal with international surrogacy arrangements which indicates that a change in domestic law as proposed by the Law Commissions will not prevent the majority of issues arising.[427]

3.9 CONCLUSION

In the absence of an international consensus on universal minimum (normative) standards and principles in governing the practice of surrogacy, the UK faces many challenges in protecting the rights of a child born from surrogacy arrangements, regardless of domestic regulation. In any regulatory process a critical appraisal of the principle of the best interests of the child is necessary in order to protect the rights of the child as well as children as a group, who are the silent stakeholders of these arrangements. For this purpose, this report has considered how the current UK law protects the best interests of the child in general and in the event of a dispute where an individual child's rights are at stake. Application of the best interests of the child in the context of surrogacy arrangements in the UK court may provide excellent evidence on how an individual child's interests should be balanced against other policy considerations, some of which are aimed at protecting children's rights in general.

Regardless of regulation of surrogacy arrangements, there are issues emerging in determining the best interests of the child. Although there are certain instances when the court has utilised the 'best interests of the child' principle as a 'gap jumper', overall case studies show that the court is left with a challenging task of balancing the different interests. These are mainly: protection of the best interests of children generally against the protection of the individual child's interests. This report examines that there is no blatant violation of a rule of law in considering the best interests of the child principle when making the parental order. The court has stayed well within the interpretation of the 'best interests of children' mandated by the legislation and 'the best interests of the child' recognised through subsequent regulation and the inherent power of the *parens patriae* of the court. The court has indeed developed principles to tackle issues arising from eligibility criteria and the discretion of the court is guided by principles that have been developed by the court and followed by successive cases. If such an attempt was not

[426] Melissa Elsworth and Natalie Gamble, 'Are contracts and pre-birth orders the way forward for UK surrogacy?' [2017] International Family Law 157.

[427] Rita D'Alton-Harrison, 'Regulating International Surrogacy, "the Elephant in the Room": Some reflections on reform from a UK study.' (2019) 31 Child and Family Law Quarterly 47, 51 argues that, "to put in place a new domestic surrogacy framework without addressing international surrogacy is to ignore the elephant in the room."

made, the regulation recognising the best interests of child principle would have been simply a 'gap jumper' and of no real use.

There is no doubt that domestic legislation should uphold the best interests of children and the child. Nevertheless, considering the cross-border nature of surrogacy arrangements, any legal control of surrogacy law will not help when there is no international consensus or cooperation. The disparity in law and non-adherence to law will keep on threatening the protection of the rights of surrogate-born children unless the best interests of the child principle is taken as the fundamental consideration in all disputes arising from surrogacy. Different approaches have been proposed for domestic regulation of surrogacy.

The current approach of the UK surrogacy regulation and the proposed reform provide two models for the world. Alternatively, there is an argument that if there is a certainty of a surrogacy contract, the children will not be left in limbo. Therefore, the 'intention' of the parties to surrogacy is important. However, the most appropriate approach is conceptualising the 'best interests of children' through legislation. Moreover, it is important to give the discretion to the court to conceptualise 'the best interests of the child' through the principles of adjudication considering the case by case approach. Among these regulatory choices finding a best approach depend on how a state respects its international obligation in the contexts of international human rights and private international law.

PART 4: PROJECT WORKSHOP

As a part of the research project 'Reproductive Healthcare and Policy Concerns: Regulation of Surrogacy Arrangements in Sri Lanka and Lessons Learned from the UK', a virtual Workshop[1] was organised by the University of Aberdeen which was held on 17 September 2021.[2]

The forum was held in two parts. In the first part, as the main researchers of this project, Dr Katarina Trimmings (senior researcher) and Ziyana Nazeemudeen (junior researcher) provided the summary of the UK approach[3] to surrogacy and Dr Rose Wijeysekera (senior researcher) and Dr Darshana Sumanadasa (junior researcher) discussed the Sri Lankan experience of regulation of surrogacy arrangements,[4] followed by a question-and-answer session.

The second half of the Workshop was dedicated to the discussion of the experience of other Asian countries with surrogacy arrangements including commercial cross-border surrogacy. There were six discussants: Mr Wanchai Roujanavong (Representative to the ASEAN[5] Commission on the Promotion and Protection of the Rights of Women and Children, Thailand), Ms Mia Damach (Director of the Child Identity Protection/former Director of the International Social Service, Geneva, Switzerland), Professor Elizabeth Aguiling–Pangalangan (Philippines), Ms Chongchith Chantharanonh (PDR's former Representative to the ASEAN commission on Promoting and Protecting the Rights of Women and Children, Laos), Ms Yuyum Fhahni (former Representative to the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, Indonesia), and Dr Sonali Kusum (Assistant Professor of Law, Tata Institute of Social Sciences, Mumbai, India).[6]

During this session, the following key points concerning the regulation of surrogacy arrangements in Asia were highlighted. Firstly, given the absence of international rules on the determination of parenthood of the child and the disparities in the State approaches to regulating surrogacy, Asian countries are still the leading provider of surrogacy services. It was highlighted that only Thailand[7] has the law to regulate surrogacy arrangements among ASEAN countries while Cambodia[8] is considering a

---

[1] See Legal Regulations of Surrogacy 2021 | What's On | The University of Aberdeen (abdn.ac.uk).
[2] See the Workshop Programme attached as Annex 1.
[3] See Part 3 above.
[4] See Part 2 above.
[5] The Association of Southeast Asian Nations (ASEAN) was established on 8th August 1967. There are ten member States in ASEAN: Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Laos, Myanmar, and Cambodia. 'Association of Southeast Asian Nations' <https://asean.org/about-us/#:~:text=The%20Association%20of%20Southeast%20Asian,%2C%20Philippines%2C%20Singapore%20and%20Thailand.> accessed 6 December 2021.
[6] University of Aberdeen, speakers and discussants, www.abdn.ac.uk/events/conferences/surrogacy-event-2021/speakers-discussants-1753.php.
[7] The Protection for Children Born through Assisted Reproductive Technologies Act, BE 2558 (2015).
[8] "Surrogacy was banded in Cambodia in November 2016 by the decision from Ministry of Health (prakas, signed October 24, 2016)." Kasumi Nakagawa, 'Cambodia Country Submission' Call for Inputs - Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child

regulation of surrogacy arrangements. With regard to Philippines and Laos, it was noted that there is no specific regulation on surrogacy. Among SAARC[9] countries, India and Nepal have banned foreign commercial surrogacy. However, even in these countries there are no specific laws regulating surrogacy arrangements. India has been considering regulating surrogacy through legislation for several years, and presently, there is a surrogacy bill (the Surrogacy (Regulation) Bill 2020) which was recently approved by the upper house of the Indian Parliament (Rajya Sabha) and will now go back to the lower house (Lok Sabha) for approval.[10]

Accordingly, in most of the participating countries there are only legal provisions pertaining to determination of the legitimacy of the child[11] or, in limited instances, laws on the legitimacy of children born as a result of artificial insemination.[12] Moreover, these countries use laws on trafficking in women and children, particularly criminal law, in curtailing commercial surrogacy.[13] This is also in a way dangerous as vulnerable women will be prosecuted for acting as surrogates and children may have to live in a prison. Therefore, there is a call to stop criminalising surrogate mothers.[14]

The lack of regulation of surrogacy in South and Southeast Asia has led these countries to become main surrogacy service providers for intended parents from China, Europe, and Australia. India and Thailand are still considered the main hubs of surrogacy in Asia regardless of the stipulated ban on cross-border surrogacy in these jurisdictions as surrogacy agencies and intermediaries use different tactics to circumvent national

---

pornography and other child sexual abuse material <https://www.ohchr.org/Documents/Issues/Children/SR/Surrogacy/AcademicInstitutions/KasumiNakagawaPannasastraUniversityCambodia.docx> accessed 6 December 2021. See also 'Supplementary Information on Cambodia's Surrogacy Situation and Surrogacy Draft Law for Consideration by the Committee during Its 74th Session' (The Gender and Development for Cambodia (GADC), Gender and Development Network (GADNet), and Center for Reproductive Rights 2019) <https://reproductiverights.org/wp-content/uploads/2021/03/CEDAW_Cambodia_74thsesssion_GADC_GADNet_CRR-1.pdf> accessed 5 December 2021.

[9] The South Asian Association for Regional Cooperation (SAARC) was established on 8th December 1985. It comprises of eights Member States: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. 'South Asian Association for Regional Cooperation (SAARC)' <https://www.saarc-sec.org/> accessed 5 December 2021.

[10] Sarah Pritchard, 'Assisted Reproduction and Surrogacy Bills Passed by Indian Parliament' *Bionews* (13 December 2021) < https://www.bionews.org.uk/page_161099> accessed 19 December 2021.

[11] For example, See Evidence Ordinance of Sri Lanka no. 14 of 1895 as amended. Section 102.,The Family Code of The Philippines 1987 Article 163-182.

[12] The Family Code of The Philippines Art.164.

[13] 'Pregnant Cambodian Women Charged with Surrogacy and Human Trafficking' *The Guardian* (7 July 2018) <https://www.theguardian.com/world/2018/jul/07/pregnant-cambodian-women-charged-with-surrogacy-and-human-trafficking> accessed 11 December 2021.

[14] As a result of all forms of surrogacy was criminalised and women who act as surrogates are prosecuted. It has been reported that in Cambodia pregnant surrogates mothers were imprisoned for cross-border human trafficking. See Lea Goetz, 'UN Call to Stop Criminalisation of Surrogates in Cambodia' *BioNews* (18 November 2019) <https://www.bionews.org.uk/page_146249> accessed 5 December 2021. See also 'Supplementary Information on Cambodia's Surrogacy Situation and Surrogacy Draft Law for Consideration by the Committee during Its 74th Session' (n 12).

regulation, leading to complex international surrogacy arrangements. As such, Thai,[15] Indian,[16] and Nepalese women continued being recruited to work as surrogate mothers.

In the Workshop, the following points were highlighted in particular:

Firstly, in most of these countries, surrogacy services are offered through different websites and social media platforms. There is another concern is even though these countries can be considered as service providing countries, there are instances wealthy person/s as intended parents in these Asian countries also go to other countries to obtain children through international surrogacy arrangements.[17] It was highlighted that there is a need for socio-legal empirical research with regard to practice of surrogacy. As Asia not only sending countries but also people from these countries go to other countries to obtain children as Asian people like to have fair babies.

Secondly, India and Thailand advocate for a ban on foreign surrogacy. As a result, the law requires at least one of the intended parents to be a national of the country where the surrogacy takes place. Particularly, in India, the recent Surrogacy (Regulation) Bill (2020) confines surrogacy to Indian citizens. Only overseas Indian citizens can obtain surrogacy services in India. For this purpose, they must obtain specific medical visa – by complying with certain conditions. One of the conditions is a medical reason for utilising surrogacy to have a child and a medical certificate as to infertility. Hence, the new Bill does not allow foreign surrogacy. Similarly, in Thailand, to get surrogacy services, one of the intended parents must be a Thai national. However, it was revealed in the discussion that Thai women have been trafficked to other neighbouring countries[18] including by Chinese agents and the children were delivered in a different country. It was discussed in the Workshop that as the Thai law on surrogacy has no extra-territorial effect Thai authorities find it difficult to protect vulnerable Thai women who are taken out of the country to work as surrogate mothers. Hence, authorities are considering the criminalisation of any act concerning surrogacy.

Thirdly, most of the discussants agreed that the status of the child should be determined based on family law and considering the genetic and gestational connection of the child. Accordingly, the idea that the status of the child should be determined through a contract considering the intention of the parties was rejected. It was highlighted that the Philippine Family Code states that "no custom, practice or agreement destructive of the family shall be recognised or given effect."[19] Accordingly, it was stressed that the surrogate mother should be considered as the legal mother of the child at birth.

---

[15] Caitlin Ashworth, 'Police Bust Alleged Illegal Surrogacy Ring, Thai Women Allegedly Gave Birth for Overseas Buyers' [2021] *Thaiger* <https://thethaiger.com/news/national/police-bust-alleged-illegal-surrogacy-ring-thai-women-allegedly-gave-birth-for-overseas-buyers> accessed 11 December 2021.

[16] 'Ex-Delhi Doctor Running Illegal Surrogacy Operation in Nepal' *The Times of India* (17 July 2020) <https://timesofindia.indiatimes.com/city/agra/ex-delhi-doctor-running-illegal-surrogacy-operation-in-nepal-agra-police/articleshow/77006879.cms> accessed 11 December 2021.

[17] Artemio Panganiban, 'The Delectable Twins of Mar and Korina' [2019] *Inquirer.net* <https://opinion.inquirer.net/120037/the-delectable-twins-of-mar-and-korina> accessed 8 December 2021.

[18] For example, 'Thai Police Arrest Man Smuggling Semen into Laos' *BBC* (21 April 2021).

[19] The Family Code of The Philippines Art. 149.

Fourthly, most of these countries advocate for altruistic surrogacy arrangements. However, it was highlighted that there is a need for a conceptualisation of payments.

The rights of the intended parents were also discussed, including with regard to requiring a medical certificate concerning infertility. It was argued that it was against the right to privacy and dignity. Later, the case of *Jan Balaz*[20] was discussed.

The protection of surrogate mothers was also discussed. In this context, the *Public Interests Litigation Jaya Shri Baj*[21] case was highlighted. Moreover, it was highlighted that to protect women, the recent surrogacy Bill in India has proposed an insurance policy framework.

One of the major concerns in the context of international surrogacy arrangements is protecting the rights of children. It was highlighted that countries that act as surrogacy service providers should take action, for example, by requiring an undertaking from the intended parents. Moreover, it was argued that when issuing birth certificates, an apostille seal should be used. However, in the case of *Paradiso*[22] the ECtHR noted that under Article 5 of the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public documents 1961[23] the "only effect of the certifying document (the "apostille") is to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which document bears"[24] and not the "truthfulness of the content of the original document."[25] Therefore, this cannot be an effective method given the disparity in the approach to surrogacy and the public policy concerns.

Valid concerns were raised concerning regulating international surrogacy arrangements. It was highlighted that there is an urgent need for international regulation on surrogacy arrangements. As surrogacy offers an opportunity to form a family, there is a belief that that there is a right to have a child through surrogacy.[26] At the same time, surrogacy is a lucrative business for many intermediaries. There are number of ethical and legal concerns over international surrogacy arrangements. As for the ethical concerns, there is a question whether a surrogacy arrangement challenges the dignity of human beings and

---

[20] *Union of India & ANR v Jan Balaz & Others* [2017] Civ Apeal No 87142010 WP C No 952015.
[21] *Jayashree Wad v Union of India Writ Petition* (Civil) 95/2015.
[22] *Paradiso and Campanelli v Italy* [2015] Appl No 2535812 (European Court of Human Rights, Twelfth Section).
[23] Hague Convention Abolishing the Requirement of Legislation for Foreign Public documents 1961.
[24] *Paradiso and Campanelli v Italy* [2015] Appl No 2535812 (European Court of Human Rights, Twelfth Section) [72].
[25] ibid.
[26] "The provisions of Article 8 do not guarantee either right to found a family or the right to adopt." *Paradiso and Campanelli v Italy* [2015] Appl No 2535812 (European Court of Human Rights, Twelfth Section) [141]. See Also 'Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material' (Human Rights Council, United Nations 2018) A/HRC/37/60 64 <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/60> accessed 15 October 2020 'a "right to a child" would be a fundamental denial of the equal human rights of the child. The "right to a child" approach must be resisted vigorously, for it undermines the fundamental premise of children as persons with human rights'.

so whether it should be allowed. Moreover, due to the cost factor, surrogacy services are only accessible to only wealthier people. Furthermore, given a possible use of anonymous gamete donors, there are concerns over the child's identity rights. Regarding legal concerns, particularly, several private international law questions arise from international surrogacy arrangements. For example, how to determine the legal parenthood of the child; which court should determine it and which law should be applied? Furthermore, should a birth certificate issued to a surrogate-born child by the country of birth be recognised by the receiving country which prohibits surrogacy, such as France or Italy?

There are also a number of public international law concerns which arise, particularly concerning human rights. For example, non-discrimination of children, sex-selection, or abandonment of children born with disability. Moreover, even though not always, surrogacy could lead to the sale or commodification of children. Particularly, as there is no screening of the suitability of the intended parents, there may be instances when children are obtained through international surrogacy arrangements by intended parents who have a criminal record as paedophiles and/or sexual abusers. There are concerns about protection of surrogate mothers, particularly, there are instances where girls under the age of eighteen were recruited as surrogate mothers. This practice should be prohibited. Another important consideration is the protection of the child's right to identity and access to origins. There is no mechanism to protect the information as to the origin of the child. There have been instances when children expressed their anger when they realised that they were born from anonymous gamete donations. At the same time, there are no mechanism to protect the information about the gestational mother. It has been reported that there are countries which offer complete removal of information of surrogate mother in birth records. It was stressed that even though all this information cannot be included in the birth certificate, there should be records concerning child's origin.

It was stressed that considering all these difficulties and possible violations of human rights, there should be a national and international regulation to protect the rights of the child, without leaving practice of surrogacy to be controlled by the market approach. Regardless of the countries' approach to the regulation of surrogacy (permit/prohibit/neglect), there should be a regulation on the protection of children rights. Particularly, even where the national approach is to ban surrogacy, there should be a regulation to that effect. This was highlighted by the UN Committee on the Rights of the Child in their Concluding Observations on Georgia.[27] Otherwise, particularly, surrogate-born children's rights will be violated, including that they may be discriminated and may become stateless. Before determining the legal parenthood of the child, States should ensure the protection of the rights of the child through at least minimum

[27] '[…] the Committee is concerned that surrogate motherhood, if not properly monitored and regulated, may lead to the sale of children' 'Concluding Observations on the Report Submitted by Georgia under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (Committee on the Rights of the Child 2019) CRC/C/OPSC/GEO/CO/1 para 22 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fGEO%2fCO%2f1&Lang=en> accessed 7 December 2021.

safeguards to be adhered to by the parties to the surrogacy arrangement, as recommended by the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography.[28] Particularly, it should be assured that consent of the birth mother is obtained, and that the child was not subjected to sale or trafficking. This was highlighted by the UN Committee on the Rights of the Child in their Concluding Observations on India[29] and Mexico.[30] Furthermore, it was highlighted that improper regulation of surrogacy may also have a negative impact on the rights of the child. Particularly, the UN Committee on the Rights of the Child in its Concluding Observations on the US conveyed concerns about the rights of the child when legal parentage is determined based on a surrogacy contract at the pre-birth/pre-conception stage.[31] Accordingly, there are human rights concerns regarding the practice of surrogacy, however, the UN Committee on the Rights of the Child as an international human rights institution has not expressly said that the practice of surrogacy should be abolished. However, there is a movement within the UN which calls for upholding the rights of the child if the practice is to be allowed. More importantly, the Special Rapporteur on the Sale of Children highlighted these human rights concerns in her reports. Moreover, recently, UNICEF child protection strategy included the topic of surrogacy in its Child Protection Strategy.[32] Furthermore, Hague Conference on Private International Law is working on a legislative project on

[28] 'Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material' (n 28). 'Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography' (Human Rights Council Thirty-fourth session 27 February-24 March 2017 2016) A/HRC/34/55 <https://undocs.org/A/HRC/34/55> accessed 10 April 2020. 'Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material' A/74/162 <https://www.un.org/en/ga/search/view_doc.asp?symbol=A/74/162> accessed 24 April 2020.

[29] 'The widespread commercial use of surrogacy, including international surrogacy, which is violating various rights of children and can lead to the sale of children' 'Concluding Observations on the Report Submitted by India under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (Committee on the Rights of the Child 2014) CRC/C/OPSC/IND/CO/1 para 23(g) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fIND%2fCO%2f1&Lang=en> accessed 6 December 2021.

[30] 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Mexico' (Committee on the Rights of the Child 2015) CRC/C/MEX/CO/4-5 para 69(b) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/146/11/PDF/G1514611.pdf?OpenElement> accessed 5 December 2021'The fact that the regulation on surrogacy in the State of Tabasco does not provide sufficient safeguards to prevent surrogacy from being used as a means to sell children;'

[31] 'While noting that surrogate motherhood is a complex area that raises many different questions that fall outside the scope of the Optional Protocol, the Committee is nevertheless concerned that widespread commercial use of surrogacy in the State party may lead, under certain circumstances, to the sale of children. The Committee is particularly concerned about the situations when parentage issues are decided exclusively on a contractual basis at pre-conception or pre-birth stage.' 'Concluding Observations on the Combined Third and Fourth Reports Submitted by the United States of America under Article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (Committee on the Rights of the Child 2017) Concluding Observations CRC/C/OPSC/USA/CO/3-4 para 24 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fUSA%2fCO%2f3-4&Lang=en> accessed 5 December 2021.

[32] 'Child Protection Strategy 2021-2030' (UNICEF) <https://www.unicef.org/media/104416/file/Child-Protection-Strategy-2021.pdf> accessed 8 December 2021.

international surrogacy and legal parentage.[33] Furthermore, *Verona Principles,*[34] which have been supported by the UN Committee on the Rights of the Child, provide a good guide on minimum standards concerning the rights of the child in regulating surrogacy arrangements. It was stressed that the lessons learned from the past concerning international adoptions should not be forgotten. Moreover, the appeal for the protection of children right to identity should not be neglected.

4.1. RECOMMENDATION: A UNIQUE ASIAN PERSPECTIVE?

The Workshop identified certain important traits in regulating surrogacy arrangements in South and Southeast Asian countries. Particularly, the need to ban foreign commercial surrogacy. Thereby a question arose whether there a unique Asian perspective on surrogacy? It is recognised here that there should be both socio-legal and socio-economic research conducted to better understand the existing approaches to surrogacy in South and Southeast Asia. There are many reasons that warrant such studies. Firstly, as there is an ongoing discussion on a potential Hague Convention on cross-border recognition of legal parentage and a Protocol on international surrogacy arrangements, there is a need to consider the approaches of Asian countries to regulating surrogacy. Secondly, even where there is a domestic regulation on surrogacy, there is a considerable knowledge gap in conceptualising the rights of the child. It appears that in addition to doctrinal research, a capacity-building training project on the protection of the rights of children within surrogacy arrangements should be conducted for authorities, policy makers, human rights defenders and academics.

[33] 'Hague Conference on Private International Law: The Parentage/ Surrogacy Project' <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> accessed 15 June 2020.
[34] International Social Service, 'Principles for the Protection of the Rights of the Child Born through Surrogacy (Verona Principles)' (International Institute of Social Studies (ISS), 25 February 2021) <https://www.iss-ssi.org/images/Surrogacy/VeronaPrinciples_25February2021.pdf> accessed 1 August 2021.

PART 5: REGULATING CROSS-BORDER SURROGACY ARRANGEMENTS: LESSONS LEARNT FROM THE UK AND INDIA AND A WAY FORWARD FOR SRI LANKA

5.1. INTRODUCTION

Sri Lanka is a country which follows the common law tradition.[1] However, the Sri Lankan legal system is greatly shaped by the Roman Dutch law,[2] English law[3] and other personal and customary laws such as Islamic law,[4] *Kandyan law*[5] and *Thesavalamai law*.[6] Legal parent-child relationship[7] is governed by general law of Sri Lanka and other customary laws. Regarding general law, most of the laws were enacted during the British reign in Sri Lanka. However, if the enacted law is silent, unclear or creates gaps, then Roman-Dutch law is applied as the common law.

There is no specific law governing the establishment of legal parenthood whenever a child is born as a result of ART,[8] including surrogacy.[9] For example, consider the following event. A woman has signed a surrogacy agreement[10] to carry a child for intended parents[11]

---

[1] Legal systems in the world fall into two main categories: common law systems and civil law systems.

[2] Sri Lanka was under the reign of the Dutch and as a result Roman-Dutch law was introduced.

[3] Sri Lanka was under the reign of the British and as a result English laws guided legislation.

[4] Sri Lanka has a rich plural legal system which recognises certain aspects of *Sharia* law as the Muslim law of Sri Lanka through a number of statutes since the colonial period. These laws mainly govern aspects of marriage and incidental issues (Muslim Marriage and Divorce Act No. 13 of 1951), intestate succession (Muslim Intestate Succession Ordinance No. 10 of 1931), and Muslims charitable trusts (Muslim mosques and charitable trusts or Wakfs Act No. 51 of 1956).

[5] *Kandyan law* is one of the territorial customary laws in Sri Lanka that applies to the people who live in Kandy province.

[6] *Thesavalamai law* is also a territorial customary law that applies to property and the people in Jaffna province.

[7] The parent-child relationship can be considered in different ways in the eyes of the law. Legal parenthood is only one aspect and is concerned with the recognition of parents according to the law of a country. However, apart from this, there may be 'genetic parenthood' and 'social parenthood'. See the discussion of Justice Baroness Hale in *Re G (Children) (Residence: Same-Sex Partner),* also known as *CG v CW* [2006] UKHL 43.

[8] Defined as "all treatments or procedures that include the *in vitro* handling of both human oocytes and sperm or of embryos for the purpose of establishing a pregnancy. This includes, but is not limited to, in vitro fertilization and embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, tubal embryo transfer, gamete and embryo cryopreservation, oocyte and embryo donation, and gestational surrogacy. ART does not include assisted insemination (artificial insemination) using sperm from either a woman's partner or a sperm donor. F Zegers-Hochchid and others, 'International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary of ART Terminology' (2009) 92 Fertility & Sterility 1520.

[9] In a surrogacy arrangement a surrogate mother agrees to carry a child to term and relinquish all the rights to the intended parents after birth. Considering the surrogate mother's connection to the child, a surrogacy arrangement can either be 'traditional' or 'gestational'.

[10] Surrogacy arrangement is an agreement between the parties to the arrangement. In most jurisdictions surrogacy agreements are not enforceable. However, for example, in California, US a surrogacy agreement is enforceable.

[11] "The person(s) who request another to carry a child for them, with the intention that they will take custody of the child following the birth and parent the child as their own. Such person(s) may, or may not be, genetically related to the child born as a result of the arrangement." 'The desirability and feasibility of further work on the parentage/surrogacy project' (Hague Conference on Private International Law 2014)

who are both genetically connected[12] to the child. The child is born, and the surrogate mother[13] makes no claim over the child and hands the child over to the intended parents. She has not derived any monetary benefits[14] from this arrangement (only the surrogate mother's expenses[15] were covered) and, therefore, it is not a commercial surrogacy arrangement.[16] How should the legal parenthood of the child born from this arrangement be determined in Sri Lanka? How would Sri Lankan authorities determine the parenthood of the child? If this is a gestational surrogacy arrangement as opposed to a traditional surrogacy agreement, will the answer be different? Consider the payment of the surrogate mother's expenses. Would the answer be different if either the surrogate mother or the intended parents were foreigners, and the child was born in Sri Lanka? Moreover, what would be the legal implications if the intended parents were homosexual partners who live in Sri Lanka? What would the Sri Lankan authority do if the surrogate mother refused to hand over the child as agreed in the surrogacy arrangement? These questions may arise in the future given the vacuum in the legal framework governing establishment of legal parenthood in Sri Lanka.

5.2. THE PRACTICE OF SURROGACY IN SRI LANKA

It is more than a mere speculation that Sri Lanka will become another destination for the international surrogacy market in Asia, even though it is not apparent yet that there are international surrogacy arrangements in Sri Lanka. The main reason for this is that even after the ban, foreign commercial surrogacy thrives in India and Thailand. There is strong

---

Prel. Doc. No 3 B 33 <https://assets.hcch.net/upload/wop/gap2014pd03b_en.pdf> accessed 10 October 2015. Annexe A, Revised Glossary.

[12] Intended parents can provide their own gametes to create the embryo or use donor gametes (egg or sperm or both).

[13] 'The woman who agrees to carry a child (or children) for the intending parent(s) and relinquishes her parental rights following the birth. [...] this term is used to include a woman who has not provided her genetic material for the creation of the child. In some States, in these circumstances, surrogates are called "gestational carriers" or "gestational hosts"' 'The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project' (n 12) 33, Annex A, Revised Glossary. Also see 'The Principles Adopted by the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences' (CAHBI) of the Council of Europe, 1989.
<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168031113e4> accessed 10 February 2017 which states that "Surrogate mother means a woman who carries a child for another person and has agreed before pregnancy that the child should be handed over after birth to that person".

[14] 'The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project' (n 12) Annex A-Revised Glossary, which defines altruistic surrogacy arrangement as 'a surrogacy arrangement where the intending parent(s) pay the surrogate nothing or, more usually, only for her 'reasonable expenses' associated with the surrogacy. No financial remuneration beyond this is paid to the surrogate. This may be a gestational or a traditional surrogacy arrangement. Such arrangements often (but not always) take place between intending parent(s) and someone they may already know (e.g. , relative or a friend).

[15] The reasonable expense is varied according to different jurisdictions. Generally, it includes the lost wages of the surrogate mother and all the expenses which were incurred due to the pregnancy such as medical costs, nutritious food and abode, clothing etc.

[16] 'The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project' (n 12) Annex A-Revised Glossary, which defines a for-profit surrogacy arrangement as 'a surrogacy arrangement where the intending parent(s) pay the surrogate financial remuneration which goes beyond her 'reasonable expenses'.' This may be termed 'compensation' for 'pain and suffering' or may be simply the fee which the surrogate mother charges for carrying the child.

evidence to suggest that India is still the dominant surrogacy market and surrogacy agencies implement cross-border/international surrogacy arrangements (ISAs)[17] circumventing the surrogacy laws.[18]

Secondly, even though the practice of surrogacy in Sri Lanka has not yet grown like in India, there is evidence that citizens of Sri Lanka engage in international surrogacy arrangements. Firstly, there are different websites which suggest that Sri Lankan surrogates have entered the surrogacy market.[19] Accordingly, intended parents travel to surrogacy-friendly countries to have a child through surrogacy arrangements. This is often called "reproductive tourism." Even though this seems to be the appropriate term, there is a doubt about this terminology.[20] Today, "reproductive tourism" is facilitated primarily through the internet, hence it is called the era of "*cyberprocreation*."[21] Parties use different websites, web applications, and social media platforms to find surrogates, gametes donors, medical facilities etc. There are different types of groups and agencies that operate as intermediaries to facilitate these arrangements. Most often, these facilities are provided in informal way on (un)regulated platforms. Disparity in the regulation concerning the practice of surrogacy does not seem to be a barrier to virtual services.

Thirdly, as there are no specific laws governing ART in Sri Lanka, this legal vacuum has created a web to filter surrogacy arrangements away from the limelight. In the absence of an international convention and due to inadequate domestic legislation to address disputes arising from informal surrogacy arrangements, States face challenges in protecting the vulnerable parties involved in these arrangements. It has been reported that many intended parents have been deceived by surrogates[22] and intermediaries. At the same time, there are instances when poor surrogates have been trafficked to different countries and deceived into working as surrogates without even meeting or knowing the real identity of the intended parents. Moreover, these platforms have been used to mislead authorities to obtain parental rights and responsibilities, under the pretence that

---

[17] ibid, Annexe A, Revised Glossary, which defines international surrogacy arrangement as "a surrogacy arrangement entered into by intending parent(s) resident in one state and a surrogate resident (or sometimes merely present) in a different state. Such an arrangement may well involve gamete donor(s) in the state where the surrogate resides (or is present), or even in a third state."

[18] See generally, Andrea Whittaker, *International Surrogacy as Disruptive Industry in Southeast Asia* (Rutgers University Press 2018).

[19] 'Find Surrogate Mother, (Websites for Meeting Intended Parents and Surrogate Mothers)' <https://www.findsurrogatemother.com/intended-parents/sri-lanka> accessed 12 December 2021. 'Find Surrogate Mother, (Listed the Names of Available Surrogate Mothers from Sri Lanka)' <https://www.findsurrogatemother.com/surrogate-mothers/15354> accessed 12 December 2021.

[20] Instead, it was suggested to use 'cross-border reproductive care'. Sharon Bassan and Merle Michaelsen, 'Honeymoon, Medical Treatment or Big Business? An Analysis of the Meanings of the Term "Reproductive Tourism" in German and Israeli Public Media Discourses' (2013) 8 Philosophy, Ethics, and Humanities in Medicine 9 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3854005/> accessed 1 February 2018.

[21] J Brad Reich and Dawn Swink, 'Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreation Era' (2011) 14 Journal of Health Care Law and Policy 241.

[22] By Nicola Harley Harley, 'Couple Conned by "fake" Surrogate Mother's Baby Lies: Heartbroken Couple Were Conned into Paying Thousands for a Baby That Did Not Exist' *The Telegraph* (23 January 2016) <https://www.telegraph.co.uk/news/health/news/12117244/Couple-conned-by-fake-surrogate-mothers-baby-lies.html> accessed 2 February 2018.'Fake Surrogate Mother Louise Pollard Jailed' *BBC NEWS* (16 June 2014) <http://www.bbc.co.uk/news/uk-england-devon-27868511> accessed 10 February 2018.

the child was a result of surrogacy arrangements,[23] where this was not the case. These actions also may lead to the sale[24] and abduction of children. In certain instances, if parties are within the jurisdiction, for certain crimes, the domestic criminal laws could be applied,[25] however, if those wrongs are inadmissible as crimes, and if there are certain disadvantages for the parties involved (specially for children born as a result of these surrogacy arrangements); and if the practice constitutes an infraction on public policy of the state, this creates a legal vacuum. As such, many States plan to introduce new legislation on surrogacy or reform their legislation to encapsulate new dimensions and emerging trends in order to adequately address the issues arising from international surrogacy arrangements. As such, Sri Lanka has a role in being one of the jurisdictions where one of the elements of the ISA can take place. It could be where the surrogate mother lives or merely is present, or the place of the child's birth, or the country of the intended parent/s. Hence, Sri Lanka could be one of the countries of origin or the state of the child's birth,[26] receiving[27] or intermediary country within the ISA process.

5.3. ISSUES ARISING FROM SURROGACY ARRANGEMENTS

There are many different issues arising: the registration of the birth of the child, establishment of parenthood of the child, determination of nationality of the child, protection of surrogate mothers from exploitation and trafficking and, most importantly, upholding the best interests of the child.[28] There are no international rules concerning the determination of legal parenthood, however, existing international legal policies found on the basis of international conventions require the State to take necessary measures to protect vulnerable parties, particularly, the best interests of the child.[29] Sri Lanka is a party to several international conventions and national legal commitments, and has the responsibility to introduce laws governing ARTs, particularly surrogacy. The determination of the legal parenthood of the child should be considered within this legal framework in Sri Lanka.

---

[23] *VG, CY v Her Majesty's Advocate* [2016] HCJAC 1.

[24] Martin Wainwright, 'Surrogate Mother Jailed for Internet Fraud' *The Guardian* (22 May 2004) <https://www.theguardian.com/technology/2004/may/22/internetcrime.internet> accessed 10 February 2018.

[25] *VG, CY v. Her Majesty's Advocate* [2016] HCJAC 1 (n 24).

[26] Annex A- Revised Glossary 'The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project' (n 12) i 'The State in which the surrogate gives birth to the child and in which the question of the child's legal parentage usually first arise. This will usually be the State in which the surrogate is resident. However, in some cases surrogate may move to a State specifically for the birth.'

[27] ibid, (i) "The State in which the intending parents are resident and to which they wish to return with the child, following the birth."

[28] 'United Nations Convention on Rights of the Child (Adopted and Opened for Signature, Ratification and Accession 20 November 1989 UNGA 44/25 (UNCRC)' Art. 3 provides that 'in all actions concerning children…the best interests of the child shall be a primary consideration.'

[29] 'Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material' (Human Rights Council, UN 2018) A/HRC/37/60 para 37 <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/60> accessed 15 October 2020, states that "…States, regardless of their perspectives on surrogacy, must prohibit, and create safeguards to prevent, the abduction of, the sale of or traffic in children in the context of surrogacy."

5.4. LAW AND POLICIES CONCERNING REPRODUCTIVE TECHNOLOGIES

IVF was used successfully in the late 1990s in Sri Lanka and the birth of the first IVF child in Sri Lanka was recorded in November 1999.[30] However, it was only in 2002 that this was reported widely in the news.[31] The discussion about the ethics of the use of reproductive technology in Sri Lanka has been captured in medical research.[32] Concerns have been raised as to bioethics that should address novel technologies arriving in Sri Lanka, including assisted reproductive technologies.[33] There are two main policy frameworks which have been formulated concerning ART.[34] Firstly, 'New Genetics and Assisted Reproductive Technologies in Sri Lanka: A Draft Policy on Biomedical Ethics' was prepared by the National Science and Technology Commission in 2003 (NASTEC Report).[35] Secondly, the Sri Lanka Medical Council (SLMC) has published a 'Code of Practice in Respect of Use of ART' (SLMC ART Code).[36] However, there is a criticism that unlike the NASTEC Report, the Code of Practice did not deal with the complex issues including surrogacy.[37]

5.5. ESTABLISHMENT OF LEGAL PARENTHOOD

According to Sri Lankan general law, whenever a child is born within a marriage the paternity is presumed considering the birth mother's relationship with the man in the marriage.[38] This presumption is the echo of the maxim '*pater est quem nuptiae demonstrant*' (by marriage the father is demonstrated). However, this presumption is

---

[30] Bob Simpson, 'IVF in Sri Lanka: A Concise History of Regulatory Impasse' (2016) 2 Reproductive BioMedicine and Society Online 8, 9.

[31] ibid.

[32] Harshalal Seneviratne, 'Ethical Issues in the Provision of Assisted Reproduction' (2011) 33 Sri Lanka Journal of Obstetrics and Gynaecology 77. Bob Simpson, 'We Have Always Been Modern: Buddhism, Science and the New Genetic and Reproductive Technologies in Sri Lanka' (2009) 10 Culture and Religion 137. VHW Dissanayake, RD Lanerolle and N Mendis, 'Research Ethics and Ethical Review Committees in Sri Lanka: A 25 Year Journey' (2006) 51 Ceylon Medical Journal 110. Bob Simpson, 'Impossible Gifts: Bodies, Buddhism and Bioethics in Contemporary Sri Lanka' (2004) 10 Journal of Royal Anthropological Institute 839. Bob Simpson, 'Acting Ethically, Responding Culturally: Framing the New Reproductive and Genetic Technologies in Sri Lanka' (2004) 5 The Asia Pacific Journal of Anthropology 227. Bob Simpson, 'Ethical Regulation and the New Reproductive Technologies in Sri Lanka: Perspectives of Ethics Committee Members' (2001) 46 Ceylon Medical Journal 54.

[33] Salla Sariola and Bob Simpson, *Research as Development: Biomedical Research, Ethics, and Collaboration in Sri Lanka* (Cornell University Press 2019) 40.

[34] See generally, Dissanayake, Lanerolle and Mendis (n 33).

[35] 'New Genetics and Assisted Reproductive Technologies in Sri Lanka, A Draft National Policy on Bioethics in 2003.' <http://www.hgucolombo.org/policy/> accessed 12 December 2021.

[36] 'Code of Practice: Artificial Reproductive Technologies' (Sri Lanka Medical Council (SLMC), 2005) <https://web.archive.org/web/20090604211953/http://www.slmedc.lk/publications/AssistedReproductiveTechnologies.htm> accessed 12 December 2021.

[37] Simpson, 'IVF in Sri Lanka: A Concise History of Regulatory Impasse' (n 31) 11.

[38] Evidence Ordinance of Sri Lanka no. 14 of 1895 as amended. Section 112, "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after his dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shown that that man had no access to the mother at any time when such person could have been begotten or that he was impotent."

rebuttable considering serological[39] or DNA evidence. In the case of *Weerasinghe v Jayasinghe*[40] it was held that "in cases where parentage (paternity) is in issue the most cogent evidence is likely to be obtained by blood tests in general and DNA tests in particular."[41] Moreover, it was held that "DNA profiling can establish parentage with a virtual certainty."[42] There is a draft Act for Parentage Testing in Civil Proceedings 2007.[43] This bill states that the presumption contained in section 112 of the Evidence Ordinance has lost significance today and genetic testing through DNA analysis gives a very high degree – a probability (99% or higher). Accordingly, this Act recognises that in civil proceedings[44] the court can make a 'parentage testing order'[45] to determine the parentage where 'parentage of any person is in issue.'[46] However, awaiting this law, it has also been reported that in Sri Lanka, the DNA test is used to check the maternity when there are issues such as a 'mix-up of newborn in the hospital' or 'abduction' of children, but it is very rare.[47] Hence, an argument can be put forward that the DNA test can be used by court order as a potential avenue to determine the parentage of a child in the event of an issue as to the maternity of the child.

The next question arises, even if the genetic parentage is determined, what is the legal basis that recognises the legal parenthood of a child? If the legal parenthood is claimed based on a 'surrogacy arrangement', there is no law concerning determination of legality of the surrogacy arrangement except common law. Then the court must consider its domestic policy in determining the legality of surrogacy arrangements. Firstly, even if the surrogate has not obtained any monetary considerations, there is no legal provision to recognise the intended parents as the legal parents. There is a requirement that the birth of the child should be registered as soon as possible and procedure to registration is provided in the Births and Deaths Registration Act No.17 of 1951. It provides the procedures concerning the registration of birth where the child is born either in Sri Lanka or abroad. However, the issue is whether the genetically connected parent can be registered as the legal parent according to this Act, as it does not define 'the parent'. However, in defining 'birth' it states, 'after complete expulsion or extraction from its

---

[39] Lisa A. Gefrides and Katherine E. Welch, 'Serology and DNA' in Ashraf Mozayani and Carla Noziglia (eds), *The Forensic Laboratory Handbook* (Humana Press Inc).
[40] *Weerasinghe v Jayasinghe* 2007 2 Sri LR 50.
[41] ibid.
[42] ibid.
[43] 'Draft Act for Parentage Testing in Civil Proceedings 2007' <https://lawcom.gov.lk/web/images/stories/reports/draft_act_for_perantage_testing_in_civil_proceedings.pdf> accessed 20 November 2021.
[44] 'Draft Act for Parentage Testing in Civil Proceedings 2007' <https://lawcom.gov.lk/web/images/stories/reports/draft_act_for_perantage_testing_in_civil_proceedings.pdf> accessed 20 November 2021. The bill interprets "civil proceeding' which 'shall be deemed to include a proceeding pursuant to an application made to a magistrate under section 2 of the Maintenance Ordinance or section 2 of the Maintenance Act, No. 37 of 1999 or any proceeding before a Quazi under the Muslim Marriage and Divorce Act".
[45] ibid s 1.
[46] ibid s 4.
[47] Chandani Kirinde, 'From crime busting to paternity issues, Lanka makes strides in DNA tests' *Sunday Times* (Sri Lanka, 9 October 2011) <https://www.sundaytimes.lk/111009/News/nws_016.html> accessed 20 November 2021.

mother'.[48] Hence, it can be argued that the legal mother is the birth mother. However, with regard to the father, this could be either the man who is married to the birth mother according to the presumption in section 112 or the person who is recognised as the father by the legal mother whose name is included on the birth certificate[49] or paternity is established through a court order.[50] However, there is no legal provision to establish the parent-child relationship with the genetic mother.
Regardless of the genetic connection with the intended parents, there is an issue that even if there is no exchange of monetary consideration, anybody can come to an agreement with a woman or a couple to bear a child for them. Sri Lanka has ratified the Hague Convention on Intercountry Adoption[51] and the values in this Convention are reflected in the Adoption Ordinance No. 24 of 1941[52] as amended by Act no. 15 of 1992. It specifically prohibits the unlawful custody of any woman who is expecting a child with the purpose of giving such child up for adoption. Moreover, it is a criminal offence to engage in bartering of any person or recruiting women to bear children.

Whoever:

(a) engages in the act of buying or selling or bartering of any person for money or for any other consideration;
(b) for the purpose of promoting, facilitating, or inducing the buying or selling or bartering or the placement in adoption, of any person for money or for any other consideration
(i) arranges for, or assists a child to travel to a foreign country without the consent of his parent or lawful guardian;
(ii) obtains an affidavit of consent from a pregnant woman, for money or for any other consideration, for the adoption of the unborn child of such woman: or
(iii) recruits women or couples to bear children; or
(iv) being a person concerned with the registration of births, knowingly permits the falsification of any birth record or register; or
(v) engages in procuring children from hospitals, shelters for women, clinics, nurseries , day care centres, or other child cure institution or welfare centres, for money or other consideration or procures a child for adoption from any such institution or centre, by [the] intimidation of the mother or any other person; or
(vi) impersonates the mother or assists in such impersonation.

Therefore, even if there is no exchange of monetary consideration, it is an offence to recruit a woman to bear a child. The above provisions explicitly prohibit any kind of arrangement to have a child through a third party or transferring the child from the birth parent/s. These provisions provide protection of children and vulnerable women against trafficking and sale.

[48] Births and Deaths Registration Act No.17 of 1951, s 70.
[49] ibid s 21(2)(a).
[50] ibid 21(2)(b).
[51] 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption.
[52] Adoption Ordinance No. 24 of 1941, s 27(a).

Nevertheless, if a child is born as a result of a surrogacy arrangement, a problem arises whether the parent-child relationship can be established by adopting the child. If there is any exchange of a monetary consideration for the conception of the child and an agreement to relinquish the child to the intended parent/s, then this arrangement is contrary to the public policy of Sri Lanka as any exchange of payment or monetary consideration for the purpose of adoption of a child is prohibited.[53] In such an event, the court will not allow the adoption of the child.

Therefore, the following observations can be made considering the existing legal framework in Sri Lanka. Firstly, the birth mother is considered to be the legal mother. Secondly, regardless of monetary considerations, recruiting a woman to bear a child with the purpose of relinquishing the child is a punishable offence. Thirdly, an argument can be put forward that regardless of the type of surrogacy, a man can use a woman to have a child and recognise himself as the father by proving paternity and registering as the father of the child on the birth certificate in order to acquire custody. Even with the mother's consent, he could take the child away from the country. The issue is that a person who is a foreigner can do the same as a Sri Lankan father. There is no requirement that the father stated on the birth certificate should be Sri Lankan. It can be argued that even though surrogacy arrangements cannot be enforced, in limited circumstances a child's paternity can be proved and a father can obtain custody and even remove the child from the country. Even though the father is a foreigner, if the surrogate mother is a citizen of Sri Lanka, the child can acquire Sri Lankan citizenship according to the Citizenship Act No. 18 of 1948. The issues concerning Sri Lanka as the country of birth/origin are complicated and even though there are laws prohibiting trafficking and the sale of children and exploitation of women, the legal framework does not adequately address issues arising from surrogacy arrangements. As such, a non-regulation of surrogacy and more broadly, ART has paved the way to different arrangements in order to obtain children and 'escape' from the Sri Lankan legal thread.

On the other hand, Sri Lanka as a destination/receiving country of a child born out of a international surrogacy arrangement, may face legal issues in determining the status of the child. It has been reported that Sri Lankan parents use surrogate mothers from India.[54] In this context, as discussed, citizenship of Sri Lanka[55] can be obtained for the child with reference to either of the child's parent being a Sri Lankan citizen by registration[56] or by descent.[57] However, any such application to register as a citizen of Sri Lanka may be refused by the minister on the grounds of public policy.[58] If a child is born abroad, the Sri Lankan diplomatic or consular office in that country 'may' register the birth of a citizen of Sri Lanka occurring in the country, complying with the provisions of the Births and Deaths Registration Act.[59] Thus, this provision provides a discretion to the

[53] ibid s 14.
[54] Simpson, 'IVF in Sri Lanka: A Concise History of Regulatory Impasse' (n 31) 11.
[55] See generally, Luwie Ganeshathasan and Asanga Welikala, 'Report on Citizenship Law: Sri Lanka' (Global Citizenship Observatory (GlobalCIT) 2017) Country Report RSCAS/GLOBALCIT-CR 2017/10.
[56] The Citizenship Act Sri Lanka No. 18 of 1948 S. 11.
[57] ibid s. 4.
[58] ibid s.11(2)(b).
[59] Consular Functions Act (No. 4 of 1981) as amended by Act (No. 18 of 2006), s 7 read with Births and Deaths Registration Act No.17 of 1951.

consular officer to refuse such registration. However, if the birth is registered, then the intended parents can apply for a Sri Lankan passport to travel to Sri Lanka with the child. Once this procedure is followed, then no other provisions or law is needed to establish the legal parenthood of the child. However, if the consular officer refuses to register the child's birth, then a problem arises as to how to determine the validity of the birth certificate as issued by an authority in a foreign country or a court decision recognising the legal parenthood of the child. Arguably, as Sri Lanka follows the common law tradition, the Sri Lankan authorities will apply the law of Sri Lanka (i.e., the *lex-fori* method) in determining the parenthood. However, if the said documents go against the public policy of Sri Lanka, then Sri Lanka may refuse to recognise the parent-child relationship that was established abroad.

5.6. RESPONSIBILITY TO PROTECT THE RIGHTS OF THE PARTIES

In this scenario, the Sri Lankan government has the responsibility to protect the rights and interests of vulnerable parties. Reproductive rights and autonomy should be respected. However, it does not mean that Sri Lanka can disregard its responsibility to protect vulnerable women and children. A state should not let women to earn a livelihood engaging in a profession which compromises their self-dignity, health, and wellbeing. Socially and economically deprived women's autonomy should not be exploited. Moreover, once a child born as a result of a surrogacy arrangement, that child should not be burdened with errors of adults. Non-recognition of legal parenthood of the child mainly affects the status and dignity of an autonomous human being. Therefore, Sri Lanka cannot disregard the rights of the child. The 1978 Constitution of Sri Lanka recognises that the state should promote the interests of children and youth to ensure their full development and to protect them from exploitation and discrimination.[60] Moreover, the ICCPR Act, No.56 of 2007 recognises that every child has the right to have their birth registered, to have a name,[61] to acquire nationality,[62] and to be protected from maltreatment, neglect, abuse or degradation.[63] More importantly the ICCPR Act recognises that in "all matters concerning children, [...] the best interests of the child shall be of paramount consideration."[64] Therefore, in any matter concerning the registration of the birth of a child or legal parenthood, the best interests of the child should be of paramount consideration. Thus, there is a need for the protection of the child's right to identity and access to information concerning their origin. Sri Lanka has the responsibility to prevent a child from being parentless, stateless, or experience any loss of identity.

It is commendable that Sri Lanka has provisions curtailing the sale of children and recruitment of women as surrogate mothers. However, there are different avenues that these laws can be circumvented. As explained above, when a person exercises their reproductive autonomy it can lead to arrangements whereby children's rights can be challenged. Moreover, there is no law which prohibits surrogacy arrangements and the

[60] The Constitution of the Democratic Socialist Republic of Sri Lanka (1978) Article 27(13).
[61] International Covenant on Civil and Political Rights (ICCPR) Act, No 56 of 2007, s 5(1)(a).
[62] ibid Art 5(1)(b).
[63] ibid s 5(1)(c).
[64] ibid s 5(2).

lack of legal regulation to address issues arising from surrogacy arrangements has negative impact on the rights of the child.

Therefore, Sri Lanka should consider bringing in laws concerning ART, particularly surrogacy, considering that Sri Lanka is not only a country of birth/origin but potentially also a receiving and facilitating country for ISAs. The experiences of India and the UK provide a critical ground to consider the regulation of surrogacy in Sri Lanka. Sri Lanka should upgrade the system of registration of birth and provide facility to access information concerning the child's origin.

5.7. LESSONS LEARNT FROM THE UK AND INDIA: RECOMMENDATIONS FOR SRI LANKA

India was once the global hub of international commercial surrogacy arrangements. However, India banned commercial surrogacy for foreigners in 2015 after many issues arose, particularly, following the cases of *Baby Manji*[65] and *Jan Balalz*.[66] Nevertheless, the prohibition was not laid down through a statute. Over the years, the Indian legislator has considered several pieces of draft legislation and very recently, the lower house of India's parliament (the Lok Sabha) approved the Assisted Reproductive Technology (Regulation) Bill 2021 before the (the Rajya Sabha) gave its approval. At the same time, the Surrogacy (Regulation) Bill 2020 was approved by the upper house with amendments put forward by a select committee and has been returned to the lower house for approval.[67]

Meanwhile, however, covert agency networks have been circumventing the laws of India and providing surrogacy services to potential intended parents from different countries. The result of such organised surrogacy arrangements is that elements of the arrangements take place in neighbouring countries. As the surrogacy industry has grown in billions, the economic considerations and incentives have taken over the public policies concerning human rights, particularly the rights of the child, and shifted the burden to countries that prohibit commercial surrogacy to tackle the issue of non-recognition of legal parenthood of the child. As such, Sri Lanka should take immediate action to intervene in this network and implement existing laws to prevent trafficking and exploitation of women and children and take a firm rights-based stance against these sugar-coated exploitations.

In the absence of any specific regulation on surrogacy in Sri Lanka, it is important to take effective action to protect vulnerable women and children. Non-regulation may lead to violation of the rights of children and women as there may be potential underground arrangements which do not get captured in the existing legal framework. Therefore, the Sri Lankan government needs to take the following actions immediately:

---

[65] *Yamada v Union of India* [2008] Ind Law SC 15549 29 Sep 2008.
[66] *Union of India & ANR v Jan Balaz & Others* [2017] Civ Appeal No 87142010 WP C No 952015.
[67] See S. Pitchard, 'Assisted Reproduction and Surrogacy Bills Passed by Indian Parliament' <https://www.bionews.org.uk/page_161099> accessed 20 December 2021.

1. Implement the laws concerning prohibition on the sale of children and trafficking of women for the purposes of surrogacy arrangements effectively. However, using criminal law to tackle this issue should be approached with caution in order to prevent further victimisation of women by penalising them for engaging in surrogacy arrangements.
2. Provide capacity building to all government authorities seeking to tackle potential violations of the rights that occur in the registration of birth and transfer of legal parenthood of the child through adoption.
3. Educate medical practitioners and law and enforcement authorities about the Sri Lankan Draft Policy on Biomedical Ethics which was prepared by the National Science and Technology Commission in 2003 (the NASTEC Report)[68] and the Code of Practice in Respect of Use of ART published by the Sri Lankan Medical Council (the SLMC ART Code).[69]

One of the reasons for the constant violations of the rights of women and children in the context of surrogacy arrangements is non-regulation of surrogacy. Regardless of the approach to the practice of surrogacy, States should regulate this practice considering the rights of the parties, including the rights of the intended parents, surrogate mothers and the children.

The existing welfare model in the UK could be a good example of how to regulate surrogacy arrangements in Sri Lanka:

I. Firstly, it recognises that there can be surrogacy arrangements and legal parenthood can be obtained by the intended parents post-birth by applying for a parental order by satisfying the requirements in section 54 of the Human Fertilisation and Embryology Act of 2008.[70] In the UK, single parents and homosexual partners can apply for a parental order.
II. Surrogacy arrangements are not enforceable in the UK and, as such, legal parenthood of the child is not be decided on the basis of a binding contract.
III. The UK permits only altruistic surrogacy arrangements.
IV. There should be restrictions on foreign commercial surrogacy arrangements. In the UK a parental order can only be obtained by the intended parent/parents domiciled in the UK. Therefore, a foreigner cannot apply for a parental order in the UK, which provides for an outright ban of foreign surrogacy in the UK. The same is recognised in the Surrogacy (Regulation) Bill 2020 in India which allows only Indian citizens, including overseas Indian citizens, to get access to surrogacy services in India.
V. The UK recognises that there should be a genetic link to either intended parent. This prevents parties from obtaining 'designer babies' without any attachment to the child.
VI. Most importantly, the UK courts recognise the best interests of the child principle in respect of every aspect of the surrogacy arrangement. Accordingly, the UK's

[68] 'New Genetics and Assisted Reproductive Technologies in Sri Lanka, A Draft National Policy on Bioethics in 2003.' (n 36).
[69] 'Code of Practice: Artificial Reproductive Technologies' (n 37).
[70] Human Fertilisation and Embryology Act (HFEA) 2008.

approach to regulating surrogacy arrangements is an example[71] which Sri Lanka can follow.

Sri Lanka should also take into account the Verona Principles[72] in regulating surrogacy arrangements and protecting children in the absence of any regulation of surrogacy arrangements. Particularly, minimum standards of human rights should be protected. Legal regulations on surrogacy should be consistent with fundamental human rights norms on the protection of human dignity.[73] Moreover, it is important to recognise the child as an independent rights holder[74] and protect the child's right to non-discrimination,[75] the child's right to health[76] and the right to identity and access to origins,[77] as well as to protect the child against sale, trafficking and exploitation.[78] The state also has the responsibility to protect children from being parentless[79] and stateless.[80] In all these instances, the state has the responsibility to recognise the best interests of the child as the paramount considerations.[81] Therefore, the state should be cautious as to possible impacts on the human dignity of the child when there is a commercial surrogacy arrangement, when there is no genetic connection between the child and the intending parent/s, lack of consent of the surrogate mother[82] and life-long consequences of separation of the child from their genetic, gestational and social parents and siblings.[83]

Accordingly, Sri Lanka should recognise that the regulation of ART is a matter of concern. Sri Lanka should bring in a law concerning the establishment of parenthood, which considers the emergence of ART and surrogacy. As a country of origin, Sri Lanka needs to actively bring in measures to prevent the creation of a surrogacy market through prohibiting commercial ISAs. It needs to recognise the birth mother as the legal mother of the child, it needs a systematic framework to register all children immediately after birth and needs to protect all information pertinent to the child's origin. As a receiving country, Sri Lanka should take immediate action to educate potential intended parents about the importance of having the legal parenthood of a child established, and create laws concerning the recognition of the birth of the child born abroad, particularly when the intended parents have used ART. Sri Lanka should ensure that all its policy decisions are centred on protecting the rights of the child.

---

[71] See Part 3 above.
[72] International Social Service, 'Principles for the Protection of the Rights of the Child Born through Surrogacy (Verona Principles)' (International Institute of Social Studies (ISS), 25 February 2021) <https://www.iss-ssi.org/images/Surrogacy/VeronaPrinciples_25February2021.pdf> accessed 1 August 2021.
[73] Principle 1 ibid.
[74] Principle 2 ibid.
[75] Principle 3 ibid.
[76] Principle 4 ibid.
[77] Principle 11 and 12 ibid.
[78] Principle 14 ibid.
[79] Principle 10 ibid.
[80] Principle 13 ibid.
[81] Principle 6 ibid.
[82] Principle 7 ibid.
[83] See Principle 1 ibid.

5.8. CONCLUSION

The practice of surrogacy in Sri Lanka has not become apparent in the public. However, there is evidence that Sri Lanka may be one of the countries of origin, destination or facilitation for international surrogacy arrangements. It is commendable that there are laws concerning prohibition of the sale and trafficking of children and legal rules against the 'employing' women for the purposes of surrogacy. However, as these are basically criminal laws, there is a legal vacuum in addressing issues arising from surrogacy arrangements, particularly the rights of children. As such, it is recommended that considering Sri Lanka's national and international human rights commitments, there should be a regulation on ART, including surrogacy arrangements.

PART 6: CONCLUSION

The collaborative project 'Reproductive Healthcare and Policy Concerns: Regulation of Surrogacy Arrangements in Sri Lanka and Lessons Learned from the United Kingdom' provided an effective learning platform on law and policy pertaining to surrogacy not only in the UK and Sri Lanka but also in other South and Southeast Asian countries.

The experience of the UK as a predominantly receiving country in the context of cross-border surrogacy, and an example of a European jurisdiction that permits and regulates altruistic surrogacy arrangements has taught lessons in upholding the rights of the child through the key features of the regulation of surrogacy in the UK, in particular, the recognition of the surrogate mother as the legal mother at birth, the ban on commercial surrogacy, avoiding the determination of the status of the child on a contract basis, and recognising the right of the intended parents to form a family through enabling the transfer of legal parenthood post-birth via a 'parental order'. However, it is true that the UK also faces problems with upholding the best interests of the child in the context of international surrogacy arrangements. Therefore, in the absence of international regulation on and cooperation in the area of international surrogacy arrangements, it is important that countries of origin/birth restrict commercial cross-border surrogacy by regulating the practice in line with international human rights law.

Accordingly, Sri Lanka, once a leading sending country in the context of intercountry adoption, has not yet been considered as a predominant sending country in the context of surrogacy. However, it is found that there are individuals and institutions which provide surrogacy services in Sri Lanka, which have not yet been 'caught in the legal net'. At the same time, it was found that Sri Lanka is also as a receiving country but has no legal regulation on surrogacy or more generally on ART. It is commendable that there are legal provisions to tackle the sale and trafficking of women and children. Nevertheless, these laws are not adequate to tackle the complex issues that may arise from surrogacy arrangements. There are two main policy frameworks which have been formulated concerning ART. Firstly, 'New Genetics and Assisted Reproductive Technologies in Sri Lanka: A Draft Policy on Biomedical Ethics' was prepared by National Science and Technology Commission in 2003 (the NASTEC Report). Secondly, the Sri Lanka Medical Council (SLMC) published a Code of Practice in respect of the use of ART (SLMC ART Code). However, there is a criticism that unlike the NASTEC Report, the Code of Practice does not deal with the complex issues including surrogacy. Regardless, as Sri Lanka has drafted a policy on biomedical ethics as early as in 2003, it is surprising that Sri Lanka has ignored the importance of regulating ART. As such, Sri Lanka needs to re-start its work on regulating surrogacy and more generally ART from where it stopped after introducing the draft policy on medical ethics.
For this endeavour, it is important to consider also the experiences of other Asian countries, particularly, India and Thailand. As it was revealed in the Project Workshop, there are certain unique considerations in regulating surrogacy in Asia, given the socio-economic considerations. However, it is important to recognise that the rights of the people should not be bartered away with the state responsibility to protect underprivileged, vulnerable women and children. Particularly, considering the national and international human rights commitments of Sri Lanka, it is important that Sri Lanka

brings in welfare regulations keeping in mind that 'intention' and the 'rights of autonomy' are merely a legal jargon, bearing in mind that in surrogacy arrangements the parties have unequal bargaining powers. As such, Sri Lanka has the responsibility to protect and uphold the dignity of women and children. The Verona Principles is an important international soft law document, which should be considered in this process and reflected in its outputs. It is important to keep in mind that children are not chattels. Also, it is important to recognise the right to form a family but not at the expense of the rights of other autonomous human beings. Finally, it is important to remember the words of the UN Special Rapporteur for the Sale of the Child:

"A child is not a good or service that the State can guarantee or provide, but rather a rights-bearing human being. Hence providing a "right to a child" would be a fundamental denial of the equal human rights of the child. The "right to a child" approach must be resisted vigorously, for it undermines the fundamental premise of children as persons with human rights"