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

IN THE FAMILY COURT

No. NE18P00440

SITTING AT ROYAL COURTS OF JUSTICE

[2019] EWFC 22 (Fam)

1st Mezzanine
Queen's Building
Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 22 February 2019

IN THE MATTER OF THE HUMAN FERTILISATION & EMBRYOLOGY ACT 2008, s.54
AND IN THE MATTER OF THE FAMILY PROCEDURE RULES 2010 part 13, rule 13.8

Before:

MRS JUSTICE THEIS

(**In Private)**

B E T W E E N :

A B	Applicants
- and -	
(1) C (2) D (3-5) THE CHILDREN	Respondents

A P P R O V E D J U D G M E N T

A P P E A R E N C E S

MS SEGAL (instructed by Ms Little of Russell-Cooke Solicitors) appeared on behalf of the Applicants.

THE FIRST & SECOND RESPONDENTS were not present and were not represented.

MS FOTTRELL QC (instructed by Ms Thomson) appeared on behalf of the Respondent Children, through their Children's Guardian.

MRS JUSTICE THEIS:

Introduction

1 This matter concerns an application for parental orders dated the 6th March 2018 for children: , born in 2017. They are currently in Iran being cared for by the wider family pending clarification in relation to their legal position with the applicants as a result of these proceedings, followed by any immigration application that is going to be made.

2 The applicants are A and his wife, B. The respondents are C and her husband D. The children were born following the parties entering into a surrogacy arrangement in Iran. One of the reasons why this case has taken just over a year to hear is due to the applicants having been unable initially to afford legal representation.

3 I would like to start by expressing my gratitude to Ms Little of Russell-Cooke and Ms Segal for taking this case on *pro bono*. This court is extremely fortunate to have members of the legal profession who are willing and able to assist in situations such as this, and to provide such excellent advice and assistance. Their expertise in this area has meant that the applicants have benefited from access to expert legal advice and representation of the highest level.

4 The respondents are not present or represented. They have been spoken to by Miss Catto, the Children's Guardian, and have confirmed through her and the documents they have signed, their agreement to this court making a parental order. Due to the unusual history of this case and the fact that it is likely the children would remain abroad the children were joined as parties. Miss Catto, who had been the parental order reporter, became the Children's Guardian. They have been represented by their solicitor, Ms Thomson, and Ms Fottrell Q. C., both experts in this particular area of the law.

5 All parties invite the court to make parental orders today. I raised the issue at the start of the hearing as to whether, bearing in mind the circumstances of this case, the Secretary of State

for the Home Department (SSHD) should be given notice of this application, and served with some of the documents. In *Re Z (Children: foreign surrogacy: allocation of work: guidance on Parental Order reports)* [2017] 4 WLR 5 at [97] Russell J said as follows:

> "It is established practice in adoption applications with international elements for the court to notify the Home Office and ask whether it wishes to intervene in the case. As a result of this practice, consideration of the role of the Home Office is to be given at the first directions hearing in an application for adoption as provided for in Practice Direction 14B of the Family Procedure Rules, rule 14.2D(ii). It is not always necessary to do so in applications for Parental Order applications, nor is it required by the Family Procedure Rules part 13. It is clear however that in this case that notification and/or invitation should have been given on the face of the court order to the Home Office, the Passport Office and the Foreign & Commonwealth Office at the first opportunity after it had become apparent that there were difficulties in the children leaving India. As noted by both Ms Cronin and Ms Logan it was only when the matter was the subject of an order and request made by a High Court judge that formal if partial explanations for the delay were forthcoming."

6 That was in circumstances where there were delays in being able to process immigration applications to bring children back who had been the subject of surrogacy arrangements. In this case there has been no application for the children to be able to come here. Nevertheless despite the fact that there is no requirement for such notice to be given, I am satisfied that in the unusual circumstances of this case, if the court is minded to grant a parental order, there should be an opportunity for the SSHD to be able to make some representations prior to the court making any final order. In those circumstances, with the agreement of the parties, the court has heard the submissions of the parties, is giving this judgment but will adjourn making an order until the SSHD has been served with the application and had the opportunity to make any representations.

Relevant Background

7 I will turn now briefly to the background. B, and A were both born in Iran and married in Iran. They came to the United Kingdom, as A was at risk in Iran as a result of his political views. They settled in England and have lived here ever since. B applied for and was granted British citizenship, and subsequently applied and obtained a British passport. A was given unlimited leave to remain in the United Kingdom. It was only then, after having their position here secured, that they were able to consider making any trips back to Iran.

8 Their child was born in the United Kingdom. Unfortunately, A's business got into financial difficulties, and had to close down. Soon after that, he suffered a bereavement. Consequently, the parties decided to live separately for a number of years. Although living separately, their evidence is that they continued in a very close, warm and loving relationship; seeing each other most days. A said he had difficulties at that time in sleeping, also had taken up smoking which caused difficulties for B. A's statement confirms he would take their child to school each day, remained very much involved in the day to day family life despite living separately during that period from his wife.

9 Their child needed some help from the mental health services. Following a short admission to hospital, the child was supported in the community, and discharged from that service. Very tragically their child died in an accident. Understandably the applicants have, in their separate ways, struggled with their child's death. They both describe in their statements the enormous sense of loss they have felt at their child's untimely death, and how that loss is still felt by each of them. At para.35 of her statement B expresses this as follows:

> "I will always miss and mourn for [our child]. It's not something you can ever truly recover from. I cry when I talk about [our child], but I do not consider that to be unusual or surprising. The early years carry the intensity of grief but years later the

loss can hit you at any time without warning, and feels as intense as it did in the immediate aftermath of [our child's] passing. I manage my grief and sadness. Special days are particularly hard. I was offered counselling, but never went to it as I did not feel that it would help me. I did go to a church and meet other people who'd lost children. I went three times and it was helpful. I recall that A went to counselling two or three times."

10 There is no doubt that was an enormously difficult and traumatising time for both of them. They considered, following their child's death, that they still wanted to be parents again, and discussed the possibility of having another child. However, B's health, and her age, were against that option; as a result the parties began to look at surrogacy. Their investigations led them to a Clinic in Iran. In her statement at para 42 B describes what took place as follows:

"I started the enquiries when we were in Iran. We were speaking with C, who is a distant relative, and E. Both were aware of the tragic events in our family. The issue of surrogacy came up. The idea was put forward that E would help us arrange the surrogacy using C as a surrogate. They acted purely for humanitarian reasons, and they are both kind and caring individuals. The surrogate obviously had the agreement and blessing of her husband as well."

11 A's gametes were taken at the Clinic in Iran. E was an intermediary in the process, and as I have said, C and her husband agreed that she would be a surrogate. At para.45 of her statement B sets out the position in relation to the surrogacy:

"The clinic advised about the surrogacy itself, and the intermediary helped with the paperwork, including the surrogacy agreement [which is in the bundle] which was signed by C and her husband. All the procedures were followed under the guidance of the specialist doctor and the Clinic. The contracts were processed by a notary

public office specialisation in this particular field. The relevant paperwork and their translations relating to both the surrogate mother and her husband have all been submitted to the court."

12 B in fact had very little direct contact with the surrogate mother. There were probably, as she describes, three times before the pregnancy, and once after the birth. A surrogacy agreement was signed, and a translation of that agreement is in the papers. The agreement refers to B's eggs being used, and until very recently that was C's understanding as well as her husband. This was what B had stated when the parental order application was issued. In fact, donor eggs were used. B said as follows at para.50 of her statement in relation to her feelings about being a mother:

"I knew immediately how much I loved being a mother. I knew too that we had so much to offer a child, and how much love and security we could give them. It was certainly a process for me to come to accept that I was not able to give birth to our child, and then that the child would not be made of our genetic material. I needed time to process that, but I also knew that biology was such a small part of the picture. It was after this that we accepted the option of a donor egg. Having come to that realisation myself however, it had been more difficult to be outwardly open about it. We are intensely private people. To lay open so much of ourselves in such a public way has been difficult. I wanted so much to be their natural mother, and I felt guilty that I could not be. I realise now that maintaining there was a genetic connection when there is not was wrong, and I have caused some delay for the court and the immigration process as a consequence, for which I am personally very distressed. E, the intermediary, knew that the eggs were donated. I don't know what the surrogate knew at the time, but I can assure the court I've now told her the eggs were donated. She was not concerned about this, and just wanted to help us."

13 This statement by B, that she has informed C what the true position was, was confirmed when Miss Catto, the Children's Guardian, spoke to C earlier this year.

14 The documents then demonstrate that the medical doctor, confirmed in a statement dated the 18th February 2018 that she had performed the IVF procedures, transferring the embryos created with the gametes of A and the donor egg; and C gave birth to the children in 2017. A's biological connection with the children has been confirmed by DNA testing.

15 On the 16th February 2018 C confirmed, in a notarised affidavit that she had no rights in respect of the children and had assigned the parentage, referred to as guardianship of the children, to the applicants. On the 12th June 2018 C and her husband signed a further document confirming that they waived any rights to the children.

16 On being told about the birth of the children, B flew to Iran. From then until December 2018 (save for one week in June) one or other of the applicants have been in Iran to be able to help care for the children. The children are based with the wider family. Both applicants registered the birth in Iran with their names on the birth certificate.

The applicants have not yet made any immigration application. As Ms Fottrell observed, on the face of the information the court has, they have been badly served by the lawyers they instructed.

17 Advice has now been received in these proceedings in relation to what options would be available. The Guardian's solicitor sought permission to be able to instruct a specialist immigration lawyer to be able to advise the court on behalf of the children in relation to the position. The advice is set out in the report of Bryony Best dated the 20th November 2018. That sets out the options as follows.

18 Firstly, to bring the children to the UK in order to apply for parental orders, it records that the Home Office guidance The Inter-Country Surrogacy and the Immigration Rules, published on the 1st June 2009, states that in order to bring children born outside the UK following a surrogacy arrangement to the UK to apply for a parental order they need to make an application outside the immigration rules, which is discretionary. The guidance says that the application for a parental order must have been made within six months of the child's birth, and that evidence must be provided to suggest that a parental order is likely to be granted. The guidance also provides that applicants should try and meet as many of the usual rules as possible, for example, ability to maintain and accommodate, and that they have broken ties with the surrogate mother. The guidance says that leave to enter for twelve months will be granted.

19 It then goes on to detail other matters. It states that where children are brought into the UK without a legal parent or close relative, they are treated as a privately fostered child under the Children Act 1989 or equivalent legislation. On arrival in the UK they must notify the local authority that the child is living with them so that they can monitor the child's welfare. The guidance also provides that once a parental order is made, an application can be made for indefinite leave to remain and to register a child as British.

20 Section 55 of the Human Fertilisation and Embryology Act 2008, which came into force on the 6th April, supersedes this guidance, and says that a child subject to a parental order made in the UK will be treated in the same way as a child that is adopted. This means that where one or more of the parents are recognised in a parental order as British then the child becomes British from the date of the order under s.2(1) of the British Nationality Act 1981. Here, the applicant, B, is a British citizen otherwise than by descent and so would pass on her British nationality to the children. This is confirmed in the Home Office's Nationality Instructions which says that a child subject to a parental order made in the UK will become a

British citizen from the date of the order if either one of the persons who obtained it is eligible.

21 The second option is to bring the child to the UK after the making of a parental order. A child who is the subject of a parental order made in the UK will become a British citizen from the date of the order if either one of the persons who obtained it, here B, is a British citizen. There is no need to register children as they will be British citizens by descent via the commissioning mother who is British. The commissioning parents can then apply for British passports for them.

22 The applicants have the benefit of some *pro bono* advice provided by Mr O'Leary of Wesley Gryk Solicitors who are extremely experienced in this area of the law in relation to the interaction between surrogacy arrangements and the immigration position. It is a matter of some regret that these applicants did not get the correct advice at an early stage. If they had, they would have been able to make an application for discretionary leave to be able to bring the children here because they promptly made an application for a parental order. The difficulties and delays have in large part been as a result of their inability to be able to afford legal advice to be able to process the application.

23 Initial directions were made on the 20th March 2018, allocating the matter to a High Court Judge. Williams J and Cobb J gave directions on the 2nd May and the 25th June. The matter first came before me on 31st July 2018. By that stage, very fortunately for the applicants, Ms Little and Ms Segal were able to take the case on. Directions were made, the matter came back before this court on the 25th October when further directions were made, listing the matter initially for a final hearing on the 17th December. That had to be delayed and was adjourned to today for a final hearing.

The evidence

24 The court now has a bundle, with a number of important documents in it. Firstly, there are two statements from each of the applicants. The first statement is dated the 31st May 2018. It is entirely unclear from the initial statements, whether the applicants understood them or whether they had been interpreted to them because there is nothing on the face of them to indicate that they were. Their respective second statements, signed today, are detailed statements setting out the background to the evidence they rely on in support of their application.

25 The court is enormously grateful to the interpreter who has attended today and interpreted the statements from English into Farsi to ensure that the applicants understand what has been written. They have then signed the statements as being true to the best of their knowledge, and Mr Resali Ahadi, the interpreter, has countersigned each of those statements so the court has an evidential basis to consider these applications.

26 In addition, within the court bundle there is the immigration advice I have referred to. Then, importantly, there are two reports from Miss Catto, the Children's Guardian. The first dated 27th July 2018, sets out the enquiries that she had made up to that date, but largely sets out the further information she required to be able to consider the application. Her second report is dated 19th February 2019. It is, if I may say so, a model report. It provides a comprehensive account of the enquiries she has undertaken and a detailed analysis in relation to the difficult issues the court has to consider.

27 It is important to set out what contact underpins the conclusions that she has reached. Firstly, in relation to the surrogate and her husband, Ms Catto details in her report the conversations that she has had with them. First with C on the 25th January 2019, as set out at para.37; and then secondly, and separately with C’s husband, D, on the 7th February 2019, as set out at para.40.

28 During each of those interviews, with the assistance of an interpreter, they have each confirmed that they now understood the correct position in relation to the eggs used to create the embryos that were transferred to C, namely that they were donor eggs. Also, they have confirmed during their conversations with Miss Catto, they consent to this court making a parental order.

29 Miss Catto tried a third time to be able to speak to them on the 19th February, as set out at para.43 of her report. The purpose of that was to be able to see the consent documents that had been signed, but unfortunately there was no link. However, the court does have scanned copied of the documents that were signed.

30 Miss Catto has seen the children via Skype as follows. First on the 24th October 2018, as described in para.50 of her report, she was able to spend about ten minutes with a Skype link with the children clearly visible, which was at a time when A was in Iran. As a result, she was able to observe him with the children. It was clearly, as she described, a busy household.

31 The second occasion was on the 10th December 2018, during a visit by her to the family home in England, as set out in para.51. She was able to observe the children through a Skype link engaging with the applicants. She gives a very vivid description of how the applicants engaged with the children.

32 As she said in her report at para.52 to 55:

> "During the Skype visits the children appeared clean and well-presented. The children bear a striking resemblance to A, and appear relaxed and settled in their home environment. The parents and the children have a warm and loving relationship. As developing children, they are likely to want to be cared for in an environment where their physical, cognitive, social and emotional needs are well

met, and where they are provided with safe and consistent care by their adult care-givers.

I have thought very carefully about whether my assessment is deficient for want of seeing the family in all the same space. In my professional view I've been able to assess whether the children's welfare is best served by the making of the order. I've been able to get a sense of who the children are, and how much they are loved by their parents. If the children were physically in the UK I might ideally wish to see them but I am not of the view that in this case any further visits are necessary, and therefore it is my view that I have observed and assessed them to be able to put forth a clear recommendation.

In the circumstances of this family it is also my view that there is a very strong welfare case for the Parental Order being made to permit the children to move full-time to the family home in [England]. I am impressed that the parents have now been able to make arrangements in Iran, but there are cultural reasons why remaining in that country is not in the children's interests. The parents have been through a lot personally, and they would be able to focus entirely on the children if the orders were made and settled. These are strong welfare considerations that have informed my analysis of the case."

33 The court has the benefit of a number of documents that address the legal position in Iran in relation to these arrangements. First, there is a printout taken from the internet of three pages setting out what is said to be the position in Iran in relation to surrogacy arrangements. In summary, they are permitted and allowed.

34 The applicants commissioned some expert evidence from Dr Soraya Tremayne as to the practice of surrogacy in Iran, including any relevant legal framework. Dr Tremayne is the co-founding director of the Facility and Reproductive Studies Group, and a research associate at the Institute of Social and Cultural Anthropology at the University of Oxford.

She too has assisted the applicants' *pro bono*. The two documents from her, which is the summary of a discussion between the applicants' solicitor and her, and her CV, is that she confirms there is no law regulating surrogacy in Iran, and that the intended parents are recognised as the children's parents on any documentation.

Section 54 Criteria

35 For this court to make a parental order the court needs to be satisfied that each of the eight criteria in s.54 of the Human Fertilisation and Embryology Act 2008 (HFEA 2008) are met.

36 First, whether the children were carried by somebody who is not one of the applicants, and whether there is a biological connection between at least one of the applicants and the children (s54 (1)). That criteria is satisfied by a number of documents. The report from the medical doctor dated the 18th February 2018 confirms the IVF procedure carried out with the embryos being transferred to C, following that procedure she carried the children and gave birth to them in 2017. The genetic connection between one of the applicants and the children is established by the Cellmark DNA report dated 4th June 2018, which confirms the genetic connection between the children and A.

37 Second is the status of the applicants' relationship (s54 (2)). They met in the1990's, married thereafter, and remain married. As I have indicated, there was a period of separation in the context I have set out, during which they very much maintained their daily relationship and their family life.

38 Third that the application is issued within six months of the children's birth (s54 (3)). It was issued on the 6th March 2018, so well within the six-month period.

39 Fourth is whether at the time of the application (March 2018) and when the court is considering making an order, the children's home must be with the applicants (s 54 (4)(b)).

The factual matrix is as I have set out: following their birth until December 2018 (save for one week in June 2018) at least one of the applicants has been in Iran caring for the children. There have been some periods when they have crossed over. It is clear from the evidence, both applicants have made and continue to make the necessary day to day care arrangements for the children who are based with family in Iran.

40 As has been set out in the skeleton arguments, the courts have taken a purposeful construction to this requirement in s.54. In *Re X (A child: surrogacy time limit)* [2015] 1 FLR 349 the applicants were separated at the time the application was made, although reconciled by the time the judgment was given, but importantly both were fully involved in the child's life throughout. The former President, Sir James Munby, said as follows at [66]:

> "The commissioning parents were separated at the time the application was issued but they were not divorced so they remained husband and wife within the meaning of s.54(2)(a) and are now, as I've mentioned, reconciled. They made the application jointly so it was within the meaning of s.54(1) an application made by two people. The real question arises in relation to s.54(4)(a): can it be said that X, the child's, home, was 'with them' at the time of the application. It plainly is now."

He continues at [67]:

> "There are in my judgment two reasons why this question should be answered in the affirmative. In the circumstances as I have described them in [8] above, X has his home with the commissioning parents, with both of them, albeit that they lived in separate houses. He plainly did not have his home with anyone else. His living arrangements were split between the commissioning father and the commissioning mother, and it can fairly be said that he 'lived with' them."

41 In *KB & RJ v RT* [2016] EWHC 760 (Fam) Pauffley J concluded that the child lived with her parents, despite being stranded in India because of the level of contact she had with

them, and their role in her day to day care. As she aptly described at [45]: "The concept of home must and should be construed flexibly".

42 In this case the evidence establishes that the children had their home with the applicants in the sense that the children's living arrangements are entirely arranged by and provided for by the applicants. When they are not in Iran, they are in Skype contact two or three times a day. The evidence points to them both remaining utterly committed to the children. They have arranged to be there for virtually all the time, and though there are other circumstances that have driven them to be apart, either B's health or A's need to be able to return to work, the Children's Guardian commends them for the arrangements that they have made to ensure the children's stability of care. They have had to remain based here since December 2018 to ensure the evidence is available to ensure this hearing is effective.

43 I am quite satisfied taking a broad and purposeful interpretation of the term "home with", this requirement is satisfied. In any event s.3 of the Human Rights Act 1998 makes clear that primary legislation should be read in a way that is compatible with Convention rights. The children and the applicants' Art.8 rights are clearly engaged in their case, their Art.8 rights point towards the court seeking to be in a position to secure the children's legal position with the applicants, so that they may be able to enjoy family life together.

44 The fifth requirement relates to domicile (s 54 (4) (b)). Both the applicants' respective domicile of origin is Iran, it is where they were born, and the majority of their family remain. However, the evidence demonstrates that they had to leave in circumstances where it appears there was limited choice in that. They came to the UK and have lived here since. They both submit that their domicile of choice is here, this is where they intend to live indefinitely and permanently. Ms Segal has helpfully reminded me of the factors set out at para [40] in *Z & B v C* [2012] 2 FLR 797 that I have very much in mind.

45 Both applicants describe in their statements in powerful and persuasive ways how their intention to permanently and indefinitely live here is founded on secure ground. I take by way of example what B says between paras.85 and 89 in her statement:

> "As I have set out in the statement we are fully settled and integrated into life in the UK. When [our child] was born we had every intention and did bring [our child] up in the UK, only rarely travelling to Iran to see family once we were allowed to do so. [Our child] was schooled in mainstream UK education and was fully integrated into our local community, as we all were as a family. My husband set up a business in the UK, and we were reliant upon the best that the British healthcare system offered both myself and A and [our child] when most in need. We do not have any property or money in Iran, and our bank accounts are here. Our home is here.
>
> Whilst we travelled to Iran in order to arrange the surrogacy, I've never considered it my home. It has become increasingly apparent that the air quality in Iran is harmful to my health, and for that reason alone I would never return there to live permanently. All of my health needs have been managed in the UK. I do not consider my health needs could possibly have been managed as efficiently as in the UK, but from my perspective I simply do not feel at home in Iran. The culture and the life there is quite alien to me after years in this country.
>
> Most importantly for me however is that the whole of [our child's], life was spent in the UK. Our memories, the places we visited together, the things we did together, are all based in the UK. I simply could not imagine living anywhere else. [Our child]lived here all her life, it was [our child's] home. Our home remained in [England]in the years after [our child's] death, and it remains our home today despite, out of necessity, having to travel to and from Iran. Put simply, I will never leave my [child]. It is [my child's] final resting place, and I would not ever think of living elsewhere. I had already established a home with A and [our child] here.

It was where we as a family resided and where we intended to reside. In that regard, nothing has changed."

46 A mirrors this in his statement. I am quite satisfied and accept that compelling evidence that the domicile of choice is established here for both applicants. It is quite clear that their intention is to permanently and indefinitely reside in this jurisdiction.

47 The sixth requirement is the applicants must be over 18 (s 54 (5)). They are.

48 The seventh requirement relates to the question of consent (s 54 (6) and (7)). The court can only make a parental order if it is satisfied that C and D consent to this court making a parental order, and that consent is given unconditionally and with full understanding in relation to what is involved. A number of documents confirm this requirement is met.

49 When the matter first came before the court when the applicants were represented a direction was made for a translation of the form A101A, the forms C51 and C52 to be sent to C. Ms Segal has confirmed the evidence demonstrates it was received by them, translated into Farsi, on the 8th October 2018.

50 Second, when the matter came back before the court on the 25th October 2018 further directions were made which required the Children's Guardian and her solicitor to be satisfied not only about the issue about consent but also whether the surrogate mother and her husband had knowledge that donor eggs were used. In the bundle that the court has, there are three copies of a blank A101A save for in each of the three copies there is the name of the children at the top. Also, there is a translated version of the form A101A consent, translated into Farsi, which has been notarised and signed by the respondent surrogate mother and her husband on the 30th January 2019.

51 Those dates and documents are entirely consistent with, and supported by, the enquiries Miss Catto made, as set out in her report. At para.37 she records the details of her conversation with C on 25th January 2019, when C confirmed she had these documents but had not at that stage signed them. At para.40 of Miss Catto's report she notes the conversation with A on 7th February 2019 when he confirms that they had been signed, and that they were in notarised form. The third attempt to be able to communicate with D on the 19th February 2019, to try and see the signed copies by Skype, unfortunately failed as the link did not work. However, Miss Catto has confirmed that the documents that are in the court bundle are those that she saw when she communicated both with the respondent surrogate mother and her husband.

52 Miss Catto is satisfied as a result of her enquiries that both the respondent surrogate mother and her husband consent to this court making a parental order. That position is also supported by the documents in the court bundle they signed in Iran setting out that they were relinquishing the parentage of the children to the applicants. Those documents are signed by them, and translated copies are in the court bundle. So, for those reasons, the court can rely on the combination of these documents and information and be satisfied that they both consent to this court making a parental order.

53 The final matter under s.54 is the question of payments (s 54 (8)). The court needs to consider what payments, if any, have been made. If any payments are considered to be other than for expenses reasonably incurred, the court needs to consider the circumstances in which they arose and whether the court should authorise those payments. In the discussions between Miss Catto and the surrogate mother Miss Catto records at para.37:

> "C confirmed that she had been happy to act as a surrogate for the intended parents because she knew they were not in a position to have any children themselves, and her actions were motivated by kindness."

That statement by her, as recorded by Miss Catto, supports what is in the documents.

54 The applicants have been able to present a schedule of payments attached to B's most recent statement, which sets out the payments they consider have been made in relation to, and connected with, the surrogacy arrangement. Most of them relate to payments for medical expenses that were incurred, and as itemised in the schedule. There is a payment of 2.5 million Tomans (about £417), itemised as being an "IVF payment", it is unclear whether that relates only to medical expenses for those procedures.

55 It also sets out payments made to the respondent surrogate mother in 2017, totalling 10.5 million Tomans (about £2,000), although not evidenced by any documentation. B describes them as being paid in cash through an intermediary. This supports, in part, what was set out in the written agreement which provides at Art.3: "All costs related to sonography and doctor visits and medicines of C will all be paid by B, and all such expenses incurred in this connection shall be reimbursed". That is supported by what C said to Miss Catto when she spoke to her earlier this year.

56 Taking all this information together, it supports the position that this was probably an altruistic arrangement, with only expenses being paid and made entirely in good faith. But even if the court is wrong about that I am quite satisfied in the circumstances of this case the court should authorise any payments that have been made other than for expenses reasonably incurred, because it is entirely clear this was a voluntary arrangement, entered into between the parties in a jurisdiction where such an arrangement is permitted and was an arrangement consented to by the respondent surrogate mother and her husband. There is no suggestion the applicants have done other than act with good faith and have not sought to circumvent any of the relevant authorities. For those reasons, if required, any payments made other than for expenses reasonably incurred are authorised.

Welfare

57 The s 54 criteria having been satisfied the court needs to be satisfied that the lifelong welfare needs of each of these young children require the court to make a parental order. The court is required to have regard to s.1 of the Adoption and Children Act 2002 (ACA 2002), in particular having regard to the welfare checklist set out in s.1(4). One of the questions that the court needs to consider is whether Miss Catto has had sufficient opportunity to be able to see the children with the applicants. *Re Z (ibid)* gave guidance about parental order applications and considered the issue about whether it was necessary for a parental order reporter to be able to see the children with the applicants.

58 I have been referred to the relevant part of that judgment of Russell J between [75] and [88]. The duty of the parental order reporter is to [88]:

> "Investigate the matters set out in s.54(1) to (8) of the 2008 Act, as required under the Family Procedure Rule 16.352A, and to do so in accordance with para.10.1 of the Practice Direction 16A which gives further directions as to how those investigations are to be carried out, including that the Parental Order reporter 'should contact or seek to interview such persons as the Parental Order reporter thinks appropriate, or the court directs'.
>
> The combined provisions of s.54(4)(a), that is the child's home 'must be' with the applicants, the emphasis on the welfare of the child provided by the 2010 regulations, the incorporation of s.1 of the Adoption and Children Act 2002, and the procedural rules and guidance, are that to be able to investigate as required and to base their conclusions and recommendations as to the subject child's welfare on evidence, the Parental Order reporter must see the child with the applicants."

59 Russell J sets out the relevant provisions, for example, at PD 16A, para.10.1, where it states:

> "The Parental Order reporter must make such investigations as are necessary to carry out the Parental Order reporter's duties. They must in particular (a) contact or seek to

interview such persons as the Parental Order reporter thinks appropriate or as the court directs; and (b) obtain such professional assistance as is available, which the Parental Order reporter thinks appropriate or which the court directs be obtained."

At [77] Russell J referred to the internal CAFCASS guidance available for parental order reports. The guidance did not require in terms that the parental order reporter sees the child, but since that guidance was issued, further work was undertaken within CAFCASS as a result of which the fact sheets were produced for commissioning parents who are applying for a parental order. And in the fact sheet entitled, "Parental Order reporters", intended applicants are told that they will be seen by the parental order reporter with their child. These documents or fact sheets were published within weeks of the final hearing of that particular case in 2015.

60 At [86] Russell J stated:

> "It is the view and guidance of this court that the Parental Order reporter's investigation in any case must include the child being seen with the applicant unless there are compelling and exceptional reasons based on the child's welfare why such observations cannot take place, or where there is sufficient independent evidence pertaining to the child's welfare from an alternative source."

Russell J then referred to a decision of mine in *Re A*, which was a case about a parental order application where the child remained in South Africa, arrangements had been made that a detailed social work assessment took place in South Africa which informed the parental order reporter here.

61 Ms Fottrell submits any consideration of this issue is fact specific to each case and Miss Catto has had sufficient opportunity to see the children with the applicants as outlined above on 24 October and 10 December via Skype. In her report Miss Catto concluded that had given her sufficient information and it was in her view that whilst, ideally, she might wish to

see them face to face no further visits were necessary. In her analysis, she sets out that she had sufficient time to be able to assess the relationship the applicants had with the children in a positive way and was able to form a view to be able to make a recommendation in relation to the children's welfare.

62 On the evidence the court has it can, in my judgment, be satisfied that the guidance, as set out in *Re Z,* has been followed. On the facts of this case Miss Catto has had sufficient opportunity to be able to see the children with the applicants, that has informed her welfare assessment to enable her to be able to effectively make the recommendations that she does. Ms Segal rightly adds that this issue should be seen in the context of this case where, unusually in my experience, Miss Catto has been involved for nearly twelve months; she has seen cumulatively, either through home visits or telephone conversations, A on seven occasions and B on six occasions. Miss Catto describes a warm and loving relationship between the applicants and the children; and asks rhetorically to herself, what more and what benefit there would be by there being a face to face contact that she does not consider she needs to be able to inform her recommendations.

63 I accept Miss Catto's conclusions, which together with the applicant's statements, means I can be satisfied she has been able to see the children with the applicants, albeit via Skype, but through the circumstances the family find themselves in, and Miss Catto's comprehensive and detailed analysis, the welfare considerations in this case would not be advanced by further delay for a face to face visit to take place. In my judgment the evidence points in the opposite direction; the welfare needs of these children require a decision to be made.

Turning now to consider the lifelong welfare needs of these young children. In addition to the very engaging video I had the privilege of watching today, they are brought to life by B in her statement.

64 The children are clearly too young to be able to express any wishes and feelings themselves, but the evidence demonstrates they have a warm and loving relationship with the applicants, that is very clearly reciprocated. As Miss Catto observes, there is a very strong welfare case for the children and the applicants to be together sooner rather than later in the family home in England.

65. The needs of the children and their age, sex and background: there are no significant health concerns, and the applicants set out their plans for their care in England in their statements. They describe in those paragraphs the network of support where they live in England, including neighbours and friends who they feel they will be able to draw on. It is right to note that there is one aspect that has caused this court some concern. It is the way, for understandable reasons, the pregnancy and birth has been presented to family and friends both here and to the family in Iran.

66 B has shown enormous strength to be able to overcome her naturally strong feelings of wanting to preserve her privacy. She has found the courage to reveal the correct and true position about the donor egg so that C and her husband are aware of what the reality is, and importantly for the children in relation to their history.

67 I am quite clear it will undoubtedly be in these children's interests for both family and friends here and family in Iran to know the truth and the reality about the surrogacy arrangement, and that the children were born in Iran. That will avoid the confusion for these children in the future if the incorrect history of how they came to be born, and where, is maintained. I invite the Local Authority to consider whether this is an issue that they would be able to provide assistance for A and B to take these steps, as the court is clear such a step would be in the children's best interests.

68 In terms of any harm the children have suffered or are at risk of suffering, Miss Catto sets out her analysis, which I am going to read in as it is important that it is included in the judgment because it may assist any letters or information that may be given to the Local Authority. Miss Catto states:

> "Given the geographical limitations, it's not been possible to observe the children in a more conventional way by direct face-to-face meeting with either B or A. As noted above, I have seen the children via Skype visits on two occasions, and had no concerns about their welfare or presentation during these calls, and in fact I assess them as to be making good progress, and be happy children. The children were dressed in clean and age and weather-appropriate clothing, and appeared alert and well-settled in their environment. A was physically present for the children for one of the Skype visits, and although I was not able to observe him performing any specific parenting task, I did have the opportunity to see them together, and I could observe the warm, loving relationship between them.
>
> I have visited the family home, and have observed this to be clean and well-furnished. A and B have showed me photographs and videos of the children in which they appear to be doing well, and I have observed the intended parents to speak warmly and proudly about the children. It is my understanding from the family GP there are no welfare concerns in relation to the commissioning couple's basic care of their eldest child, and agency checks indicate the family has not had any previous involvement with the Local Authority Children's Services, which would suggest that there were no issues in their care of their child previously. I remain concerned however that there are several areas in relation to the personal and practical circumstances of the intended parents which, when considered cumulatively, could indicate a need for the provision of support moving forward to ensure the children's long-term welfare.

The intended parents have been through a lot, and the family may need some professional input in the coming months and years. As noted in my previous report, both A and B have shared significant information in relation to their health, all of which could have an impact on their parenting capacity […]

Though the parties do not consider their health issues are likely to impact on their parenting capacity, I remain concerned that both experience a degree of physical limitation which could impact upon their capacity to manage the competing needs of very young children, and may mean that they could benefit from some additional support.

Given the understandably significant impact that their child's passing has had upon the intended parents, I remain of the view that they will need to have access to additional support when the children arrive in the UK, to assist the parties in adjusting to the emotional demands and physical practicalities of parenting in the wake of such a significant loss. This will be particularly necessary if the children present with any developmental delays or issues arising from their prematurity or otherwise.

The financial circumstances of the intended parents also cause me some concern. […] Furthermore, whilst B and A made practical preparations for the children by purchasing cribs, clothing and other necessary equipment, there has been significant delay in this case, meaning that the children's needs will have changed, and they will likely need to purchase new more age-appropriate equipment. Though the intended parents do not envisage any immediate issues in meeting the children's financial needs, this again could impact on their welfare needs in the longer term, and could mean that additional support is required to ensure that they are provided with information and support to access any alternative funding streams, for example, ensuring they are in receipt of appropriate benefit or making charity applications for additional funding."

69 She makes it clear in para.74 that

> "There is a need for further assessment of the family and children to allow for a fuller and balanced assessment of their respective needs, and to ensure their longer term welfare can be met".

She continued this would:

> "Ordinarily take the form of a Local Authority Child In Need assessment, however such an assessment cannot be triggered without the children being resident in the UK. It is my professional opinion that upon the children's arrival in the UK they will need to be observed in the care of B and A, and that consideration is given to a referral to Children's Services for a holistic Children In Need assessment to ensure that the family has access to any and all relevant supports that may be required to ensure the children's continued welfare."

70 As she sets out, health, coupled with what may be financial pressures on them and the enormous parenting task of parenting young children, there should be a structure put in place so that some referral is activated at the appropriate time that would meet the welfare needs of these children.

71 I make it quite clear, as Ms Fottrell has in her submissions, this structure is in no way intended to undermine the care that will be given to these children by B and A, but what it will do is to provide the support that I consider it is very likely they will need.

72 The court needs to consider whether the making of a parental order will mean the children cease being members of a family. C and her husband have made it clear on repeated occasions in documents they have signed they have relinquished any parental rights they have to the children. And so, whilst as a matter of law here, they are the mother and father, they expressly do not wish to exercise those rights. They are an important part of the children's background and identity as I have set out, and I hope the applicants will be

supported in making sure each of the children are aware of C's and her husband's role in these children's lives.

73 Miss Catto in her very helpful analysis sets out that having considered all the welfare considerations, she recommends that the court should make a parental order. Whilst I do not demur at this stage from her welfare analysis, for the reasons that I set out at the beginning of this judgment, I am satisfied that even though the criteria have been met, and that making a parental order on the information the court has at the moment would meet the children's lifelong welfare needs, I consider, for the reasons I have given, that it is appropriate that there is a time-limited adjournment to enable the SSHD to be given notice of this application.

74 There should be nothing that should delay the appropriate immigration applications being made to enable the children to join the applicants at their home here. Whether those applications are granted is, of course, a matter entirely for the SSHD. Whatever view the court has formed about the warm and loving relationship the applicants have with the children, these early years are important periods for establishing safe and secure attachments for these children with the applicants. I would invite consideration of any immigration applications to bring these children to this jurisdiction to be determined as quickly as possible, so, depending on the outcome of those applications, the applicants can then make whatever arrangements need to be made for the welfare needs of these children.

75 There will be a time limited adjournment to enable the SSHD to be given notice and time for any representations he wishes to make. The matter will be listed soon thereafter to consider whether a parental order should be made.

Postscript

76 The SSHD informed the court he did not wish to make any representations and parental orders were made.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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