IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

[2023] EWHC 3196 (Fam)

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 3 November 2023

Before:

MRS JUSTICE KNOWLES

(In Private)

B E T W E E N :

(1) EF
(2) GH — Applicants

- and -

XY — Respondent

Re QR (Parental Order: Dispensing with Consent: Proportionality)

MR A POWELL (instructed by Edward Cooke Family Law) appeared on behalf of the Applicants.

THE RESPONDENT did not appear and was not represented.

J U D G M E N T

MRS JUSTICE KNOWLES:

1 I am concerned today with a little girl called QR who was born in May 2020 and is, thus, three years and five months old. The applicants are EF and GH. Both are Indian nationals resident in this jurisdiction. They made an application pursuant to section 54 of the Human Fertilisation and Embryology Act 2008 for a parental order. This is because QR was born in consequence of a gestational surrogacy agreement in India to a married surrogate called XY. XY husband's name is unknown to the applicants and, therefore, to the court. The application was made on 17 May 2023 and I gave directions to facilitate this final hearing on 4 August 2023.

2 In coming to my decision, I have considered a bundle of documents prepared on behalf of the applicants and also a report by the parental order reporter Ms Baker, dated 2 November 2023, which recommends the making of a parental order. I have also had the benefit of a detailed skeleton argument prepared by Mr Powell, counsel appearing on behalf of the applicants.

3 It will be immediately apparent that there are three key issues relating to the section 54 criteria, which I will need to scrutinise with some care; first, the six month time limit pursuant to section 54(3) as this application has been made two years and six months after the expiry of that time limit; second, domicile, for at least one of the applicants must be able to demonstrate abandonment of their domicile of origin in India and the acquisition of a domicile of choice in this jurisdiction; and, finally, and most significantly, the consent of the surrogate and her husband. When I gave directions in August 2023, it was apparent that the application was being made on the basis that the court would be invited to dispense with the consent of both the surrogate and her husband.

4 I turn now to the background in these proceedings. The applicants have been a lawfully married couple since 2004, although their marriage certificate is dated, for a variety of reasons which need not concern the court, as 10 March 2006. Both were born, educated and employed in India. Following their marriage, the applicants lived in India until 2010, apart from a year spent in the United States between 2007 and 2008 by reason of EF's employment. In March 2010, the applicants moved to the UK so EF could be part of a project for his employer and, when that project concluded after three and a half years, EF and GH stayed in the UK, as EF was able to continue his employment here. The couple began to see their long-term future in this jurisdiction and, accordingly, they applied for indefinite leave to remain which was granted with effect from 13 February 2015 for a period of ten years.

5 The applicants had tried to have children of their own since their marriage but only sought medical help in 2013 when they were not able to become pregnant. By 2015, the couple had been referred to specialist IVF services in the UK but, instead, they decided to seek treatment in India where they had three unsuccessful rounds of IVF. In 2018, GH was 40 years old and, in view of her age, it was suggested that the couple explore surrogacy using her eggs. Later that year, an attempt to do so was sadly unsuccessful and, by 2019, the medical advice was that the couple should use donor eggs and a surrogate together with EF's sperm in order to become pregnant.

6 The applicants decided to pursue that course and engaged the services of IVF specialists in Mumbai. Their surrogate, XY, was pregnant by November 2019. The arrangements for this surrogacy were made using, as I have indicated, a team of IVF specialists recommended by

EF's sister who is a practising gynaecologist. The doctor involved was a Dr ZJ who handled the egg donation and surrogacy arrangements. She was the sole source of information for the applicants about their surrogate. They asked to meet XY but were advised that this was not customary and instead received a photo and updates from Dr ZJ about the pregnancy.

7 The applicants saw XY briefly from a distance on 7 September 2019. They did not know precisely where she lived during her pregnancy, but they were aware that she had moved into accommodation arranged by Dr ZJ. The applicants found Dr ZJ reassuring and professional in her approach which was focused upon providing XY with a good level of care. They sent gifts to XY for a baby shower organised by Dr ZJ in March 2020 and asked to send a card or make a phone call to her but were advised by Dr ZJ not to contact her. All the applicants knew about their surrogate was that XY had temporarily resided with her sister at an address in Mumbai but had moved to accommodation arranged by Dr ZJ for the course of her pregnancy. They knew of the address in Mumbai and they also knew that XY was a married woman but were never provided with her husband's name. She was said by Dr ZJ to be estranged from her husband. All the legal arrangements consequential on the surrogacy, such as applying for a birth certificate, were undertaken by Dr ZJ.

8 Moving a little forward in time, in 2022 when the applicants had been advised that they should apply for a parental order on returning to the United Kingdom, the applicants sought further information from Dr ZJ about XY's circumstances and whereabouts. In August 2022, they were told that XY had returned to Nepal, and I pause here to note that, before that date, they had never been told that she had come from that place. They were also told that XY had kept her surrogacy confidential from family and friends. In September 2022, the applicants asked Dr ZJ to provide them with written confirmation of what she had told them in August. She failed to respond substantively and, in October 2022, the applicants drafted a letter for Dr ZJ to sign setting out the information about XY which she had given them. In response to that letter, Dr ZJ confirmed that she had been trying to contact XY but had been unable to locate her. Such enquiries as she had made, which were unspecified, had led Dr ZJ to believe that XY had returned to an unknown address in Nepal. From my perusal of the WhatsApp messages between the applicants and Dr ZJ at this time, it is evident to me that Dr ZJ professed to have no awareness that other jurisdictions might have different legal requirements in respect of surrogacy to those pertaining in India. Her one significant WhatsApp message said:

> "First, you are Indian citizen, then why you need these things. This is unexpected for me."

Thereafter, Dr ZJ failed to forward a signed copy of the letter which the applicants had sent to her.

9 QR was born in May 2020 at the height of the global Covid pandemic. The applicants were not present at her birth as India was in complete lockdown. They were fortunate enough to be able to get a flight to India fairly quickly but had to be quarantined for two weeks after their arrival. They thus did not meet QR until 27 May 2020 when she was discharged from hospital and had had no opportunity at all to meet XY at the birth.

10 Sadly, QR became very ill when she was 45 days old and required urgent and sustained hospital treatment. Further medical complications arose because of her frail state, requiring more hospitalisation which left her – at the age of three months – weakened and traumatised by the medical intervention she had experienced. When QR was about six months old, the

applicants started to plan to return to the United Kingdom, but in December 2020 and January 2021 there was an upswing in the Covid pandemic and another lockdown in India. The applicants were naturally fearful of travel because of QR's weakened health. However, by spring 2022, the applicants were determined to return to the UK but yet again events overtook them. War broke out in Ukraine which had the effect of delaying their application for a visa to enable QR to travel to the UK. These problems persisted throughout 2022 until the applicants engaged the services of an immigration lawyer.

11 At some point in the summer of 2022, the applicants were advised that they should apply for a parental order but only once they had returned to the United Kingdom. They had taken some initial advice about the legal process in respect of an overseas surrogacy in 2018 when they had been considering surrogacy in Ukraine as well as in India. However, they misunderstood the need to apply for a parental order because they thought, as Indian nationals entering into an agreement in India with an Indian birth certificate naming them as QR's parents, that this would suffice in order to obtain a visa for QR to travel to the United Kingdom and for them to be recognised as her parents in English law.

12 In May 2023, UK Visas and Immigration, as part of their visa application process, asked the applicants for proof within ten working days that a parental order application had been made for QR in this jurisdiction. Before that point, the applicants were still labouring under the belief that they could apply for a parental order once they were back in this jurisdiction. In a panic, the applicants finally instructed specialist surrogacy lawyers who explained the process of applying for a parental order. The applicants made their application on 17 May 2023 and also obtained specialist immigration advice via their surrogacy lawyer to assist them with QR's visa application. With this expert help, QR was finally granted a visa on 16 June 2023 and she and her parents travelled back to the UK on 26 June 2023.

13 I note that, on 2 June 2023, the applicants' surrogacy lawyer wrote to Dr JZ by email setting out the position in English law and explaining why it was necessary to obtain the consent of XY and her husband. Dr ZJ did not respond to that letter. On 13, 25 and 27 July 2023 the applicants' lawyers again wrote to Dr ZJ by email inviting her to sign an affidavit confirming her knowledge of the surrogate's whereabouts. No response was received to any of those enquiries.

14 On 7 August 2023 the applicants' lawyers wrote by email attaching the court order that I made dated 4 August 2023 which made a respectful request to Dr ZJ to assist with any information she might have about the surrogate's whereabouts. No response was received from her.

15 The background I have described illustrates, firstly, the problems which may arise for applicants in entering an arm's length surrogacy arrangement where they are wholly dependent upon one information source about their surrogate and, secondly, the consequences of entering into a surrogacy arrangement overseas without an informed understanding of the requirements of English law pertaining to the grant of legal parentage of a child born via surrogacy.

16 I turn, first of all, to the criteria for the making of a parental order, many of these being uncontentious. Section 54(1) requires me to be satisfied that QR has been carried by a surrogate and that the sperm or the egg of one of the applicants was used to bring about the creation of the embryo. QR was conceived by IVF, this procedure having been undertaken in a clinic in India. She was born via gestational surrogacy and she is not biologically

related to the surrogate, XY. I have seen DNA test results which show that EF is the father of QR.

17 Section 54(2) requires the applicants to be either husband and wife, civil partners or two persons living as partners in an enduring family relationship or a single person. The applicants underwent a ceremony of marriage in 2004 but, for reasons which do not undermine the authenticity of that ceremony, their marriage certificate is dated 2006. I have seen a copy of the certificate and I am satisfied by it. Both applicants pursuant to section 54(5) must be aged 18 years or more and, having seen both their passports, they plainly are.

18 By virtue of section 54(8), the court must be satisfied that no money or other benefit other than for expenses reasonably incurred has been given or received by either of the applicants for or in consideration of (1) the making of the order; (2) any agreement required by section 54(6); (3) the handing over of the child to the applicants and (4) the making of arrangements with a view to the making of the order unless authorised by the court.

19 The applicants made payments amounting to £3,963 to the surrogate. This is evidenced by documents appended to EF's statement. All of the payments to the surrogate were not made by the applicants but were made by Dr ZJ. They also made payments amounting to £11,411 to the surrogacy agency represented by Dr ZJ, again evidenced by documents appended to EF's statement. Despite being asked in solicitors' correspondence to clarify the arrangements made, Dr ZJ has failed to respond to that request.

20 Commercial surrogacy is not lawful in this country and the court must be careful to be involved in anything which looks like paying to buy children from overseas. However, I am satisfied in this case that the payments made appear to be lawful in India, were in accordance with the surrogacy agreement signed by the applicants, the surrogacy agency and XY, despite the lack of clarity about how much money was received by the surrogate. Through no fault of the applicants, there is a lack of clarity about how much of the money received by the surrogate can be described as "reasonable expenses." Finally, QR's welfare is paramount and overrides all other matters. She needs a parental order to recognise and cement her place in her new family. I retrospectively authorise the payments made to Dr ZJ and, by extension to the surrogate, XY.

21 I turn now to the first and most substantive of the three legal issues in this case. Section 54(6) requires the court to be satisfied that the woman who carried the child, and any other person who is a parent of the child but is not one of the applicants, to have freely and with full understanding of what is involved agreed unconditionally to the making of the order.

22 As Mr Powell sets out in his skeleton argument, consent is the bedrock that underpins the way in which the statutory framework operates as confirmed recently by the Court of Appeal in *Re C (Surrogacy: Consent)* [2023] EWCA Civ 16. As the statute stipulates, both the surrogate and her husband, if applicable, must consent freely and with full understanding of what is involved, having agreed unconditionally to the making of an order.

23 Section 54(7) states that section 54(6) does not require the agreement of a person who cannot be found or is incapable of giving agreement and the agreement of the woman who carried the child is ineffective for the purpose of that subsection if given by her less than six weeks after the child's birth.

24 In cases where section 54(7) is engaged and the court is being invited to dispense with consent because the surrogate or, in this case, the surrogate's husband as well, cannot be

found, I accept that the court will exercise extreme caution before doing so. In *Re D and L (Surrogacy)* [2012] EWHC 2631 Fam, Baker J (as he then was) said this in respect of dispensing with consent:

> "It is a very important element of the surrogacy law in this country that a parental order should normally only be made with the consent of the woman who carried and gave birth to the child. The reasons for this provision are obvious. 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. As Baroness Hale of Richmond observed in *Re G (Children)* [2006] UKHL 43, at paragraphs 33-35."

25 He went on to say:

> "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."

26 Baker J went on to find that three matters must be scrutinised by the court when a court is invited to dispense with consent:

> "First, when it is said that the woman who gave birth to the child cannot be found, the court must carefully scrutinise the evidence as to the efforts which have been taken to find her. It is only when all reasonable steps have been taken to locate her without success that a court is likely to dispense with the need for valid consent. Half-hearted or token attempts to find the surrogate will not be enough. Furthermore, it will normally be prudent for the applicants to lay the ground for satisfying these requirements at an early stage. Even where, as in this case, the applicants do not meet the surrogate, they should establish clear lines of communication with her, preferably not simply through one person or agency, and should ensure that the surrogate is made aware during the pregnancy that she will be required to give consent six weeks after the birth.
>
> "Secondly, although a consent given before the expiry of six weeks after birth is not valid for the purposes of section 54, the court is entitled to take into account evidence that the woman did give consent at earlier times to giving up the baby. The weight attached to such earlier consent is, however, likely to be limited. The courts must be careful not to use such evidence to undermine the legal requirement that a consent is only valid if given after six weeks.
>
> "Thirdly, in the light of the changes affected by the 2010 regulations, the child's welfare is now the paramount consideration when the court is 'coming to a decision' in relation to the making of a parental order. Mr Ford submits, and I accept, that this includes decisions about whether to make an order without the consent of the woman who gave

> birth in circumstances in which she cannot be found or is incapable of giving consent. It would, however, be wrong to utilise this provision as a means of avoiding the need to take all reasonable steps to attain the woman's consent."

27 As well as applying the approach that Baker J identified in *Re D and L,* proportionality must also be a relevant consideration when the court is invited (a) to dispense with the consent of the surrogate and/or her husband and (b) to approve the reasonable steps that the applicants have taken to locate a surrogate. I will refer to that later in my judgment.

28 In this case, the applicants invite me to dispense with the consent of XY and that of her unnamed husband on the basis that they cannot be found. I have already set out the steps taken to trace XY in this arm's length surrogacy via Dr ZJ. The applicants have also been sensitive to the cultural issues arising from attempts to locate XY and were concerned that to do so might compromise her safety and well-being. Therefore, they decided not to send correspondence to the address on the surrogacy agreement, this being but a temporary address in Mumbai where XY is said to have resided with her sister. They did so because Dr ZJ had confirmed that XY had apparently moved back to Nepal and there was, thus, the possibility of correspondence being read by unknown third parties. The contents of that correspondence would be likely highly confidential and private.

29 In his second statement, EF explained that surrogacy in India is not regarded favourably by wider society, either for the intended mother or for the surrogate with those concerned being commonly made to feel ashamed of being involved in what is thought culturally to be an unnatural process.

30 Mr Powell told me in his skeleton argument that much of what EF averted to in his statement was supported by some of the ethnographic literature that had examined surrogacy in India; for example, Professor Amrita Pande in her 2014 ethnography, "*Wombs in Labor*," illustrates that while surrogacy in India is complex, there is also a high level of stigma attached to surrogacy. The element of stigma and the possible cultural repercussions underpinned the applicants' desire to exercise caution in the steps that they took to locate XY.

31 The mischief in this case arose from, (a) the applicants' ignorance at the time that they began their surrogacy journey of what was required by the law of this jurisdiction with respect to the consent of the surrogate and her husband including the need to evidence that consent; (b) their wholesale reliance, if not utter dependence, on Dr ZJ as the point of contact with their surrogate and their reliance on the partial information provided by her; and, (c) their ignorance of the most basic information about the surrogate and her husband, namely, for example, what her husband was called.

32 Applying the approach set out by Baker J in *Re D and L*, Mr Powell submitted that all reasonable and proportionate steps had been taken to identify the surrogate's whereabouts. Contact with Dr ZJ, the professional who had a direct line of communication with the surrogate, had been met with a resounding silence.

33 I have considered very carefully whether there are any further steps that the applicants could take other than those already taken by them and, given the cultural sensitivities, which I accept, sending correspondence to the last known address or searching on social media or via advertisements in newspapers would potentially place the surrogate in a hugely difficult and potentially shaming social position. XY was described as being estranged from her husband but that may no longer be the case. She may have formally ended one marriage to embark

upon another relationship and in both of those scenarios I cannot know if she has told her husband, old or new, of her experience as a surrogate. If she has not (and she may not have done given the cultural issues to which I have referred), publicity and tracing may undermine, if not significantly compromise, her own family circumstances.

34 Mr Powell submitted that the test set out by Baker J in the first part of his three stage test, namely, that only when all reasonable steps had been taken to locate the surrogate without success, should be expanded by applying a proportionality approach on the basis that, though proportionality may be thought to be part of the taking of reasonable steps, he put it this way, if reasonable steps have been taken, the court should then ask itself, is it proportionate to take any more? That proportionality evaluation, Mr Powell submitted, is of course specific to the circumstances of the individual case but it is also specific to the context and the cultural situation in the country wherein the surrogacy has taken place. Proportionality is of course engaged by the surrogate's rights to privacy and to respect for her Article 8 rights. Any step taken by the applicant or the court that would interfere with those rights must be proportionate and justified.

35 Having regard to the circumstances in this case and the wider socio-cultural sensitivities about surrogacy in India, I have decided that it cannot be justified, either reasonably or indeed proportionately, to even risk taking further steps that may breach the surrogate's right to privacy.

36 I turn now to the question of whether I should dispense with the consent of XY. I am, however, entitled to look at the evidential landscape surrounding the surrogacy agreement dated 7 September 2019, this being signed by the surrogate prior to QR's birth. That agreement contemplated that the applicants would "assume all legal and parental rights and responsibilities for the child and the surrogate does not desire nor intend to assume a parental or any other type of relationship that the child." This agreement was signed both by the surrogate and her sister prior to the applicants signing it themselves.

37 On 13 August 2020, almost three months after the birth of QR, XY signed a notarised document which recorded that it had been translated into Hindi. That document read:

> "I state that I do not have any objection and give my consent to travel with the baby anywhere in the world."

38 Those words plainly are not words of consent to a parental order but acknowledged XY's consent to the applicants being able to remove QR from India, consistent evidentially with the overall tenor of the surrogacy agreement. This was not a statement which was signed in the presence of the applicants. Mr Powell invited me to infer that, had the surrogate opposed the applicants removing QR from India, she would not have signed the August 2020 document consenting to QR's removal from the jurisdiction.

39 Having looked at matters carefully, I accept the arguments made on behalf of the applicants that I should dispense with XY's consent as she is incapable of being found. I do so having applied the three-stage test as set out by Baker J in *D and L*.

40 I turn now to the question of the surrogate's husband. Section 54(6) applies to the husband of a surrogate unless it can be shown that he did not consent to the placing in her of the embryo or of the sperm and eggs or to her artificial insemination. On the face of it, as Mr Powell submitted, it is difficult to see how it can be said that the husband did consent to XY's surrogacy treatment given that he and she were said to be estranged. He submitted that, if

that approach did not find favour with the court, then section 54(7) would also apply on the basis that the husband cannot be found and his consent can be dispensed with. If I found that XY was incapable of being found, then it must also follow that her husband was incapable of being found as well.

41 I note that in a case called *Y and Another v V and Others* [2022] EWFC 120, Theis J dispensed with the consent of the husband where the surrogate was reluctant to provide his details. She did so applying the approach set out in *A, B and C (Adoption: Notification of Fathers and Relatives*) [2020] EWCA Civ 41, where a birth mother refused to provide the details of the child's father. Theis J held that each case needs to be considered on its own facts, requiring the court to strike a fair balance between the competing interests of each of the birth parents and, most importantly, those of the child.

42 In these circumstances, as Mr Powell submitted, the issue here is even more extreme. Being unable to identify XY's whereabouts, there is no real prospect of being able to identify her unnamed husband. Dr ZJ described XY's relationship with her husband as being estranged and this makes it even less likely that he can be found and indeed, in my view, less likely that he did in fact consent in the first place to the surrogacy process. EF's evidence was to the effect that Dr ZJ had told them that XY had been separated from her husband for several years before she started the surrogacy process but any further detail in that regard was not forthcoming.

43 In these circumstances, I do not know anything about the surrogate's husband. I cannot even be certain that Dr ZJ was told about his details by XY and, in those circumstances applying the test set out by Baker J, I dispense with the consent of XY's husband on the basis that he is incapable of being found.

44 The second significant issue in the case is that of the time limit. Section 54(3) of the 2008 Act requires that an application for a parental order must be made within six months of the child's birth. This would have required the applicants to have applied by November 2020 (6 months after QR's birth in May 2020) and this application, as I have already indicated, was issued two years and six months after the six-month time limit expired.

46 *Re X (A child: Parental Order: Time Limit*) [2014] EWHC 3135 Fam, remains the seminal authority in respect of applications that have been made out of time. As Munby P (President, as he then was) makes plain in that judgment, each case will be fact-specific and the court intended to lay down no principle beyond that which appeared from the authorities. However, whilst each case will always be fact-specific, where a court is invited to read down the section 54 criteria, the ratio in *Re X* is capable of being distilled into the following principles set out below.

47 These principles are: first, the statutory subject matter; second, the background; third, the purpose of the requirement, (if known); fourth, its importance; fifth, its relation to the general object intended to be secured by the Act; sixth, the actual or possible impact of non-compliance on the parties; seventh, whether Parliament could fairly have been taken to have intended total invalidity and, eighth, whether any departure from the precise letter of statute, however minor, was fatal. Once the court has undertaken that analysis, the final principle to which the court must have regard is the assumption that Parliament intended a sensible result.

48 EF described quite candidly in his written evidence and in what he told me this morning that the applicants were simply unaware of the need to apply for a parental order. They thought as Indian nationals that they did not need to do so because they would have an Indian passport and an Indian birth certificate showing them as the lawful parents of QR. Once it became

apparent when they applied for QR to obtain a visa that they should make an application for a parental order, they applied for such an order immediately having taken specialist advice. Had it not been for the Covid lockdowns that swept the world in March 2020 and QR's ill health, the applicants would no doubt have returned to this jurisdiction within the first six months of her life. I accept that the combination of QR's ill health, their ignorance and the Covid pandemic, together with poor legal advice in the summer of 2022, contributed to the delay in applying. These were not applicants who deliberately tarried. The minute they knew that they had to apply they did so.

49 In this case, no sensible result would be achieved if the applicants were barred from applying for a parental order for QR. This cannot, in my view, have been the intention of Parliament in the circumstances of this particular case. Were I not to permit their application to proceed, that would ultimately be prejudicial to QR's best interests. They are the only people who seek to exercise parental responsibility for her in circumstances where no one else is available to do so. I am satisfied that I can disapply the requirement in section 54(3) and permit this application to proceed.

50 Finally, in relation to domicile, section 54(4)(b) requires that at the time of the making of the application, either or both applicants must be domiciled in the United Kingdom, the Channel Islands or the Isle of Man. An individual is said to have a domicile of origin from birth and will be domiciled in that country unless and until they abandon it and acquire a domicile of choice in another jurisdiction.

51 The first applicant, EF, asserts that he has abandoned his domicile of origin in India and acquired a domicile of choice in this jurisdiction and of course he must persuade the court on the facts that this is so. I must, therefore, be satisfied that, on the balance of probabilities, it is more likely than not that he has not only abandoned his domicile of origin but that he has acquired a new domicile of choice here in the United Kingdom.

52 In *Z v C (Parental Order Domicile)* [2011] EWHC 3181 Fam, Theis J identified ten salient points in respect of domicile:

> "(1) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it.
>
> "(2) No person can be without a domicile.
>
> "(3) No person can at the same time for the same purpose have more than one domicile.
>
> "(4) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired.
>
> "(5) Every person receives at birth a domicile of origin.
>
> "(6) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise.
>
> "(7) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country,

must be considered in determining whether he has acquired a domicile of choice.

"(8) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious.

"(9) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely, and not otherwise. A person who has formed the intention of leaving a country does not cease to have his home in it until he acts according to that intention.

"(10) When a domicile of choice is abandoned, a new domicile of choice may be acquired, but if it is not acquired, the domicile of origin revives."

53 In these circumstances, in the context of this case and applying these principles to the facts, I accept that the first applicant has acquired a domicile of choice in the United Kingdom. In coming to that decision I have taken the following into account.

54 Firstly, when the applicants moved to London 13 years ago, they wanted to make it their forever home; secondly, that when the first applicant's employer wanted him to move back to India in 2013/2014, he persuaded senior management to allow him to work on London-based projects illustrating his wish to remain there. As soon as the first applicant became eligible to apply for indefinite leave to remain, he did so obtaining a residence permit along with the second applicant valid from 4 February 2015 for a period of ten years. I have seen those documents.

55 Fourthly, the first applicant considered that the English way of life resonated with how he wanted his family life to be led and where he wished to raise his family. He owns property in this jurisdiction and exhibited to his statement the registered title of that property which is in his name. QR was registered in school in north London in October 2022 prior to her return to this jurisdiction, further illustrating a commitment to remain here.

56 The first applicant's official and personal bank accounts are in this jurisdiction, he pays tax here and he has no intention of residing permanently elsewhere than in this jurisdiction. I accept that he has demonstrated that he is firmly anchored to this jurisdiction and I find that he has abandoned his domicile of origin in India and acquired a new domicile of choice in England.

57 Finally, section 54(4)(a) requires that at the time of the application and the making of the order, the child's home must be with the applicants. QR has been living with them since her discharge from hospital on 27 May 2020. She was living with them in India in May 2023 when they made their application and from June 2023 has lived with them in the United Kingdom.

58 Thus, having considered all of the factors in section 54 of the 2008 Act, I remind myself that, in approving the making of a parental order, I must look at QR's welfare from a lifelong perspective having regard to the welfare checklist as set out in section 1 of the Adoption and Children Act 2002.

59 In *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135, Munby P observed:

> "A parental order has, to adopt Theis J's powerful expression, a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in *Re J (Adoption: Non-Patrial)* [1998] INLR 424, 429, referred to as 'the psychological relationship of parent and child with all its far-reaching manifestations and consequences.' Moreover, these consequences are lifelong and, for all practical purposes, irreversible ... and the court considering an application for a parental order is required to treat the child's welfare throughout his life as paramount ... Parliament has therefore required the judge considering an application for a parental order to look into a distant future."

60 Finally, in *Re A v B (Children: Surrogacy: Parental Orders: Time Limits*) [2015] EWHC 911, Russell J observed that a parental order is the bespoke order for children born through surrogacy because:

> "Parental orders create a permanent parent-child relationship throughout the children's lifetimes which reflect the reality of their particular situation about which they are both already aware. Thus parental orders are explicitly the most apposite orders to be made in keeping with the children's welfare throughout their lives, and which confer important status and rights over and above parental responsibility."

61 The contents of Ms Baker's report make plain that QR is thriving in the care of the applicants. She is clearly a much loved and wanted child. She needs a parental order to give permanence and security to her care arrangements in circumstances where no one else other than the applicants seek to provide lifelong care for her. As Mr Powell put it, QR enjoys a family life with the applicants, that is her social reality. A parental order will not only reflect her life story but will make her legally part of the applicants' family, thereby ensuring her social and legal realities are congruent. I observe that QR will need a full understanding of how she came to be born and will require support and love from her family to deal with this information as and when it is made known to her. EF has told me that he and his wife intend to impart that information to QR in a child-focused and appropriate way.

62 So, standing back and looking at all matters in the round, having satisfied myself that the criteria in section 54 are made out, I make a parental order in respect of QR to the applicants.

63 This case is yet another warning of the problems which might arise for those who embark on a surrogacy arrangement overseas. Many of the problems in this case would have been avoided if the applicants had informed themselves about the legal requirements for making a child born via surrogacy their own child according to the law in this jurisdiction. This case is also a cautionary tale about the problems arising with arm's length surrogacy arrangements. That is my decision.

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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This transcript has been approved by the Judge.