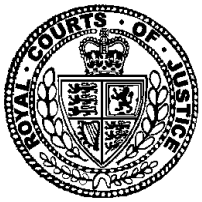

Neutral Citation Number: [2019] EWHC 2095 (Admin)

Case No: CO/4206/2018

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2019

Before :

MRS JUSTICE LIEVEN DBE

- -

Between :

THE QUEEN **(on the application of H,** **by her litigation friend, B)**	**Claimant**
- and –	
SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Defendant**
-and-	
(1) C **(2) D**	**Interested parties**

- -
- -

Richard Alomo and Dr Chelvan (instructed by **Direct Access**) for the **Claimant**
Sarah Hannett and Nathan Roberts (instructed by **Government Legal Department**) for the **Defendant**
Hannah Markham QC (instructed by **Freemans Solicitors**) for the **Interested parties**

Hearing dates: 16/07/2019 – 17/07/2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE LIEVEN DBE

Mrs Justice Lieven:

1. This case concerns whether the inability of A (the Claimant's genetic father) to be named on the Claimant's birth certificate is a breach of the Claimant's article 8 and 14 ECHR rights. The Claimant applies for a declaration of incompatibility under s.4 of the Human Rights Act 1998 in respect of sections 35 and 38 of the Human Fertilisation and Embryology Act (HFEA) 2008 and for a declaration that those sections breach the Claimant's human rights.

2. The Claimant (H) was born pursuant to a surrogacy arrangement by which C (the First Interested Party) gave birth to the Claimant, who is now 3 years old. The genetic mother is an egg donor who has taken no part in the proceedings, or the Claimant's life. The genetic father is A, who is the same sex partner of B. The Second Interested Party, D, is and was at all material times married to C.

3. The Claimant was represented by Mr Alomo and Dr Chelvan, the Secretary of State for Health and Social Care (the Defendant) by Ms Hannett and Mr Roberts, and the Interested Parties by Ms Markham QC. I am very grateful to all of them for their careful and balanced submissions.

4. I should say that I was somewhat concerned about B being H's litigation friend, given the potential for a conflict of interest. However, given the nature of the issue and the way the case was argued, I decided to take this concern no further.

The factual background

5. In August 2015 A and B entered into a surrogacy arrangement with C and D, a married couple. In September 2015 C underwent an assisted reproduction procedure in Cyprus, using donated eggs, and sperm from both A and B. C became pregnant and eventually gave birth to H. A DNA test confirmed A to be the genetic father. During the course of C's pregnancy there was a breakdown in relations between the parties.

6. C and D registered the Claimant's birth on 10 May 2016, and are named as the mother and father respectively on the birth certificate. C and D did not consent to the making of a

parental order under s.54 HFEA 2008. Proceedings to determine the Claimant's place of residence, contact, and the extent to which A and B should have parental responsibility for the Claimant, were heard by Theis J in December 2016.

7. On 13 December 2016 Theis J ordered ("the Order") that A and B, as well as C and D, should have parental responsibility for the Claimant. Further, she made a child arrangements order under the Children Act 1989 declaring among other things:
    a. The Claimant shall live with A and B.
    b. A and B shall make all of the day to day decisions in respect of the Claimant.
    c. A and B shall make all decisions concerning her education, medical treatment and "all other parenting decisions".
    d. Further, a specific issues order was made changing the Claimant's name to incorporate the surnames of A and B.
    e. C and D should have regular contact with H throughout the year.

8. The Court of Appeal dismissed the appeal brought by C and D against Theis J's order, [2017] EWCA Civ 1798.

9. As well as her relationship with A and B, the Claimant has an ongoing relationship with C and D, and their wider extended family which includes siblings, as is referred to in the witness statement of C.

10. A is a Brazilian citizen. One of the reasons that he has given in his witness statement for wishing to be named on H's birth certificate is the impact of his not being named on H's ability to gain Brazilian citizenship.

The Statutory Framework

11. The statutory framework under the Surrogacy Arrangements Act 1985 and the HFEA 2008 dealing with "parenthood in cases involving assisted reproduction" is comprehensive and necessarily covers a variety of different situations, including different genetic relationships between child and intended parents, and different relationships between intended parents. I will not set out all the relevant statutory provisions, but

summarise the scheme, setting out only the provisions which are central to this case. It is however an important part of the Defendant's case that the statutory scheme is both comprehensive and highly detailed.

Surrogacy Arrangements Act 1985

12. Section 1 SAA 1985 defines a "surrogate mother" as;

> *"a woman who carries a child in pursuance of an arrangement made before she began to carry the child, and made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or persons."*

13. Section 1A SAA 1985 provides that surrogacy arrangements are not enforceable by or against any party to such an arrangement. Section 2 SAA 1985 criminalises, amongst other things, the initiation of and participation in the negotiation of surrogacy arrangements by third parties on a commercial basis. Section 3 SAA 1985 criminalises the publication of advertisements offering to enter into, or facilitate the making of, a surrogacy arrangement.

Human Fertilisation and Embryology Act 2008

14. Section 33(1) provides that;

> *"the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child."*

15. Section 35 provides

> *"(1) If—*
> *(a)at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage with a man, and*
> *(b)the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,*
> *then, subject to section 38(2) to (4), the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo*

> *or the sperm and eggs or to her artificial insemination (as the case may be).*
> *(2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1)(a).”*

16. Section 38(1) and (2) provide;

> *“(1) Where a person is to be treated as the father of the child by virtue of section 35 or 36, no other person is to be treated as the father of the child.*
> *(2) In England and Wales and Northern Ireland, sections 35 and 36 do not affect any presumption, applying by virtue of the rules of common law, that a child is the legitimate child of the parties to a marriage.”*

17. Section 54 allows for the making of parental orders where the child is born pursuant to a surrogacy arrangement using the gametes of one of the intended parents.

> *“54 Parental orders: two applicants*
>
> *(1) On an application made by two people (“the applicants”), the court may make an order providing for a child to be treated in law as the child of the applicants if—*
> *(a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,*
>
> *(b) the gametes of at least one of the applicants were used to bring about the creation of the embryo, and*
>
> *(c) the conditions in subsections (2) to [(8A)] are satisfied.*
>
> *(2) The applicants must be—*
> *(a) husband and wife,*
>
> *(b) civil partners of each other, or*
>
> *(c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.*

(3) Except in a case falling within subsection (11), the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born.

(4) At the time of the application and the making of the order—
(a) the child's home must be with the applicants, and

(b) either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man.

(5) At the time of the making of the order both the applicants must have attained the age of 18.

(6) The court must be satisfied that both—
(a) the woman who carried the child, and

(b) any other person who is a parent of the child but is not one of the applicants (including any man who is the father by virtue of section 35 or 36 or any woman who is a parent by virtue of section 42 or 43),
have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

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

(8) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of—
(a) the making of the order,

(b) any agreement required by subsection (6),

(c) the handing over of the child to the applicants, or

(d) the making of arrangements with a view to the making of the order,
unless authorised by the court.
...
(9) For the purposes of an application under this section—
(a) in relation to England and Wales

(i) "the court" means the High Court or the family court, and

(ii) proceedings on the application are to be "family proceedings" for the purposes of the Children Act 1989,

> *…*
> *(10) Subsection (1)(a) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination.*
>
> *(11) An application which—*
> *(a) relates to a child born before the coming into force of this section, and*
>
> *(b) is made by two persons who, throughout the period applicable under subsection*
> *(2) of section 30 of the 1990 Act, were not eligible to apply for an order under that section in relation to the child as husband and wife,*
> *may be made within the period of six months beginning with the day on which this section comes into force."*

18. The provisions of the HFEA 2008, and to some extent the Human Fertilisation and Embryology Act 1990 (HFEA 1990) were summarised by Helen Mountfield QC (sitting as a Deputy High Court Judge) in *R(K) v Home Secretary* [2018] 1 WLR 6000, and I gratefully adopt her analysis;

> *"44. One can see that in cases of assisted conception, there may be strong social policy reasons for treating a person other than the 'biological' father as the father of a child born as a result. There are many other complexities, including of surrogacy arrangements.*
>
> *45. The complexity of these issues has generated an equally complex statutory structure, and Mr Tam QC elaborated on this in the course of developing his submission that, in all contexts, it is an aim of legal policy, that a child shall only ever have two parents, and that at least one of those shall be the woman to whom the child was born. This, he submitted, was the policy of the BNA 1981 and also the policy of the 1990 and 2008 Acts concerning assisted conception."*

19. Provision for the registration of parental orders is made in sections 77 to 79 of, and Schedule 1 to, the Adoption and Children Act 2002 ("ACA 2002") and the Human Fertilisation and Embryology (Parental Orders) Regulations 2018 ("2018 Regulations"). The Registrar General ("RG") must maintain a register, to be called the Parental Order Register. Every parental order made by the Court must contain a direction to the RG to make in the Parental Order Register an entry in the form prescribed in the 2018

Regulations. The RG must ensure that there is a traceable link between the Parental Order Register and the child's original birth certificate (which shows the name of the woman who gave birth to the child as the mother); but the link is not open to the public for general inspection or search. A certificate from the Parental Order Register will be issued for the child. Such a certificate is materially similar to a long-form birth certificate, save that both the intended parents are recorded as "parent".

20. When determining a parental order application, the paramount consideration is the welfare of the child: see paragraph 2 of Schedule 1 to 2018 Regulations, applying section 1 ACA 2002. The effect of the 2018 Regulations is that that the Courts "should weigh the balance between public policy considerations and welfare … decisively in favour of welfare" albeit the Court will carefully scrutinise applications with a view to policing public policy matters: *Re L (A Child)* [2011] Fam 106 at [10] and [12].

The policy background

21. The Defendant has filed two witness statements from Jeremy Mean, the Deputy Director of the Health Ethics branch of the Department of Health and Social Care, with responsibility for policy on assisted reproduction and embryology. The first witness statement sets out a detailed history of the evolution of the policy and statutes in the field of assisted reproduction, dating back to the first child conceived as a result of in vitro fertilisation (IVF) in 1978 and the Committee of Inquiry into Human Fertilisation and Embryology chaired by Dame (later Baroness) Warnock which reported in 1984.

22. The SAA 1985 was the first product of the Warnock Report. There was then a Green Paper and White Paper leading up to the HFEA 1990. In January 2004 the Government announced a review of the 1990 Act to reflect changing social and medical positions, and a further Green and then White Paper were produced. This process then culminated in the HFEA 2008.

23. It is not necessary to set out the content of the various reports, reviews and Parliamentary debates that Mr Mean refers to. It is apparent from this material that there has been very careful consideration of the moral, ethical and legal implications of surrogacy and the balances to be struck in terms of those various considerations.

24. Mr Mean also refers to the policy considerations which have been in play in devising the regulatory response to surrogacy. The scope of the issues that arise in relation to the law on surrogacy are helpfully summarised in the European Parliament's Comparative Study on the regime of surrogacy in EU Member States (2013) as follows:

> *"On an ethical basis, there are different viewpoints on surrogacy, genetic (traditional) or gestational, altruistic or commercial. Most religions and relevant organisations are against surrogacy, particularly its commercial aspect, since they see it as immoral, against the unity of marriage and procreation, or against the dignity of the child to be carried by their biological mother; as a result, they call upon the law to maintain surrogacy as illegal. Liberal approaches, however, emphasis the need of the state and the law to stay neutral toward competing moral standards, drawing, among else, on John Stuart Mill's principle that only harmful practices should be prohibited by law and that one is ultimately sovereign over one's body and mind... (section 1.2.2)"*

25. I will not burden this judgment with long passages from the Warnock Report, or the Green and White Papers. However, it is apparent from those documents that very careful consideration has been put into balancing the competing issues and interests. This includes the interests of the genetic parents, the children, and what might be deemed the broader public interest. I am intensely conscious of the fact that not just have these balances been drawn up after long processes including much consultation, but also that many of those involved are far more familiar and expert in the field of moral and ethical judgments than this Court.

26. Mr Mean's witness statement sets out a number of key policy drivers which have been reflected in the statutory scheme. An overarching concern is to prevent the commodification of surrogacy. The first specific purpose of the provisions is to provide certainty for parents, gamete or embryo donors and especially any children.

27. The second is the need to regulate assisted reproduction so that it is not misused. The reason for the 2008 Act was to update the legislation to deal both with advances in technology, but also changes in social and legal policy.

28. The third is to enshrine the principle that surrogacy arrangements are not enforceable. Surrogacy is lawful in the UK, but subject to certain restrictions. Mr Mean says at paragraph 62 of his first witness statement;

> *"Another principal purpose of the legal parenthood provisions, firstly in the 1990 Act and the 2008 Act, is to provide certainty for patients, gamete or embryo donors and, especially, any resulting children, as to who is to be recognised as the legal parent(s) of a child born as a result of assisted reproduction. In opening the Second Reading debate in the House of Commons on the Bill that became the 1990 Act, the Secretary of State for Health (Mr Kenneth Clarke MP) said*
>
> *"The other main reason for introducing the Bill is the lack of any adequate statutory framework to cover the status and legal position of children born as a result of treatments licensed under the Bill. Whatever our views about the treatments, I am sure that all hon. Members will agree that it is wrong that there should be uncertainty about the position of children born as a result of them."*

29. During the passage of the 2008 Bill at the House of Commons Private Bill Committee Dr Evan Harris MP proposed an amendment to the Bill which would have allowed the intended father to be the legal father at birth. The amendment was opposed by the Government and the Minister, Dawn Primarolo MP, spoke against it. She said as follows;

> *"The subject of surrogacy is complex and fraught with difficult ethical considerations. The Human Fertilisation and Embryology Act 1990 and the Bill recognise that by providing elements of certainty, although it is not possible to provide complete certainty, because of the complexity. One of those elements is that if the surrogate mother is married, her husband is treated as the father of the child unless it is shown that he did not consent to the treatment—a point that has been made. That provision reflects the common law presumption that a child born to a woman in a marriage is also the child of her husband. I shall return to that principle in a moment because it is a very important principle that the legislation is designed not to breach*
> .....

> *Although surrogacy arrangements are not illegal, they are not enforceable by the courts. That is to avoid a surrogate being forced to hand a child to whom she has given birth over to someone else. The clear principle, which the Bill maintains, is that the woman who gives birth to the child is the mother. Having given birth, she may change her mind about handing the baby over to the commissioning couple, and the law recognises that she is entitled to do so. That may be a fraught issue for commissioning couples, but the law is there for specific reasons, and those principles have underpinned surrogacy thus far. I recognise that the situation that we are discussing would be upsetting, particularly for the commissioning couple, but we must look to the child's welfare. Removing a baby from a mother against her wishes is not something that the 1990 Act or the Bill encourages, but the amendments would undermine that position. In the unusual circumstance of a surrogate choosing to keep the baby, taking fatherhood or parenthood away from her partner and giving it to the commissioning father—if he is the genetic parent—would open the way for the commissioning couple to claim custody of the child. That would open up untold difficulties and problems.*
>
> *As I have said, this is a highly sensitive and complex issue, which is fraught with difficulties. In those circumstances, the Committee should not add further difficulties to what is already a difficult situation. That would complicate matters in a way that was not in the child's best interests, and it is the child's best interests which continue to anchor our considerations. I recognise that the amendments seek to address a sensitive situation by removing parenthood from the married man in particular situations. However, we cannot breach the other principles that I have outlined, with the consequences that that would have for the child."*

30. In their Skeleton Argument Mr Alomo and Dr Chelvan sought to criticise the reasoning in this passage and submitted that the Minister's justification for rejecting the amendment did not bear scrutiny. Before the hearing I raised my concern about whether this was an appropriate matter to put before the Court, given the terms of Article 9 of the Bill of Rights 1689 and asked for submissions on the point.

31. There is no doubt that the Ministerial statement is admissible as to the justification for the impugned provisions, see Lord Nicholls in *Wilson v First County Trust* [2004] 1 AC 816. The principles set out by Lord Nicholls at [63] to [67] when the Court was considering

Parliamentary statements in cases concerning declarations of incompatibility under the HRA, can be summarised as follows;

a. When considering justification (either the policy objective or proportionality), the facts may speak for themselves or the court may need to enlighten itself as to the mischief at which the legislation is aimed.
b. In doing so, the court must be able to take into account statements made in parliamentary debates (among other things, such as White Papers and explanatory notes).
c. Taking account is not "questioning" proceedings, but placing the court in a better position to understand the legislation.
d. Ministerial statements should not be treated as indicative of Parliament's objective intention; nor should they be given determinative weight; reasons given by a minister may not be the same reasons of other parliamentarians.
e. Proportionality is not to be judged by the quality of the reasons given in a parliamentary statement, the court noting among other things that ex tempore statements may sometimes lack clarity or be misdirected; lack of cogent justification in a statement does not "count against" the legislation.
f. "The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights" [67].

32. Similar conclusions were also reached by Lord Hope at [116]-[118]. Lord Hobhouse further noted that the risk of placing weight on parliamentary statements is that those statements rely on social policy objectives at the time of the passage of the legislation, rather than at the time of the alleged violation of the relevant ECHR right at [144].

33. Mr Alomo relied on *Craig v Attorney-General of Scotland* [2018] CSOH 117 [2019] SC. 230 [15] at 236 (as per Lord Malcolm), to argue that there exists a second freestanding exception to the Article 9 prohibition, in judicial review proceedings:

> *" 15. It would be possible to embark upon a detailed analysis of a large number of cases and other material; however, I consider that sufficient guidance can be found in the decision of the Privy Council in Toussaint v Attorney General of St Vincent and the 10 Grenadines [2007] 1 WLR 2825. The judgment of the Board was delivered by Lord Mance. At paragraph 16 it was noted that the House of Lords had on a number of occasions stated that use could be made of ministerial statements in Parliament in judicial review proceedings."*

34. To the degree that Mr Alomo was arguing that in any judicial review proceedings any reference to, or submissions concerning, proceedings in Parliament can be made, I do not think that can be correct or what was meant by the Court in *Craig*. It is quite clear from *Wilson v First County* and Lord Mance in *Toussaint* [2007] 1 WLR 2825 that the Court should not engage in a critique of the Parliamentary proceedings, or make judgments as to whether the Minister put forward good or bad justifications. As Lord Browne-Wilson put it in *Prebble v Television NZ* [1995] 1 AC 321 at p.332;

> *"In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: Burdett v. Abbot (1811) 14 East 1; Stockdale v. Hansard (1839) 9 Ad. & El. 1 ; Bradlaugh v. Gossett (1884) 12 Q.B.D. 271 ; Pickin v. British Railways Board [1974] A.C. 765 ; Pepper v. Hart [1993] A.C. 593 . As Blackstone said in his Commentaries on the Laws of England, 17th ed. (1830), vol. 1, p. 163:*
>
> *'the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere."*

35. In the light of the case law it seems to me that the correct approach is to admit the Ministerial Statement of Ms Primarolo, and have regard to the fact that Parliament considered the amendment and did not support it. However, as far as the Minister's

reasons are concerned, I will not analyse the criticisms made in Mr Alomo's Skeleton Argument, but rather consider the various elements of justification advanced by Ms Hannett on the basis of Mr Mean's two witness statements.

The European legal dimension

36. The Defendant has also filed a witness statement from Dr Andrea Mulligan setting out the legal position in relation to surrogacy across the Council of Europe member states.

37. In 15 member states surrogacy is expressly prohibited by law; in five it is lawful and expressly provided for; and in six there is no formal regulation. Of the 15 that prohibit surrogacy it appears that, in some, there is recognition of the genetic parenthood of the father. What can be said beyond any doubt from this material is that there is no consensus across the Council of Europe member states and Mr Alomo accepted that.

The Strasbourg case law

38. In *Menesson v France* (65192/11) the Fifth Section of the European Court of Human Rights considered a complaint that the applicants had been unable to obtain recognition in France of the legal parent-child relationship established abroad, in breach of article 8. The French applicants (husband and wife) had entered into a gestational surrogacy agreement with a woman in California. This involved IVF using the gametes from the first Applicant and a donor egg, implanted into the uterus of the surrogate mother. The Applicants obtained a judgment in California, where surrogacy is legal, that they should be recorded as the father and mother and birth certificates were drawn up in those terms in California. The French authorities refused to enter these particulars onto the French register of births.

39. The Court found as follows;

a) There was no dispute that the refusal of the French authorities to legally recognise the family tie between the applicants amounted to an interference in their family life [48];

b) The Court accepted there was a legitimate aim in the Government seeking to deter French nationals from recourse to methods of assisted reproduction outside France that were unlawful in France [62];

c) There is a substantial margin of appreciation where there is no consensus within the member states [75-77];

d) However, that margin was narrowed where "a particularly important facet of an individual's existence or identity is at stake" [80];

e) An essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned" [80];

f) The Court considered whether a fair balance was struck between the interest of the community in ensuring that members conform to the democratic choice, and the interest of the child [81];

g) There was no breach of the parents' family life because of the limited practical consequences on family life [94];

h) There was a breach in respect of the children's private life because they were left in a position of legal uncertainty and their identity within French society was "undermined." [96].

40. At [99- 100] the Court said;

> *"99. The Court can accept that France may wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory. Having regard to the foregoing, however, the effects of non-recognition in French law of the legal parent-child relationship between children thus conceived and the intended parents are not limited to the parents alone, who have chosen a particular method of assisted reproduction prohibited by the French authorities. They also affect the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation with the children's best interests, respect for which must guide any decision in their regard.*

> *100) This analysis takes on a special dimension where, as in the present case, one of the intended parents is also the child's biological parent. Having regard to the importance of biological parentage as a component of identity (see, for example, Jäggi [v. Switzerland, no. 58757/00], § 37[, ECHR 2006-X]), it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof. Not only was the relationship between the third and fourth applicants and their biological father not recognised when registration of the details of the birth certificates was requested, but formal recognition by means of a declaration of paternity or adoption or through the effect of de facto enjoyment of civil status would fall foul of the prohibition established by the Court of Cassation in its case-law in that regard ... The Court considers, having regard to the consequences of this serious restriction on the identity and right to respect for private life of the third and fourth applicants, that by thus preventing both the recognition and establishment under domestic law of their legal relationship with their biological father, the respondent State overstepped the permissible limits of its margin of appreciation."*

41. Subsequently to *Mennesson* the French Court of Cassation sought an advisory opinion under article 3 of Protocol no 16 from the Grand Chamber of the ECtHR, the *Advisory Opinion*. This related to the position of the intended mother under the surrogacy arrangement in *Mennesson*. The following questions were posed to the Court;

> *"1. By refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the 'intended mother' as the 'legal mother', while accepting registration in so far as the certificate designates the 'intended father', who is the child's biological father, is a State Party overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the 'intended mother'?*
>
> *2. In the event of an answer in the affirmative to either of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child*

> *relationship, ensure compliance with the requirements of Article 8 of the Convention?"*

42. The Court said at [37] that in deciding whether

> *"Article 8 of the Convention requires domestic law to provide a possibility of recognition of the relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, two factors will carry particular weight: the child's best interests and the scope of the margin of appreciation available to the States Parties."*

43. The Court's conclusion on the first issue is at [46];

> *"In sum, given the requirements of the child's best interests and the reduced margin of appreciation, the Court is of the opinion that, in a situation such as that referred to by the Court of Cassation in its questions and as delimited by the Court in paragraph 36 above, the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad through a gestational surrogacy arrangement requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother". [emphasis added]*

44. On the second issue, whether the right to respect for the child's private life required the recognition to take the form of entry on the register of births, the Court found it did not. In the light of the lack of consensus across Europe on surrogacy, the Court said at [54];

> *"What is important is that at the latest when, according to the assessment of the circumstances of each case, the relationship between the child and the intended mother has become a practical reality, an effective mechanism should exist enabling that relationship to be recognised. Adoption may satisfy this requirement provided that the conditions which govern it are appropriate and the procedure enables a decision to be taken rapidly, so that the child is not kept for a lengthy period in a position of legal uncertainty as regards the relationship. It is self-evident that these conditions must include an assessment by the courts of the child's best interests in the light of the circumstances of the case."*

Article 8

45. Article 8 provides;

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

46. The Court's analysis under art 8 proceeds through the following steps;

a. Is article 8 engaged?

b. If so, does the complaint constitute a material interference with the Claimant's art 8 rights?

c. If so, is the interference justified?

d. The approach to justification has been set out in numerous cases. I will adopt that in *R (Tigere) v Secretary of State for Business Innovation and Skills* [*2015] 1 WLR 3820;*

> *"Does the measure have a legitimate aim sufficient to justify the limitation of a fundamental, right?*
>
> *Is the measure rationally connected to that aim?*
>
> *Could a less intrusive measure be used?*
>
> *"bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?"*

47. Before dealing with those issues it is necessary to consider the degree to which the Court should afford Parliament a discretionary area of judgment in this field. As is clear from *Mennesson* and the *Advisory Opinion*, surrogacy is an issue upon which there is no European consensus, and that is a factor which has generally led the Strasbourg Court to

give member states a wide margin of appreciation. Mr Alomo accepts the fact that there is a lack of European consensus, and that surrogacy raises difficult moral and ethical issues.

48. The margin of appreciation between the supranational court and the member states is not the same as that between the national courts and the Executive or Legislature, see *Re G (Adoption: Unmarried Couples)* [2009 1 AC 173, particularly Lady Hale at [118] and Lord Kerr in *Steinfeld v Secretary of State for International Development* [2018] 3 WLR 4250 at [34]. Further, the Strasbourg Court does not say which organ of the State – Court, Legislature or Executive, should make the relevant judgement. However, the same or similar factors may be relevant to both margin of appreciation and the discretionary area of judgement left to Parliament or the Executive. Therefore the lack of a European consensus, and the difficult moral and ethical issues involved in surrogacy, are both material to a judgment as to whether this is an appropriate matter for the Court rather than Parliament to decide, and the degree to which the Court will defer to the judgements made by Parliament in the statutory scheme. Both of these were factors which the majority of the Justices in *Nicklinson v Secretary of State for Health* [2015] 1 AC 657 considered to be relevant in according Parliament a discretionary area of judgement in relation to assisted dying (albeit different members of the Court took different views on the width of the discretion). Lord Neuberger addressed the correct approach at [75];

> *"Where the legislature has enacted a statutory provision, which is within the margin of appreciation accorded to members states, it would be wrong in principle and contrary to the approach adopted in In re G, for a national court to frank the provision as a matter of course simply because it is rational. However, where the provision enacted by Parliament is both rational and within the margin of appreciation accorded by the Strasbourg court, a court in the United Kingdom would normally be very cautious before deciding that it infringes a Convention right. As Lord Mance said in In re G, the extent to which a United Kingdom court should be prepared to entertain holding that such legislation is incompatible must depend on all the circumstances, including the nature of the subject-matter, and the extent to which the legislature or judiciary could claim particular expertise or competence.*

49. Finding the ratio in *Nicklinson* is not always an easy task, but the approach of being "very cautious" is one that is reflected in all the judgments in the case.

50. Further, surrogacy is an issue which undoubtedly raises highly sensitive moral and ethical issues, and complex policy judgements as to how those issues should be balanced. Although the fact that such issues arise does not make the subject matter inappropriate for the courts to adjudicate upon, it will in some instances be the case that Parliament is the more appropriate forum in which to balance these issues particularly where the scheme is concerned with a number of different interests (see, for example, a number of the judgments in *Nicklinson).*

51. The other factor which is relevant to the margin of judgement accorded to Parliament is the degree to which the statutory scheme has been subject to a detailed process of consultation and consideration (*Lawrence v Fen Tigers (no 3)* 2015 1 WLR 3485 at [83] in the judgement of Lords Neuberger and Dyson).

52. In *Re Gallagher* 2019 2 WLR 509 Lord Sumption made clear that when considering whether a declaration of incompatibility should be made it was necessary to consider the scheme as a whole rather than focus on the impact on the individual: "*The impact on individual cases is no more than illustrative of the impact of the scheme as a whole" [50]*. At [61] of the same judgment Lord Sumption stated clearly that, when judging whether the scheme strikes a fair balance, the fact that "*a better scheme could have been devised"* does not mean that the scheme lies outside the margin of judgement. Equally, bright line rules rather than individual discretionary decisions, can be proportionate (see [48] and the reference to *Animal Defenders International v UK* [2013] (57 EHRR 21).

The submissions

53. The Claimant puts her overarching case as follows. The effect of sections 35 and 38 HFEA 2008 is that H's biological father, with whom she resides and who provides her with both nature and nurture and caters for her needs on a daily basis, is not recognised by the law as her father. Instead that status is conferred on D, who has no biological connection with the Claimant.

54. The Claimant starts by arguing that article 8 is engaged. A person's birth certificate is an important fundamental document, and it is thus of vital importance that it should accurately record the person's parentage. In *Re HFEA (ABCDEFGH: Declaration of Parentage)* [2015] EWHC 2602 the President of the Family Division acknowledged at [3] that parentage is a question of the most fundamental gravity and importance to an individual. As so often with this type of case, it is important to understand the context in which judicial comments are made. In that case the errors by the clinics in question meant that there was a genuine lack of clarity as to who were the fathers and/or the parents under the Act and the legal consequences of the errors by the clinics had a fundamental impact on the individuals. It was therefore a very different case on its facts from the present.

55. The Claimant relies on Cobb J at *Re AB and CD v the Z Fertility Clinic* [2013] 2 FLR 1357, an earlier case about the same very poor administration by at least one clinic. He said;

> *"2. The legal status of 'parent' carries with it implications for:*
> *i) the law relating to contact & residence (section 10(4)(a) Children Act 1989);*
>
> *ii) child maintenance (schedule 1, para.4 and 10 Children Act 1989 as amended by schedule 6 HFEA 2008);*
>
> *iii) inheritance (section 48(5) HFEA 2008);*
>
> *iv) "bring (ing) and defend (ing) proceedings about the child" (Baroness Hale in Re G [2006] UKHL 43 [2006] 2 FLR 629 @ §32);*
>
> *and importantly:*
>
> *v) "mak(ing) the child a member of that person's family" (Re G ibid.)"*

56. The Claimant then submits that the failure to recognise H as A's legal child constitutes an interference in H's article 8 rights, relying both on family and private life. Although Mr Alomo did argue there was an interference with family life, the real focus of his case was

on private life, and in the light of ***Mennesson***, as well as the UK statutory scheme, those submissions have greater force. He firmly bases his case on *Mennesson* and in particular paragraph [100] thereof and says that there is an obligation under article 8 to give full legal recognition to the fact of the child's biological father. To do otherwise would be a serious restriction on H's identity and her right to a private life.

57. Mr Alomo argues that the *Advisory Opinion* is about the status of the intended mother, and that is a different issue from the position of the father. He says that the second issue in the *Advisory Opinion* and the finding that the intended mother's legal relationship to the child did not have to take the form of entry in the register of births again related specifically to the position of the mother.

58. On justification Mr Alomo starts by relying on Lord Kerr in ***Steinfeld*** at [28] that the margin of appreciation to member states is not mirrored within the domestic arena. He refers to [80] of ***Mennesson*** and the narrowing of the margin in respect of parentage, and particularly relies on the importance of the legal parent-child relationship. Above all, he emphasised the need for the best interests of the child to be the paramount consideration, relying on the United National Convention on the Rights of the Child (UNCRC) article 3, which provides that;

> *"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
>
> *2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
>
> *3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."*

59. In relation to the heads of justification advanced by Ms Hannett; on the benefit of legal certainty, the Claimant says that the only certainty is that the birth mother (the surrogate) is the legal mother. Who if anyone is registered as the father will turn on a number of matters which may vary or be unclear, such as the consent of the husband to the original arrangement. Therefore, he says, there is no certainty in any event.

60. Thus, he argues that there is no sound reason why the donor of the gametes should not be treated as the legal parents.

61. On non-enforceability his argument seemed to be that there were circumstances in which the agreement would effectively be enforceable under s.37 so again in practice the aim is not fully met.

62. In respect of the justification that the impugned provisions ensure that the child has a legal father who is part of the same family unit as the mother, the Claimant argues that that should not trump the child's right to have her biological father recognised as her legal father. She further argues that many children have parents who are not part of one family unit, so the justification itself carries little weight. As has happened on the facts of this case the Family Court can make a ruling as to what family the child lives with.

63. In terms of fair balance, the Claimant argues that she is disadvantaged by the impugned provisions because she is precluded from obtaining Brazilian citizenship as of right; she is denied the social and emotional benefits of having legal recognition of her biological father; she may be financially disadvantaged by the working of inheritance law; and she does not have a legal reality which corresponds with her day to day reality.

64. The Claimant argues that a fair balance is not struck by the fact that A has obtained parental responsibility under section 3 of the Children Act 1989 and the order of Theis J, because that is a different concept from legal parenthood. It does not have the same quality of long term certainty, and in any event, comes to an end when the child obtains her majority.

65. Parental orders under s.54 HFEA 2008 are subject to consent. It is argued that the possibility of a parental order cannot justify the interference with the Claimant's article 8 rights given that such orders require the consent of the surrogate mother and her husband. I note however that Mr Alomo does not seek a declaration of incompatibility in respect of s.54.

66. The Claimant also relies on article 14 of the ECHR and relies on the well-known passage in *Ghaidan v Godin Mendoza* [2004] 2 AC 557;

> *"It is common ground that five questions arise in an article 14 inquiry, based on the approach of Brooke LJ in Wandsworth London Borough Council v Michalak [2003] 1 WLR 617 , 625, para 20, as amplified in R (Carson) v Secretary of State for Work and Pensions [2002] 3 All ER 994 , 1010, para 52; [2003] 3 All ER 577 . The original four questions were: (i) Do the facts fall within the ambit of one or more of the Convention rights? (ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (iii) Were those others in an analogous situation? (iv) Was the difference in treatment objectively justifiable? I e, did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?*
>
> *134. The additional question is whether the difference in treatment is based on one or more of the grounds proscribed—whether expressly or by inference—in article 14. The appellant argued that that question should be asked after question (iv), the respondent that it should be asked after question (ii). In my view, the Michalak questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided."*

67. Mr Alomo posited three comparators, or analogous situations. The first was if the child had been conceived as a result of a normal sexual encounter, then it would have been

possible to displace the presumption that the husband was the father. The second, if the child had been conceived as a result of insemination as opposed to assisted reproduction under the HFEA, and it could be shown that D did not consent, then A would be her legal father. The third, if it could be shown that D did not consent to C's treatment, then D would not be the legal father on the birth certificate

68. Ms Hannett's submissions can be summarised briefly, not least because much of them I agree with and adopt in my conclusions below. She submits that surrogacy and assisted reproduction raise difficult ethical and moral issues that have been dealt with in a comprehensive statutory scheme. Parliament, both in 1990 and 2008, attempted to balance a range of competing interests and considerations, and did so after extensive consultation and a very full process. In those circumstances the Court should be very cautious in disagreeing with the range of judgements made within the statutory scheme.

69. She says that the scheme must be considered as a whole, and it is necessary and proportionate to have bright line rules as to who are the child's parents; and it is also proportionate to have requirements for consent to be given, if the starting point rules are departed from. She argues that the real mischief that the Claimant complains about is that C and D did not consent to a parental order, but that the need for consent is fundamental to the scheme, and there is no challenge to s.54 HFEA.

70. She emphasises that there is not just one potentially lawful scheme. Parliament has a discretionary area of judgement and the issue is therefore not whether there could be a better scheme, but whether this particular statutory scheme is compatible.

71. Referring to ***Mennesson*** and the *Advisory Opinion* she argues that the Claimant's case goes far beyond what is required by the Strasbourg Court, and that ***Mennesson*** turned on the absolute nature of the provisions relating to surrogacy in France.

72. Ms Hannett argues that there is no interference with the Claimant's article 8 rights, either under family or private life and submits that there are no practical consequences for the child from the impugned provisions, because her relationship with A is fully protected.

73. The Defendant relies on three heads of justification – the need for legal certainty as to who is the parent; the need to ensure that gamete donors are not the legal parents; and the need to ensure that surrogacy arrangements are not enforceable.

74. Ms Markham QC adopts Ms Hannett's submissions. She very appropriately sought not to repeat those submissions but focused on the powers under the Children Act 1989 to give legal certainty to the relationship between H and A, and always to seek to meet the best interests of the child. She also pointed to the decision of Williams J in *NG v AV* [2018] EWHC 3360 (Fam), wherein it was accepted that the mother on the birth certificate was not the genetic mother. She said that it was clear that the birth certificate was not necessarily a true record of genetic parentage.

Conclusions

75. In my view sections 35 and 38 HFEA are not incompatible with the Claimant's article 8 rights. The starting point is that surrogacy raises intensely difficult moral and ethical issues, where complex balances have to be drawn in any legal scheme. Those balances must seek to protect the interests of the children concerned, and take into account the wider ethical dimensions. It will necessarily be the case that, at various points, the scheme will give precedence to one policy priority over some other issue.

76. By reason of that very complexity it is hardly surprising that there is no consensus across the Council of Europe member states on the legal approach to surrogacy. Indeed, it is plain from Dr Mulligan's statement that there is a very wide divergence of approach, ranging from total bans to acceptance of surrogacy with differing degrees of regulation. The balance struck by the Strasbourg Court in *Mennesson* is between giving States a margin of appreciation, but ensuring the rights of the children are protected to an appropriate degree. In both the Strasbourg judgments and the domestic statutory scheme, the requirement of the UNCRC article 3, to protect the best interests of children, are fully met by the balances that have been struck in the legislative scheme.

77. Further, the legislative scheme that has been drawn up in the UK has been extremely carefully considered through two pre-legislative processes. These have involved the

Warnock Report, two White Papers and two rounds of extensive consultation. The most recent full consideration of the law was in 2008, and the issues that the Claimant raises have not fundamentally changed since then. Further, the specific issue which is raised in this case, whether a genetic father should be registered on the birth certificate in place of the surrogate's husband, is one that was specifically raised in Parliament in 2008 by Dr Harris MP's proposed amendment, and was ultimately withdrawn.

78. For these reasons, relying on the principles set out in the case law I have referred to above, and in particular the judgment of Lord Neuberger in ***Nicklinson***, this is a case where it is appropriate to give a wide area of discretionary judgement to Parliament in the setting of the statutory provisions.

79. The Claimant places very great reliance on the decision in ***Mennesson*** and the reference to the need for "*full recognition*" of the legal relationship with the biological father. However, there are in my view critical distinctions between the UK statutory scheme and that in France, as considered in ***Mennesson***. What led to the breach of article 8 in France was the absolute inability of the children to have their genetic father accorded legal status. Most importantly in the UK there is provision in the HFEA for the genetic father to establish legal parenthood through the parental order provisions in s.54 HFEA 2008. There was no equivalent of this process in ***Mennesson***. Ultimately the reason that s.54 cannot be relied upon here by A, is that C and D do not consent. However, the Claimant does not seek to argue that s.54 and the consent requirement is incompatible. In any event, for reasons that I will expand upon below a requirement for consent does not appear to me to be disproportionate. There is nothing in ***Mennesson*** that would suggest that a provision such as s.54 would not provide the "de facto enjoyment of civil status", as referred to in [100] of the judgment, which would be sufficient to meet any alleged article 8 breach.

80. This conclusion is reinforced by the *Advisory Opinion* which at [51] states that the choice of means of recognition is for the signatory State, and at [54] states that the requirement is that "*an effective mechanism should exist enabling that relationship to recognised"*. Such an effective mechanism does exist in the HFEA, albeit subject to consent.

81. Turning to the four stages in ***Tigere***, I accept that H's private life is interfered with by the operation of s.35 and 38, but not her family life. On family life, the Court in ***Mennesson*** rejected the case in respect of family life at [94] because there were no practical consequences for her family life. In my view that position is even clearer on the facts of this case. Pursuant to the order of Theis J, H lives with A and B, and they have day to day responsibility for her life. Her family life with them is fully protected by the terms of the Child Arrangements Order, and the impugned provisions have no real impact on her family life.

82. However, in respect of private life, in my view there is an interference. Paragraph [100] of ***Mennesson*** emphasised "*Having regard to the importance of biological parentage as a component of identity…".* Genetic or biological inheritance is an important facet of any individual's personal identity. That does not mean it has to be the overriding facet, or that in some cases it may have little or no importance. But it is necessarily fundamental to who an individual is, and it may become even more so as genetic medicine advances. Ms Hannett's argument that the genetic relationship is reflected in the order giving A parental responsibility does not fully meet the argument. Parental responsibility orders do what they say, they give "responsibility", but they do not accord the holder the status of legal parenthood. In my view therefore, a statutory scheme which provides that, in certain circumstances, the surrogate's husband is recorded on the birth certificate rather than the genetic father, particularly where the genetic father strongly wishes to be named, does interfere with the child's private life.

83. The next stages in the article 8 analysis are to consider (i) legitimate aim, (ii) necessity in a democratic society and(iii) justification. In this case, it is convenient to consider these together. The burden of justification falls upon the Defendant. There can be no doubt that a scheme for the regulation of surrogacy meets a legitimate aim, and is necessary. In my view there are three specific factors, most clearly set out by Lord Sumption in ***Gallagher***, which are important when determining justification in this case. Firstly, it is necessary to look at the scheme as a whole to see how the provisions work together. Secondly, it is open to Parliament to have in place bright line rules rather than leave decisions to case specific discretionary judgments. Thirdly, the fact that it might be possible to devise a

"better" scheme or one that more fully protects someone's Convention rights, does not mean that the scheme in question is incompatible.

84. The Defendant advances three limbs of justification. The first is that there is a need for legal certainty so that the child, and anyone else, can know who that child's legal parents are. One aspect of that legal certainty is that every child should have at least one parent and no more than two parents. The need for legal certainty is in my view impossible to overstate. Happily for H, she has four people who want to be her parents. For some children the problem may be the other way around, and none of the adults concerned wish to be the legal parents. It is essential that the law is clear and precise as to who is the legal parent. That end result is strongly in H, and all surrogate children's, interests.

85. It would be possible to devise a scheme in a way that created legal certainty, but with the genetic father being the legal parent. However, as is clear from ***Gallagher*** the fact that there might be another way to meet the legitimate aim does not mean the scheme is incompatible.

86. The second limb of justification is that gamete donors should not be legal parents. Lying behind this are two policy aims – that the donors do not become the legal parents, and that the parents of children conceived by donated gametes are that child's legal parents. I can see that this limb might be problematic under article 8 if there were not the parental order provisions which do allow the status of gamete donors, such as A, to have legal status but only with consent. The importance of ensuring that gamete donors cannot be forced to become legal parents, because of the lack of an automatic provision such as in s.35 and 38 is in my view correct.

87. The third limb is the overarching objective of ensuring that surrogacy arrangements are not enforceable in domestic law. Although this objective does not directly relate to sections 35 and 38 HFEA, it is one element of the interlocking scheme. If the genetic father could require himself to be named on the birth certificate in place of the husband then that would tip the balance towards a more enforceable, or at least compellable, position for the intended parents. It would mean that the husband was displaced as the

legal parent leaving the child at birth with legal parents in different family units. Of course, such a situation may arise with a child conceived other than through a surrogacy arrangement, but it is easy to see that such an outcome does not meet the policy objectives. These judgments as to where the balance in such a complex scheme lies, are in my view plainly for Parliament. Again, as *Gallagher* makes clear it is lawful to have a statutory scheme with "bright lines", such as here the naming of the husband rather than the genetic father.

88. In reaching the conclusion that the interference with H's article 8 rights is justified, I also take the view that the interference is relatively limited, as Ms Hannett argued. H will in reality know and understand her genetic heritage because it is perfectly open to A to explain it to her, and A and B have day to day parental responsibility for her. Therefore, unlike the child in *Jaggi v Switzerland* (58757/00) there is no question of the child simply not knowing or understanding her heritage. In *Jaggi* the child (by then an adult) had no way of establishing his genetic identity.

89. In terms of the "fair balance", the direct impacts on H of A not being named on the birth certificate are limited. The Claimant put forward two specific matters, namely Brazilian nationality and inheritance. The evidence is not absolutely clear but I am prepared to accept that, if A was named on the birth certificate, H would have an automatic right to Brazilian citizenship, whereas as the position stands she would have to apply. That may be a detriment, but it is not possible to know whether H would wish to be a Brazilian citizen. Certainly, at the present time there is no evidence of any harm to H from her not being a Brazilian citizen. Further, as Ms Hannett submits, the domestic law of other countries is not the responsibility of the UK. The evidence on inheritance impacts was even more speculative. It is possible that there could be theoretical detriment because the presumptions about support of children in inheritance law would not apply. However, such detriment can plainly be overcome by A making testamentary provision for the Claimant, so any such harm is both theoretical and fully capable of being mitigated.

90. In respect of article 14, I again conclude there is no breach. Although the facts do fall within the ambit of article 14, it does not appear to me that the examples put forward by

Mr Alomo are in truly analogous situations. The first "comparator" is of a child born of a "sexual encounter", but that is plainly not analogous. Thirty years of policy formulation and intense ethical debate show the differences between the two situations. The differences are demonstrated in *M v F and H (Legal Paternity)* [2013] EWHC 1901 (Fam), where a man "donated" sperm through sexual intercourse and was found to be the child's father.

91. The second and third comparators are children conceived by way of artificial insemination or assisted reproduction without D's consent. In neither case would the surrogate mother's husband be automatically named on the birth certificate. However, in my view these situations are not analogous. The fact that D consented to the treatment is fundamental to the ascription of legal parenthood. He accepted that he would be the legal parent, subject to any subsequent parental order, and effectively as C's spouse he was agreeing to and being a party to the whole arrangement. If he had not consented, the balances struck in the scheme would inevitably be different.

Relief

92. For the reasons set out above I have concluded that there is no incompatibility. However, if I had reached the opposite conclusion, I would have had to consider the relevance of the Law Commission's review of the laws around surrogacy launched on 4 May 2018. A consultation paper was published in June 2019. There are a wide range of potential legislative changes set out, with detailed and complex proposals. The Defendant argues that in those circumstances the Court should leave the matter for Parliament to consider any proposed changes that emerge from the review, before making any declaration of incompatibility. It is argued that the position is analogous to that on assisted dying considered in *Nicklinson*. Given that I have found there is no incompatibility, I do not need to deal with this argument, save to say that I can see very considerable force in it on the facts of this case.