

ENGLAND AND WALES / JUDGMENT

Re X (Foreign Surrogacy: Consent)

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[2025] EWFC 71 IN THE FAMILY COURT SITTING AT THE ROYAL COURTS OF JUSTICE Case No: ZE24P80012/ZE24P80013 Royal Courts of Justice Strand, London, WC2A 2LL Date: 26 March 2025 Before: MRS JUSTICE THEIS DBE

- ----- Between: Mr and Mrs X Applicants
- and – Ms Z
- -----
- ----- Respondent Ralph Marnham (instructed by Collyer Bristow) for the Applicants (acting pro bono) The Respondent did not attend Hearing date: 26th March 2025
- ----- Approved Judgment This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. Nobody may be identified by name or location. The anonymity of everyone other than the lawyers must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court. Mrs Justice Theis DBE:

Introduction

1. The court is concerned with applications for parental orders concerning twin girls, AB and CD, now just over a year old. They were born following a surrogacy arrangement in Nigeria between the applicant intended parents, Mr and Mrs X, and the gestational surrogate, Ms Z.
2. This is the third hearing in this application, which has been necessary to ensure the court has the relevant evidence to consider whether the criteria under s54 Human Fertilisation and Embryology Act 2008 (HFEA 2008) are established and, if so, whether making parental orders will meet the lifelong welfare needs of these two young children.
3. The court is extremely grateful to the applicants' legal team, Christina Pippas and Laura Burrows at Collyer Bristow solicitors, and Ralph Marnham, Counsel, for acting pro bono and providing their expertise and experience. Their assistance has been invaluable. With their support and advice the applicants have now filed signed statements that comply with the directions made by the court and exhibit the relevant evidence they rely upon.
4. In Re H (Anonymous Surrogacy) [2025] EWHC 220 (Fam) Sir Andrew McFarlane, President of the

Family Division, at [18] set out that: ‘The individual requirements set out in HFEA 2008, s 54 must be satisfied before a court may grant a parental order. Each of the elements stipulated by Parliament is of importance. The court must scrutinise parental order applications with care to ensure compliance with the statute, particularly so when the application includes a foreign element.’

5. Re H also involved a child born in Nigeria following a surrogacy arrangement. The President referred in Re H at [19] to the special restrictions imposed on adoptions from Nigeria due to the specific areas of concern relating to adoption from Nigeria including ‘difficulties confirming the background and adoptability of children; unreliable documentation; concerns about corruption in the Nigerian adoption system; evidence of organised child trafficking within Nigeria; concerns about weaknesses in checks completed by Nigerian authorities.’ He continued at [19] ‘Whilst there is no comparable statutory restriction on surrogacy cases originating from Nigeria, the need for care as to the reliability of documentation and the potential for the involvement of organised child traffickers underscores the need for caution in parental order applications involving a Nigerian surrogacy’.
6. At [20] the President stated ‘A further cause for concern in the present case is the anonymity of the surrogate mother. Not only does that anonymity prevent the court from being able to be satisfied that the mother knows of the application and consents to it, it also raises the level of suspicion that the arrangements may have been otherwise than it is said to be. Whilst Mr and Mrs H have explained their motivation for opting for an anonymous surrogacy, their decision has, in fact, caused them a great deal of difficulty in presenting the present application. Those who follow in their footsteps in the future would be well advised to avoid engaging with an anonymous surrogate’. (emphasis added)
7. A similar situation arose in this case. Mr and Mrs X did not have any direct contact or involvement with Ms Z and were entirely reliant on the hospital. That has caused significant delay in their application being determined. The President’s warning in Re H should be heeded. Every step should be taken by intended parents to avoid engaging with any surrogacy arrangement that proposes an anonymous surrogate, or even one that seeks to limit the intended parents contact with the surrogate. Any such lack of transparency is likely to impact on this court’s ability to be able to assess any consent being relied upon, which could result in a parental order not being made. Relevant background
8. Mr and Mrs X were born in Nigeria. Mr X came to this jurisdiction in 2005 to pursue his education and begin his career as a specialist nurse. He has remained working and living here since then.
9. Mr and Mrs X met in 2006, began living together in 2008 and married in 2011.
10. They purchased their family home in 2014.

11. Between 2011 and 2022 Mr and Mrs X underwent five IVF procedures which were, sadly, unsuccessful. Following that they were advised to consider surrogacy.
12. After looking at the options they decided to engage a clinic based in Lagos, Kingswill Specialist hospital ('the hospital'). They entered into a surrogacy agreement with Ms Z in May 2023, although they did not meet Ms Z. The embryos were created using donor eggs and Mr X's sperm, as set out in the letter from Dr Nwogu, Medical Director at the hospital dated 20 March 2024.
13. The embryo transfer took place on 3 June 2023 and a pregnancy was confirmed.
14. The applicants travelled to Lagos in January 2024 for the birth. Mr and Mrs X were present at the hospital for the birth. AB and CD were placed in their care soon after their birth. Following three days in hospital they moved to rented accommodation. After 10 days Mr and Mrs X returned to England due to work commitments and left the children in the care of Mrs X's sister for four weeks before Mrs X returned back to Nigeria and cared for the children whilst Mr X remained here and worked. He returned back for a short visit in the early summer.
15. On 3 April 2024 Ms Z signed an affidavit giving her consent to parental orders being made. The affidavit was signed at the High Court in Lagos and witnessed by a Commissioner of Oaths.
16. On 11 July 2024 the application for parental orders was made.
17. On 8 August 2024 the children travelled with Mr and Mrs X to England.
18. Directions were made on 15 August 2024 that re-allocated the matter to High Court Judge level and directed Mr and Mrs X to file statements. The parental order reporter was appointed and Ms Inman filed her report on 13 January 2025.
19. At hearings on 21 January 2025 and 12 March 2025 I made directions for the applicants to file statements setting out the evidence they relied upon in support of their applications. Now with the support of their legal team both Mr and Mrs X have filed detailed statements.
20. On 17 March 2025 the parental order reporter, Ms Inman, was able to speak to Ms Z by telephone and she confirmed her consent to this court making a parental order.
21. On 24 March 2025 A101A forms were sent to the hospital to be sent on to Ms Z, together with the C52 acknowledgment of service forms.
22. On 26 March 2025 further documents were filed, including a statement from Dr Obidike Uchechi, Medical Officer based at the hospital, who Ms Inman liaised with in making the arrangements to speak to Ms Z. In her statement Dr Obidike Uchechi set out the arrangements she had made for Ms Z to meet with Ms Inman on 17 March 2025 and for Ms Z to sign the A101A forms on 24 March 2024. She states there had been insufficient time to get the forms notarised. She confirmed that Ms Z had also seen the C51 applications and the C52

acknowledgment of service forms. The s 54 criteria

23. The relevant parts of HFEA 2008, s 54 are:

- (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. (8A)
 - (9) ...
 - (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) ...
24. In this case five of the eight criteria under s54 can be dealt with shortly. The evidence demonstrates that the children were carried by Ms Z and DNA tests establish that there is a biological link with each child and Mr X (s54(1)). The applicants were married in 2011 (s54(2(a))) and the applications were made within six months of the birth of the children (s54(3)). Both the applicants are over the age of 18 years (s54(5)). The evidence sets out the payments that were made. In total 6.5m Naira (c£3,300) was paid to the hospital and from that just over 1.9m Naira (c£980) was paid to Ms Z. There is limited detailed information as to how much of the payments made relate to expenses reasonably incurred and the court is invited to authorise any element of the payments which do not relate to expenses reasonably incurred, which I do (s54(8)). There is nothing in the evidence to suggest that this was other than an arrangement that was entered into voluntarily, the level of payments are not significantly different than has been authorised in other similar cases and there is no suggestion Mr and Mrs X have done anything other than act in good faith.
25. The remaining three criteria require more detailed consideration.
26. S54 (4) (a) provides that the court should be satisfied that the children had their home with Mr and Mrs X at the time when the application was made and at the time when the court is considering making a parental order. From the history set out above the children were in the physical care of Mrs X when the applications were made. Mr X remained here and worked in order to provide for the family. He remained in very regular contact with Mrs X and they jointly made day to day decisions for the care of the children. They had applied for and were awaiting the visa applications for the children to be determined, the six month time limit for them to make the parental order applications was approaching and once the visa applications were granted Mr X travelled to Nigeria to then travel back with Mrs X and the children in early August 2024.
27. I accept Mr Marnham's submissions that the court should take a purposive approach to the meaning of 'home' and conclude that despite their physical separation at the time the applications were made the children had their home with both applicants. The facts clearly

establish that the Article 8 right to family life are engaged for Mr and Mrs X and the children and the interpretation of home should be considered through that lens. Although this is fact specific to each case this approach accords with cases such as *Re A (A Child: Surrogacy:s54 Criteria)* [2020] EWHC 1426 (Fam) Keehan J, *Re Z (Parental Order: Child's Home)* [2021] EWHC 29 (Fam) Knowles J and *X v Z (Parental Order Adult)* [2022] EWFC 26 Theis J.

28. S54 (4)(b) requires at least one of the applicants to be domiciled in this jurisdiction at the time the application is made and when the court is considering making a parental order. Mr Marnham submits both Mr and Mrs X state they have a domicile of choice here. It is a question of fact and the court needs to be satisfied on the balance of probabilities that at least one of the applicants has abandoned their domicile of origin and acquired a new domicile of choice. It requires clear evidence that an individual's domicile of origin has been displaced. Arden LJ (as she then was) noted in *Barlow Clowes International Limited v Henwood* [2008] EWCA Civ 577 at [14] that 'Given that a person can only have one domicile at any one time for the same purpose, he must in my judgment have a singular and distinctive relationship with the country of supposed domicile of choice. That means it must be his ultimate home or, as it has been put, the place where he would wish to spend his last days'.
29. The focus is on intention and Mr Marnham submits the court is able to find that Mr X has formed that intention relying on the following features in this case. Mr X has been in this jurisdiction since 2005 and has studied and worked here during those twenty years. Mr and Mrs X have been living here together since 2008, were married here in 2011 and jointly purchased a property here in 2014. Mr X acquired British Citizenship in 2010 and has stated in his evidence he has no intention of returning to live in Nigeria, he retains no property or bank accounts there and no longer has the right to vote there.
30. I accept those submissions. Mr X's life is in this jurisdiction and the evidence supports his stated intention that he has abandoned his domicile of origin and intends to remain living in this jurisdiction permanently and indefinitely. His family life, his work and his assets are all anchored in this jurisdiction and this is where Mr and Mrs X intend to bring up their children and live for the rest of their lives.
31. Turning, finally, to the question of consent. S54(6) provides that the court needs to be satisfied that Ms Z has given her consent to the court making a parental order and that consent was given freely, unconditionally and with full understanding. Rule 13.11 (1) Family Procedure Rules 2010 provides that 'Unless the court directs otherwise, the agreement of the other parent or the woman who carried the child to the making of the parental order may be given in the form referred to in practice Direction 5A or a form to the like effect'. Rule 13.11(4) sets out the requirements for any form of agreement executed outside the United Kingdom.
32. In this case the evidence demonstrates that Ms Z signed affidavits on 3 April 2024 that set out her consent to relinquish parental responsibility for the children and to consent to parental orders being made. An affidavit signed on 28 March 2024 confirmed she was not married. It

took some time to arrange a meeting with Ms Z, as described in Ms Inman's addendum report dated 28 February 2025. A telephone meeting was finally arranged between the parental order reporter, Ms Inman, and Ms Z on 17 March 2025 where Ms Z confirmed orally her agreement to the court making a parental order. Ms Inman records in the email she sent to the court following that meeting 'I explained my role to [Ms Z] and she confirmed her identity. [Ms Z] said that she willingly gave consent to the parental orders for [AB and CD] after they were born and continues to give her consent. She understands what this means, and this was always her intention. She confirmed that she has signed documents last year to confirm her consent to the order. [Ms Z] shared that the hospital had treated her well and said that she had received payment directly from them for the surrogacy procedure'. Ms Inman attended this hearing and gave oral evidence. She confirmed this account and said she was satisfied that Ms Z consented. Ms Z was able to provide details about the previous consents she had given, where those documents had been signed and repeated her consent to Ms Inman to the court making a parental order.

33. Mr Marnham rightly reminds the court of the importance of consent, it is the cornerstone of the statutory framework and described by Peter Jackson LJ in *Re C (Surrogacy: Consent)* [2023] EWCA Civ 16 at [61] as follows 'The right of a surrogate not to provide consent is a pillar of the legislation'.
34. Having considered the evidence in this case I am satisfied that Ms Z has provided her consent in a way that meets the requirements of s54(6). The affidavits signed by her in April 2024 are clear in their terms and provide consent. They are sworn at the High Court Registry, Lagos before a Commissioner for Oaths. The written consents were given more than six weeks after the birth of the children. Ms Z repeated her position about consent in the recent meeting with Ms Inman and was able to give detail about the previous written consents, for example where they were signed, and remained clear that she thought everything had been done. Ms Inman's evidence, which I accept, was that she was satisfied that Ms Z understood the consent she had given. Welfare
35. Each of the relevant s54 criteria having been established it is necessary to consider whether making parental orders will meet the lifelong welfare needs of these two young children.
36. Ms Inman has undertaken her own enquiries, including visiting the children at the family home in January 2025. Her report sets out her detailed welfare analysis, which I accept, and concludes with making a very clear recommendation that the court should make a parental order.
37. The welfare considerations are powerful in this case. Mr X is the children's biological parent. The Article 8 rights to family life are engaged and, subject to the s54 criteria being established, there is a positive obligation on the State to provide effective recognition of the children's relationship with Mr and Mrs X. Making a parental order for each child will provide the lifelong security and stability their welfare clearly demands.

38. I am satisfied a parental order should be made in favour of Mr and Mrs X in relation to both AB and CD, only that order will meet their lifelong welfare needs and secure their legal parental relationship with Mr and Mrs X in a lifelong way.

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