Neutral Citation Number: [2015] EWFC 73

Case No: ZC15P00214

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 September 2015

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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In the matter of Z (A Child)

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- -

Miss Elizabeth Isaacs QC and Mr Adem Muzaffer (instructed by Natalie Gamble Associates) for the applicant father
Miss Melanie Carew (of CAFCASS Legal) for the child
The respondent surrogate mother was neither present nor represented

Hearing dates: 28-29 July 2015

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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.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was handed down in open court

Sir James Munby, President of the Family Division :

1. When section 54(1) of the Human Fertilisation and Embryology Act 2008 provides that in certain circumstances the court may make a parental order on the application of "two people", is it open to the court to make such an order on the application of one person? Can section 54(1) be 'read down' in accordance with section 3(1) of the Human Rights Act 1998 so as to enable that to be done? These are the questions raised for decision here. In my judgment the answer to each question is clear: No.

The facts

2. I am concerned with a child, Z, who was born in August 2014 in the State of Minnesota in the United States of America. Z was conceived with the applicant father's sperm and a third party donor's egg implanted in an experienced unmarried American surrogate mother. There is no need for me to go into the details. Suffice it to say that the surrogacy arrangements were made through the agency of an Illinois company and in accordance with Illinois law. The agency was paid $12,000 and the surrogate mother a total of $33,737.10, comprising $5,637.10 in expenses, $1,100 compensation for the inconvenience of fertility treatment, $25,000 pregnancy compensation and $2,000 C-section compensation. Following Z's birth, the father obtained a declaratory judgment from the appropriate court in Minnesota, relieving the surrogate mother of any legal rights or responsibilities for Z and establishing the father's sole parentage of Z. Following that court order he was registered as Z's father in Minnesota. The father has since returned to this country, bringing Z with him.

3. The legal effect of this can be summarised as follows. The surrogate mother, although she no longer has any legal rights in relation to Z under Minnesota law, is treated in this country as being his mother. Whatever his legal rights in Minnesota, the father does not have parental responsibility for Z in this country. For the moment Z's position has been secured by making him a ward of court, but this in the nature of things cannot provide a permanent solution. There are only two possible routes by which the court can secure the permanent transfer in this country of parental responsibility from the surrogate mother to the father: by means of a parental order in accordance with section 54 of the 2008 Act; or by means of a adoption order in accordance with section 46 of the Adoption and Children Act 2002. For reasons that are well understood and apparent from a number of authorities which there is no need for me to refer to, the father would very much prefer to be able to obtain a parental order.

4. Thus in February 2015 the father applied to this court for a parental order in accordance with section 54 of the 2008 Act. The surrogate mother has executed a notarised consent to the making of the order which complies with the requirements of sections 54(6) and 54(7) of the Act (see below). The parental order reporter supports the father's application and invites the court to exercise its discretion retrospectively to authorise the various payments.

The issue

5. But for one matter this application would be unproblematic. The problem is that the application is made by a single parent, whereas section 54 seemingly requires an application to be made by "two people".

The legislation

6. So far as material, section 54 of the 2008 Act provides as follows:

> "(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 (8) 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 [not relevant], 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 … ,
>
> 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 … "the court" means the High Court or the family court …
>
> (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."

The legislative context

7. To set section 54 in its historical context, I need briefly to refer not merely to some of the provisions of its statutory predecessor, section 30 of the Human Fertilisation and Embryology Act 1990 (which came into force in 1994), but also to analogous provisions in the legislation relating to adoption.

8. I start with adoption. From the very beginning of adoption in this country, the legislation has always provided for adoption orders to be made in favour of either one person (see, for example, section 1(3) of the Adoption Act 1926, sections 14 and 15 of the Adoption Act 1976 and, now, section 51 of the Adoption and Children Act 2002) or a couple. Originally, and until quite recently, a couple could adopt only if they were husband and wife (see, for example, section 1(3) of the 1926 Act and section 14 of the 1976 Act).

9. That was the state of adoption law when section 30 of the 1990 Act came into force in 1994:

> "(1) The court may make an order providing for a child to be treated in law as the child of the parties to a marriage (referred to in this section as "the husband" and "the wife") if –
>
> (a) the child has been carried by a woman other than the wife as the result of the placing in her of an embryo or sperm and eggs or her artificial insemination,
>
> (b) the gametes of the husband or the wife, or both, were used to bring about the creation of the embryo, and
>
> (c) the conditions in subsections (2) to (7) below are satisfied.
>
> (2) The husband and the wife must apply for the order within six months of the birth of the child …
>
> (3) At the time of the application and of the making of the order –
>
> (a) the child's home must be with the husband and the wife, and
>
> (b) the husband or the wife, of both of them, must be domiciled in a part of the United Kingdom or in the Channel Islands or the Isle of Man.
>
> (4) At the time of the making of the order both the husband and the wife must have attained the age of eighteen."

So, in contrast to contemporary and long-established adoption law, section 30 contained no provision for a parental order to be made in favour of one person.

10. Section 50 of the 2002 Act, in contrast to its statutory predecessors, provides for adoption by "a couple", defined for this purpose in section 144(4) as meaning "(a) a married couple, or (b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship."

11. The Civil Partnership Act 2004 came into force on 5 December 2005. Its effect, so far as material for present purposes, was to extend section 50 of the 2002 Act to include civil partners. However, it left section 30 of the 1990 Act unaffected.

12. Accordingly, when what is now section 54 of the 2008 Act was being considered in Parliament, the situation was this: (1) An adoption order could in principle be made in favour of one person or a couple (defined for this purpose as a married couple, civil partners, or two people, whether of different sexes or the same sex, living as partners in an enduring family relationship). (2) In contrast, a parental order could be made only in favour of a married couple.

13. The effect of section 54(2) of the 2008 Act was, as we have seen, to bring the definition of a "couple" into line with the definition in section 144(4) of the 2002 Act.

So, in terms of a "couple", the approach was the same for a parental order as for an adoption order. But – and this is at the heart of the problem that confronts me – section 54 of the 2008 Act, like its predecessor, section 30 of the 1990 Act, does not, on its face, contemplate the making of a parental order in favour of one person. Putting the same point slightly differently, the distinction in this respect between adoption orders and parental orders enshrined in section 30(1) of the 1990 Act was carried forward into section 54(1) of the 2008 Act, although in their approach to the concept of a couple the two pieces of legislation have tended, by and large, to march side by side.

14. I can bring the legislative story up-to-date by noting that with effect from 13 March 2014, when the Marriage (Same Sex Couples) Act 2013 came into force, both section 144(4) of the 2002 Act and section 54(2) of the 2008 Act apply also to married couples of the same sex.

The legislative debate

15. Miss Elizabeth Isaacs QC, who appears on behalf of the father, has with the assistance of her junior, Mr Adem Muzaffer, and her instructing solicitor, Miss Natalie Gamble, taken me in great detail through the legislative process which culminated in the enactment of the 2008 Act. For present purposes, it suffices for me to note the Public Bill Committee debate on clause 54 of the Bill in the House of Commons on 12 June 2008. Dr Pugh, Member of Parliament for Stockport, moved a series of amendments, tabled by the Member for Oxford West and Abingdon (Hansard, col 246), to permit the making of a parental order in favour of one person. Summarising his colleague's argument, he said (cols 247-248):

> "He suggests that now that the concept of supportive parenting has been established, it seems timely to ensure that single parents should have the opportunity to apply for a parental order following surrogacy. He suggests that that would make the law consistent with current adoption law, which allows applications from single people and couples. The amendment that he proposed would bring the legislation in line with the current adoption law.
>
> My hon. Friend's key point is that when the Bill refers to a couple – a same-sex couple, a civil partnership or a married couple – additional phrasing would allow a couple to be defined in the same way as in the legislation, but he adds to that that one person who is not married or a civil partner is also a potential beneficiary of a parental order. He wishes to stress that his point is purely to make the provision consistent with adoption law."

16. The response of Dawn Primarolo, Minister of State, Department of Health, was as follows (cols 248-249):

> "Surrogacy is a complex area. I shall start by responding to the hon. Gentleman. As far as surrogacy is concerned, the mother who gives birth is the mother. Parental orders, like adoption

orders, transfer parenthood after birth. In my view, there is a difference, and I will seek to explain why before asking him not to press the amendments.

Under the 1990 Act, it is possible to make parental orders transferring parenthood only to married couples. The Bill extends the provisions to include civil partners and couples who are not in a civil partnership or married, but who are living as partners in an enduring relationship. A parental order is awarded by a court, subject to the report of the parental order reporter, who visits the parties concerned and prepares a report on whether the provisions of the law are met – for example, whether the woman who carried the child has freely given her unconditional consent.

Surrogacy arrangements are not in themselves enforceable in law, although, when making decisions about whether or not to grant a parental order, the courts will take into account factors such a – as we would expect – where it would be in the best interests of the child to be brought up. The Bill does not extend parental orders to single people. As the hon. Gentleman said, the amendments seek to change that with regard to surrogacy. It is interesting to note that surrogacy has rarely featured in the scrutiny and the debates that have taken place on the review of the 1990 Act and the Bill. Arguments for the change to access to parental orders, which the amendments seek, have surfaced only recently.

Before I answer the specific points, it might be useful to recap by saying that surrogacy is such a sensitive issue, fraught with potential complications such as the surrogate mother being entitled to change her mind and decide to keep her baby, that the 1990 Act quite specifically limits parental orders to married couples where the gametes of at least one of them are used. That recognises the magnitude of a situation in which a person becomes pregnant with the express intention of handing the child over to someone else, and the responsibility that that places on the people who will receive the child. There is an argument, which the Government have acknowledged in the Bill, that such a responsibility is likely to be better handled by a couple than a single man or woman.

I would say to the hon. Gentleman that there is a difference. His point was that single people are able to adopt and to receive IVF, so why can they not get a parental order over surrogacy? The difference is this: adoption involves a child who already exists and whose parents are not able to keep the child, for whom new parents are sought. That is different, which is why there is no parallel. IVF involves a woman becoming pregnant herself and giving birth to her child – there is not a direct

> parallel. Surrogacy, however, involves agreeing to hand over a child even before conception. The Government are still of the view that the magnitude of that means that it is best dealt with by a couple. That is why we have made the arrangements that we have.
>
> I am grateful to the hon. Gentleman for raising the debate, but I say to him that in the Government's view, discussions about surrogacy should be dealt with elsewhere and not by amending the Bill, because the issues involved are complex and the debate has not been properly considered due to its late emergence as an issue in the Bill."

17. Dr Pugh's response (col 249) was to beg leave to withdraw the amendment. Leave was given. The Minister repeated (col 249):

> "Under the 1990 Act it is possible for parental orders to transfer parenthood only to married couples. We are extending the provisions to include civil partners and couples who are not civil partners or married, but who are living together in the enduring family relationship to which I referred earlier."

The argument

18. Fundamentally, says Miss Isaacs, the objection to the requirement in section 54(1) of the 2008 Act that an application for a parental order can be made only by *two* people is that this is a discriminatory interference with a *single* person's rights to private and family life, which is therefore inconsistent with Articles 8 and 14 of the Convention. She submits that the father's relationship with Z, actual as it now is or prospective at the time Z was born, implicates both the father's and Z's rights under Article 8. She relies, if need be, upon the decision of the Strasbourg court in *Anayo v Germany (Application No 20578/07)* [2011] 1 FLR 1883, paras 57, 60 (though note the comment of Baker J in *Re G; Re Z (Children: Sperm Donors: Leave to apply for Children Act Orders)* [2013] EWHC 134 (Fam), [2013] 1 FLR 1334, para 120). She also relies upon the Article 12 "right to marry and to found a family" – which she construes as embracing separate rights to "marry" and to "found a family" – and upon *X and Y v United Kingdom (Application No 7229/75)* 12 DR 32.

19. Adopting the analysis in *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173, paras 8, 107, 132, Miss Isaacs submits that being single (in contrast to being one of a couple, whether married or not) is a "status" within the meaning of Article 14 of the Convention. She points to what Lord Nicholls of Birkenhead said in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, para 19:

> "Parliament is charged with the primary responsibility for deciding the best way of dealing with social problems. The court's role is one of review. The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's Convention rights. The readiness of the court to depart from the view of the legislature depends upon the subject matter of the

> legislation and of the complaint … But … where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons said to constitute justification. The reasons must be cogent if such differential treatment is to be justified."

20. Miss Isaacs elaborates the argument in this way. She points out that both the law, and indeed government policy, clearly support the principle that single people should not be excluded from being eligible to *adopt* by reason of their personal relationship status. The "complex" and "sensitive" features of adoption – deliberately she mimics the words of the Minister of State – are *not* regarded as a bar to single people adopting. So, she submits, it is artificial, disproportionate and discriminatory to distinguish between adoption and surrogacy on the basis of the complexity or sensitivity of surrogacy. The "two people" requirement in section 54(1) offends, she says, against two cardinal principles of twenty-first century family law: that there should be no discrimination against the increasingly different kinds of family which society is creating; and that the child's welfare remains the court's paramount consideration.

21. Section 54(1), she submits, also perpetuates the artificiality facing the ever-increasing number of people in the father's position, who are compelled to make do with legal solutions – adoption orders or child arrangements orders – which do not provide the optimum legal and psychological solution for, and thus do not promote the best interests of, a child born of a surrogacy arrangement. She seeks to bolster the argument by pointing to the significant increase in international surrogacy cases, and thus of single parents in surrogacy cases, since the Minister of State was speaking in 2008. The legal and societal context is now, she submits, significantly, indeed profoundly, different.

22. Miss Melanie Carew of CAFCASS Legal on behalf of Z encourages me to agree with Miss Isaacs.

<u>The problem</u>

23. Let it be assumed for the moment that this contention is correct; there remains a substantial obstacle in the father's way. Since the relevant provision here is in primary legislation it is not enough to show that there is incompatibility: see section 6(2) of the Human Rights Act 1998. It is different if the provision is not in primary legislation. As Lord Hoffmann said in *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173, paras 2-3:

> "2 The legal obstacle to their adoption application is article 14 of the Adoption (Northern Ireland) Order 1987:
>
> > "(1) An adoption order shall not be made on the application of more than one person except in the circumstances specified in paragraphs (2) …

> (2) An adoption order may be made on the application of a married couple where both the husband and the wife have attained the age of 21 years."

> 3 On the other hand, section 6(1) of the 1998 Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right and the Family Division of the High Court is for this purpose a public authority. If the 1987 Order were primary legislation, section 6(2) would require the court nevertheless to give effect to it. But the Order is not primary legislation as defined in section 21(1) of the 1998 Act and is therefore overridden by Convention rights."

24. The father's fall-back position is that he will, if necessary, seek a declaration of incompatibility in accordance with section 4 of the 1998 Act. The disadvantage, of course, is that such a declaration leaves the offending provision intact and of continuing validity: see sections 3(2)(b) and 4(6) of the Act.

'Reading down' section 54

25. The father's primary position is that there is in fact no incompatibility, because, Miss Isaacs submits, the relevant provisions of section 54 can properly be 'read down' in accordance with section 3(1) of the 1998 Act:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

26. As she points out, the court has been prepared to 'read down' both section 54(3) of the 2008 Act and section 54(4): see *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145, *In re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135, [2015] Fam 186, [2015] 1 FLR 349, *Re A and B (Children) (Surrogacy: Parental orders: time limits)* [2015] EWHC 911 (Fam), and *A and B v X and Y* [2015] EWHC 2080 (Fam). Likewise, she submits, section 54(1), and the related provisions in sections 54(2)-(5), can and should be read down. In saying this, she recognises that it was not the approach adopted very recently by Theis J in *Re A, B v C* [2015] EWFC 17, who treated it as axiomatic (para 20) that:

> "A single person is … unable to apply for a parental order."

In that case an adoption order was made.

27. In none of the cases I have just referred to was there need for any extended discussion of the circumstances in which it is appropriate and permissible to 'read down' a statute. In *In re X* I referred (at para 47) to the statement by Lord Mance in *Pomiechowski v District Court of Legnica, Poland and another* [2012] UKSC 20, [2012] 1 WLR 1604, para 38, where he said that section 3 of the 1998 Act permits:

> "reading in words, provided that they are "compatible with the underlying thrust of the legislation" and do not go against "the grain of the legislation"."

In *A and B v X and Y* [2015] EWHC 2080 (Fam), Theis J referred (at para 47) to what Lord Nicholls of Birkenhead said in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, para 32:

> "From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation."

The present case, in contrast, demands a closer analysis of what is or is not permissible.

Ghaidan v Godin-Mendoza

28. For present purposes the key authority is the decision of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557. The most illuminating speeches are those of Lord Nicholls of Birkenhead and Lord Rodger of Earlsferry. I have already quoted what Lord Nicholls said at para 32, but there are other passages in his speech to which I need to refer. I start with para 27:

> "Section 3 is open to more than one interpretation. The difficulty lies in the word "possible". Section 3(1), read in conjunction with section 3(2) and section 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant by application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which "possibility" is to be judged? A comprehensive answer to this question is proving elusive."

He continued (paras 29-30):

> "29 … It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may none the less require the legislation to be given a different meaning.

> 30 From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3."

29. Answering that question, Lord Nicholls commented (para 31):

> "…it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration."

There then follows the passage which I have already quoted.

30. The heart of Lord Nicholls' analysis follows in para 33:

> "Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation … Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

31. Lord Steyn noted (para 39) that:

> "under the 1998 Act the use of the interpretative power under section 3 is the principal remedial measure, and … the making of a declaration of incompatibility is a measure of last resort."

32. Lord Rodger of Earlsferry agreed with Lord Nicholls. He observed (para 108) that:

> "the Act discloses one clear limit to section 3(1). It is not concerned with provisions which, properly interpreted, impose an unavoidable obligation to act in a particular way."

Picking up a point earlier made by Lord Nicholls, he said (para 115):

> "In any given case, however, there may come a point where, standing back, the only proper conclusion is that the scale of what is proposed would go beyond any implication that could possibly be derived from reading the existing legislation in a way that was compatible with the Convention right in question. In that event, the boundary line will have been crossed and only Parliament can effect the necessary change."

33. In a number of passages in his speech, Lord Rodger indicated the boundaries of what is permissible. In para 111, he said that section 3(1) gives the court no power to "change black into white" or to remove "the very core and essence" or "pith and substance" of what Parliament has enacted. In para 116 he said that it was not open to the court to depart substantially from a "cardinal principle" of the legislation. In para 110 he had noted that:

> "…of course, in considering what constitutes the substance of the provision or provisions under consideration, it is necessary to have regard to their place in the overall scheme of the legislation as enacted by Parliament."

34. He summarised the proper approach as follows (paras 121-122):

> "121 … If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.
>
> 122 … the key to what it is possible for the courts to imply into legislation without crossing the border from interpretation to amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it

> amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with Convention rights, the implication is a legitimate exercise of the powers conferred by section 3(1). Of course, the greater the extent of the proposed implication, the greater the need to make sure that the court is not going beyond the scheme of the legislation and embarking upon amendment. Nevertheless, what matters is not the number of words but their effect."

Discussion

35. Miss Isaacs has argued with skill and pertinacity that section 54(1) can legitimately be 'read down'. With all respect to her submissions, I am unable to agree.

36. The principle that only two people – a couple – can apply for a parental order has been a clear and prominent feature of the legislation throughout. Although the concept of who are a couple for this purpose has changed down the years, section 54 of the 2008 Act, like section 30 of the 1990 Act, is clear that one person cannot apply. Section 54(1) could not be clearer, and the contrast in this respect – obvious to any knowledgeable critic – between adoption orders and parental orders, which is a fundamental difference of obvious significance, is both very striking and, in my judgment, very telling. Surely, it betokens a very clear difference of policy which Parliament, for whatever reasons, thought it appropriate to draw both in 1990 and again in 2008. And, as it happens, this is not a matter of mere speculation or surmise, because we know from what the Minister of State said in 2008 that this was seen as a necessary distinction based on what were thought to be important points of principle.

37. Given that a parental order is a creature of statute, given that this part of the statutory scheme goes to the core question, the crucially important question, of who, for this purpose, can be a parent, this consistent statutory limitation on the ambit of the statutory scheme always has been, and remains, in my judgment, a "fundamental feature", a "cardinal" or "essential" principle of the legislation, to adopt the language of, respectively, Lord Nicholls and Lord Rodger. Putting the same point the other way round, to construe section 54(1) as Miss Isaacs would have me read it would not be "compatible with the underlying thrust of the legislation", nor would it "go with the grain of the legislation." On the contrary, it would be to ignore what is, as it has always been, a key feature of the scheme and scope of the legislation.

38. Miss Isaacs seeks to persuade me to the other view by submitting (a) that the cardinal principle of the 2008 Act was to make the law fit for the twenty-first century by removing discrimination against different types of families and (b) that the fundamental purpose of section 54 was only ever to provide a regulatory scheme for the making of legal orders to safeguard the welfare of children born through surrogacy arrangements rather than to prevent or restrict eligibility to apply for such orders on the basis of any discriminatory criterion, such as single person status. No doubt these were important ingredients in what went to make up the statutory scheme as Parliament devised it in 2008, but they do not, in my judgment, reflect the whole picture or adequately describe all the key features of the statutory scheme.

39. In my judgment, this application fails *in limine*. As a single parent, as a sole applicant, the father cannot bring himself within section 54(1) of the 2008 Act.

40. I should make clear, for the avoidance of doubt or misunderstanding, that nothing I have said is intended to throw any doubt upon the correctness of the decisions, referred to in paragraph 26 above, holding that it *is* permissible to 'read down' sections 54(3) and 54(4) of the 2008 Act. In my judgment, each of those cases was correctly decided.

A caveat

41. I end with this caveat. I have been prepared to *assume* for the purposes of this judgment the correctness of Miss Isaacs' submissions based on Articles 8, 12 and 14 of the Convention and of the propositions which she seeks to derive from them. There has been no need for me to come to any concluded view on these matters and it is better that I do not, for these are issues which may yet need to be considered and ruled on if, as may be, the father decides to seek a declaration of incompatibility.