Neutral Citation Number: [2016] EWHC 1191 (Fam)

Case No: ZC15P00214

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 May 2016

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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In the matter of Z (A Child) (No 2)

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Miss Elizabeth Isaacs QC and Mr Adem Muzaffer (instructed by Natalie Gamble Associates) for the applicant father
Mr Teertha Gupta QC and Mr Andrew Powell (instructed by CAFCASS Legal) for Z
Miss Samantha Broadfoot and Miss Dorothea Gartland (instructed by the Government Legal Department) for the Secretary of State for Health

Hearing date: 16 May 2016

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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. This is the sequel to a judgment I handed down on 7 September 2015: *In re Z (A Child) (Surrogate Father: Parental Order)* [2015] EWFC 73, [2015] 1 WLR 4993. I need not repeat the facts (*Re Z*, paras 2-4) except to note that Z, who is the biological son of the applicant father, was carried to birth by a surrogate mother.

2. The father, as I shall refer to him, applied to the family court for a parental order in accordance with section 54 of the Human Fertilisation and Embryology Act 2008. Faced with the difficulty that the language of section 54 contemplates that any such order can be made only on the application of "two people", he sought to persuade me that section 54 could be "read down" in accordance with section 3(1) of the Human Rights Act 1998 so as to enable a parental order to be made on the application of one person. Applying the principles expounded by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, I held (*Re Z*, paras 36-39) that section 54 could not legitimately be "read down" in this way.

3. The father's fall-back position (*Re Z*, para 24) was that he would, if necessary, seek a declaration of incompatibility in accordance with section 4 of the 1998 Act.

4. Then, as now, the father was represented by Miss Elizabeth Isaacs QC and Mr Adem Muzaffer, instructed by Miss Natalie Gamble of Natalie Gamble Associates. I summarised their argument as follows (*Re Z*, paras 18-19):

> "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 European Court of Human Rights in *Anayo v Germany* (2010) 55 EHRR 164, paras 57, 60 (though note the comment of Baker J in *In re G (Children: Sperm Donors: Leave to apply for Children Act Orders)* [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* (1977) 12 DR 32 .
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> 19 Adopting the analysis in *In re G (Adoption: Unmarried Couple)* [2009] 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."

5. My judgment concluded with this important caveat (*Re Z*, para 41):

> "I have been prepared to assume for the purposes of this judgment the correctness of Miss Isaacs's 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."

6. That was on 7 September 2015. An order I made on 8 September 2015 recorded the father's intention to seek a declaration of incompatibility. The application came on for hearing before me in the High Court on 16 May 2016. Z was represented by his Guardian and by Mr Teertha Gupta QC and Mr Andrew Powell. The Secretary of State for Health was represented by Miss Samantha Broadfoot and Miss Dorothea Gartland.

7. In my earlier judgment (*Re Z*, para 3) I had described, though without using the phrase, the legal limbo in which Z finds himself. I referred to the fact that, for the moment, his position had been secured by making him a ward of court, though commenting that in the nature of things this could not provide a permanent solution. In an order which I made on 10 September 2015 I directed that Z was to remain a ward of court and placed him in the care and control of his father. In order to avoid the need for the father to be making constant applications to the court (see Lowe & White, Wards of Court, ed 2, 1986, paras 5-2, 5-6, 5-16), the order gave him permission to (i) temporarily remove Z from the jurisdiction as he sees fit, (ii) agree to any medical examination or treatment that Z may require and (iii) apply for a British passport for Z. I understand that the father subsequently applied for a British passport for Z which was issued in November 2015.

8. In support of the father's application for a declaration of incompatibility, Miss Isaacs, Mr Muzaffer and Miss Gamble appropriately prepared a very detailed skeleton argument. Because of the course the proceedings have taken (see below) I can be fairly brief in summarising their core submissions.

9. They submit that section 54 of the 2008 Act, insofar as it confines the power of the court to make a parental order to cases where the application is made by "two people", is incompatible with the rights of both the father and Z, either (a) under article 8 or (b) under article 8 taken in conjunction with article 14. (The argument is no longer based on article 12.) Amongst the authorities they rely upon in support of the case based on article 8 are the important decisions of the Strasbourg court on 26 June 2014 in the two linked cases of *Mennesson v France (Application no. 65192/11)* and *Labassee v France (Application no. 65941/11)*. Central to their argument in relation to article 14 is the decision of the House of Lords in *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] AC 173.

10. The guardian supported the father's case.

11. The Secretary of State's position was set out very clearly in the position statement dated 13 May 2016 prepared by Miss Broadfoot and Miss Gartland:

> "… having carefully considered the evidence and skeleton arguments filed on behalf of the [father] and the Guardian in this case, the Secretary of State concedes that the current provisions of section 54(1) and (2) of the Human Fertilisation and Embryology Act 2008 are incompatible with Article 14 taken in conjunction with Article 8. The concession is made on the basis of the statement of reasons which is attached to this position statement."

12. I should set out that statement of reasons in full:

> "1 By this claim the [father] seeks a declaration that section 54(1) and (2) of the Human Embryology and Fertilisation Act 2008 is incompatible with his and [Z's] human rights under Articles 8 and / or Article 14 taken in conjunction with Article 8. The [father's] position is supported by the child, acting through his Guardian.
>
> 2 The Secretary of State has carefully considered the evidence and skeleton arguments filed on behalf of the [father] and the Guardian.
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> 3 The Secretary of State accepts that the facts fall within the ambit of Article 8 and that Article 14 is engaged. It is accepted that there is a difference in treatment between a single person entering into a lawful surrogacy arrangement and a couple entering the same arrangement. This difference in treatment, namely the inability to obtain a parental order, is on the sole ground of the status of the commissioning parent as a single person versus the same person were he part of a couple. The Secretary of State accepts that, in light of the evidence filed and the jurisprudential developments both domestic and in Strasbourg, including for example *Mennesson v France* (Application no. 65192/11) taken with *Wagner v Luxembourg* (Application no. 76240/01), this difference in treatment on the sole ground of the status of the commissioning parent as a single person versus being part of a couple, can no longer be justified within the meaning of Article 14."

13. The Secretary of State's position was further elaborated in a letter from the Government Legal Department dated 11 May 2016:

> "… my client concedes that the current provisions are incompatible with Article 14 taken in conjunction with Article 8. We have not however, conceded that the provisions are incompatible with Article 8 taken alone.
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> In brief summary, this is because:
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> 1) There is no Convention right, whether in Article 8 or elsewhere, to undertake a surrogacy arrangement.

2) Article 8 does not entitle a person to any particular method of obtaining legal recognition of the parent-child relationship following that arrangement. In particular Article 8 does not entitle a person to a Parental Order. Provided that there is a mechanism for ensuring that children born as a result of surrogacy arrangements lawfully performed abroad have access to a form of recognition of their legal relationship with their parents, it is up to the State to determine how that is to be achieved, subject only to questions of discrimination.

3) The most common method for providing legal recognition of the parent-child relationship in surrogacy cases across Europe is through adoption. There has been no suggestion in any of the Strasbourg cases that the provision of adoption in surrogacy cases instead of another form of recognition, is a breach of Article 8. It is only because the UK has a different method which is available to couples but not to single people, that the issue arises. This is in reality, a discrimination case. That is the basis of the concession.

In considering the Article 8 question the court would be reminded:

1) When considering primary legislation in the field of social policy, the Courts have a reviewing role and must accord particular deference to policy choices made by Parliament – see e.g. Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816, 844 at [70].

2) It is necessary to concentrate on the scheme as a whole, even if the scheme might be said to have interfered with an individual's rights and in assessing that scheme the question is not whether the existing law is unfair and could be made fairer: Lawrence v Fen Tigers Ltd (No 3) [2015] 1 WLR 3485 at [56-57] and [83] (SC).

3) Further, a State may, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases: Animal Defenders International v United Kingdom (2013) 57 EHRR 607 (Grand Chamber) at §106.

In summary therefore, it is my client's position that whilst the regulatory requirements for adoption are more demanding than those required for a parental order, adoption nonetheless remains an available solution and its availability means that there is no breach of [the father's] or [Z's] rights under Article 8. We accept however, that the exclusion of [Z] and [the father] from obtaining a parental order on the sole ground that [the

> father] was not part of a couple is discrimination contrary to Article 14 taken in conjunction with Article 8."

14. It will be seen that the Secretary of State's concession was very precisely formulated and narrowly drawn. The Secretary of State does *not* accept that there is any incompatibility with article 8 taken alone. The concession is that the relevant provisions are incompatible with article 14, taken in conjunction with article 8. As it was put in the letter, "This is in reality, a discrimination case. That is the basis of the concession."

15. The father's response, as set out in a position statement also dated 13 May 2016, was that, for reasons of proportionality, he no longer invited the court to consider what his counsel described as the academic distinction between incompatibility on the basis of article 8 alone and incompatibility on the basis of article 8 in conjunction with article 14. He invited me to record that it was not necessary to determine this issue.

16. On behalf of Z, Mr Gupta and Mr Powell in a position statement dated 16 May 2016 accept and endorse the basis upon which the Secretary of State's concession has been made.

17. In these circumstances all three parties, the father, Z and the Secretary of State, invite me to make a declaration of incompatibility pursuant to section 4(1) of the 1998 Act in the following terms, "the Court noting that the [Secretary of State for Health] does not oppose a declaration being made in the[se] terms:"

> "Sections 54(1) and (2) of the Human Fertilisation and Embryology Act 2008 are incompatible with the rights of the Applicant and the Second Respondent under Article 14 ECHR taken in conjunction with Article 8 insofar as they prevent the Applicant from obtaining a parental order on the sole ground of his status as a single person as opposed to being part of a couple."

18. A declaration cannot, of course, be made merely by consent or by concession. Whatever the parties may agree, the court can properly make a declaration only if it is satisfied that the declaration sought is, on the facts and in all the circumstances, soundly based both in law and in fact.

19. I am satisfied, for all the reasons given by the father and by the Secretary of State, with which I agree, that I can properly make a declaration in the terms sought. I also agree that, in the circumstances, there is no need for me to determine the other issue raised by the father.

20. The order I made – it is dated 16 May 2016 – accordingly contained a declaration in the terms sought. It further provided that the father's application for a parental order in respect of Z was adjourned generally with liberty to restore and that any future proceedings should be reserved to the President of the Family Division.

21. This, in my judgment suffices to explain the circumstances in which and the reasons why I made the order.

22. However, referring to certain observations in *Regina (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657, Miss Isaacs, Mr Muzaffer and Miss Gamble invite me to go further. They point first to what Lord Wilson said (para 203):

> "in making a declaration, it behoves the court precisely to identify in the circumstances of the successful applicant the factors which precipitate the provision's infringement of his human rights. In addressing its task of fashioning a response to the declaration, Parliament deserves no less."

They invite me to elaborate my reasoning. I see no need to do so and every reason why it would be unwise to explore in any more detail a number of difficult points, in particular in relation to alleged incompatibility on the basis of article 8 alone, on which in the event I have heard no argument.

23. My judgment proceeds exclusively on the narrow footing identified by the Secretary of State. I make clear that I express no views, one way or the other, in relation to the father's claim based on article 8 alone; and the fact that I have set out in some detail what was said about this on behalf of the Secretary of State in the letter of 11 May 2016 is not to be taken as any expression of either agreement or disagreement with the Secretary of State's submissions. This is all matter for another day.

24. Next, they point to what Lord Neuberger said in *Nicklinson* (para 127):

> "Of course, it is for Parliament to decide how to respond to a declaration of incompatibility, and in particular how to change the law. However, at least in a case such as this, the court would owe a duty, not least to Parliament, not to grant a declaration without having reached and expressed some idea of how the incompatibility identified by the court could be remedied."

Basing themselves on this, they invite me to express my views as to *how* the conceded incompatibility may be remedied. Specifically, they invite me to "endorse" the amendments which they have drafted to remedy the discriminatory provisions in section 54. Furthermore, they invite me to "recommend that the Secretary of State be invited to exercise his power to remedy the incompatibility" pursuant to section 10(2) of the 1998 Act. This provides that:

> "If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility."

25. They seek to bolster the argument in relation to the last matter by pointing to what the Court of Appeal said in *Regina (H) v London North and East Region Mental Health Review Tribunal (Secretary of State for Health intervening)* [2001] EWCA Civ 415, [2002] QB 1, 12:

> "we believe that it is only rarely that the provisions of sections 72 and 73 [of the Mental Health Act 1983] constrain a mental

> health review tribunal to refuse an order of discharge where the continued detention of the patient infringes article 5. Indeed, in our experience where a tribunal refuses an application for a discharge it usually gives reasons for doing so that involve a positive finding that the patient is suffering from a mental disorder that warrants his or her continued detention. These may well be matters that the Secretary of State will wish to bear in mind when considering whether to take remedial action under section 10 of the Human Rights Act 1998."

26. They submit that the use of the remedial power under section 10 is "appropriate and necessary in this case because it would ensure that [the father] could apply for a parental order with minimum delay, and would prevent Z … remaining in a legally vulnerable position for any longer than is absolutely necessary."

27. Going even further, they invite me to "pass comment (by way of *obiter dicta*) about the merits of Parliamentary review of the scheme of section 54" and to "express any view as to the desirability or necessity for future reform as may be considered appropriate."

28. I absolutely decline to do any of this.

29. The present case is very different from *Nicklinson*, a case in which, it may be noted, no declaration of incompatibility was in the event made and where a nine-judge Supreme Court was much divided both as to whether, in the circumstances, a declaration of incompatibility could be made and, if it could, whether it should. With all respect to their Lordships, their observations do not of themselves provide any justification for proceeding as the father would have me do in this juridically very different case. Nor does the decision in *H* drive me in the direction the father would have me go.

30. On behalf of the Secretary of State, Miss Broadfoot and Miss Gartland understandably counsel great caution. First, they point out – correctly as it seems to me – that there are various different ways in which the discriminatory effect of the present legislation could be cured. Secondly, they observe that this is an area of social policy in relation to a matter – surrogacy – which is controversial. Thirdly, they submit, and I agree, that it is constitutionally a matter for the legislature to determine its response. Fourthly, they submit, and again I agree, that it is entirely a matter for the government to decide whether or not to utilise the Ministerial power under section 10. It is important to note the language of section 10(2). It is a matter for "a Minister", therefore not for a judge, to "consider" whether there are "compelling reasons." Moreover, as they point out, the court can be in no position to know whether such compelling reasons exist, as this may depend upon a number of factors of which the court can have no knowledge or in respect of which it may be lacking in relevant expertise. Fifthly, and finally, they caution that any observations I might be tempted to make may have unintended implications and unforeseen consequences.

31. These, in my judgment, are all compelling arguments demonstrating that I should, as I do, firmly decline to proceed where the father would have me go.