Neutral Citation Number: [2023] EWCA Civ 16

Case No: CA-2022-001475

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE FAMILY COURT AT PETERBOROUGH**
**Her Honour Judge Gordon-Saker**
**PE20P01804**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 January 2023

**Before :**

**LADY JUSTICE KING**
**LADY JUSTICE THIRLWALL**
and
**LORD JUSTICE PETER JACKSON**

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**Re C (Surrogacy: Consent)**

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**Janet Bazley KC, Olivia Magennis, and Melissa Elsworth** (instructed by **Goodman Ray Solicitors**) for the **Appellant**
**Aidan Vine KC and Mavis Amonoo-Acquah** (instructed by **Brethertons LLP**) for the **Respondents**

Hearing date : 3 November 2022

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 16 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Lord Justice Peter Jackson:**

*Introduction*

1. On 11 August 2021, a parental order was made in respect of C, a boy then under a year old, in favour of the Respondents to this appeal. The Appellant is his surrogate and biological mother. On 14 July 2022, she was granted permission to appeal out of time by Theis J, who transferred the hearing of the appeal to the Court of Appeal under Rule 30.13 of the Family Procedure Rules 2010.

2. The central issue raised by the appeal is a simple one, but it is of great importance to the adults and to C. The Appellant argues that the court did not have the power to make the parental order as she had not given the free and unconditional consent that is required by section 54(6) of the Human Fertilisation and Embryology Act 2008 ('HFEA 2008'). In consequence, she submits that the order must be set aside. The Respondents contend that the necessary consent was given, but if that is not so, they argue that the parental order should nevertheless be left in place.

*Background*

3. The parties met in late 2018, when they were introduced to one another by the Appellant's sister. After a time, the Appellant offered to act as a surrogate for the Respondents and in May 2019 a surrogacy agreement was signed. In May/June 2019, an unsuccessful IVF attempt was made using a donor egg and the Second Respondent's sperm. In November 2019, artificial insemination took place using the Appellant's egg and the Second Respondent's sperm. The following month, the Appellant informed the Respondents that she was pregnant.

4. In Spring 2020, the relationship between the parties deteriorated. The Appellant describes becoming increasingly emotionally attached to the baby and feeling undervalued by the Respondents. The Respondents say that the Appellant kept them at arm's length during the pregnancy and was unwilling to share information.

5. In September 2020, C was born and was handed over by the Appellant to the Respondents 7 hours after birth. Following the transfer, the Appellant described feeling a sense of loss and she received postnatal counselling at the Respondents' expense.

6. On 27 November 2020, the Respondents applied for a parental order. On 4 January 2021, the Appellant returned the form of acknowledgement to the court saying that she did not consent to the making of the parental order and opposed the application. At the same time, she wrote to the Respondents explaining her position.

7. In January 2021, the Appellant received brief legal advice, paid for by the Respondents, and some legal help to draft her court statement. In February 2021, the parties attended mediation and agreed to work on their relationship and rebuild trust.

8. On 7 June 2021, Mrs Chapman, the parental order reporter appointed by CAFCASS, filed her parental order report. She was unable to recommend that a parental order be made as the Appellant had not consented "due to wanting to keep her parental responsibility to allow her to have legal rights to spend time with C."

9. On 8 June 2021, the application came before magistrates at hearing at which the parties were unrepresented. The Respondents invited the court to make a 'lives-with' order in their favour, which would give parental responsibility to the First Respondent. Although the Appellant supported this course, the magistrates declined to make the order on the basis that her "consents… will need to be fully and clearly established". The parties agreed to attend mediation. The matter was reallocated to Her Honour Judge Gordon-Saker ('the judge') for a one-hour hearing on 11 August 2021.

10. On 22 June 2021, the Appellant filed a statement in which she acknowledged that it was always anticipated that she would consent to a parental order. However, her position had changed because of her unexpected feelings for C and because she had anticipated being a significant person to him (though not a mother figure), but she now felt pushed out. She stated that she would consent to a parental order being made on two conditions: that a child arrangements order was made providing for monthly contact and that a prohibited steps order was made preventing the Respondents from moving without her written agreement.

11. On 11 August 2021, the application came before the judge. The Respondents were represented by counsel. The hearing took place via CVP. The Appellant appeared in person and Mrs Chapman was also present on the telephone. At the end of the hearing, the judge made a parental order and a child arrangements order, consisting of a 'lives with' order in favour of the Respondents ("for the avoidance of doubt") and a contact order whereby C would spend one weekend day with the Appellant every six weeks and two additional weekend days each year to celebrate his birthday and Christmas.

12. The next day, the Appellant emailed the Respondents' solicitors, stating that she had felt under pressure to consent to the parental order and had only provided conditional consent. She did not at that stage seek to appeal.

13. Between September 2021 and December 2021, the Appellant had contact with C as ordered. However, scheduled contact on 2 January 2022 did not take place.

14. On 8 February 2022, the Respondents issued an application seeking to discharge or vary the terms of the child arrangements order. On 13 February 2022, the scheduled contact did not take place; the Appellant attended the Respondents' home, but they would not permit contact.

15. On 11 March 2022, the District Judge heard submissions from the parties about the Respondents' application and gave directions. The Appellant said that she intended to seek permission to appeal the parental order.

16. On 31 March 2022, on the recommendation of CAFCASS, the District Judge suspended direct contact while assessments were undertaken, and in the interim ordered indirect contact. On 28 July 2022, by consent, C was joined as a party to the Children Act proceedings, which are ongoing, and a Children's Guardian was appointed.

17. On 14 July 2022, Theis J granted permission to appeal out of time in respect of the parental order, while refusing permission to appeal in relation to the suspension of

contact. On 9 August 2022, C's Guardian stated that she did not seek to join the appeal unless directed by this court.

*Parental orders*

18. Surrogacy is legal in the UK, although surrogacy arrangements are not enforceable in law. At birth, the surrogate (and, if she is married or in a civil partnership, her consenting spouse or civil partner) will be the legal parent(s) of the child. Following the birth, a legal process – the parental order process – takes place to transfer legal parenthood from the surrogate to the intended parents ('IPs').

19. The application for a parental order is governed by section 54 HFEA 2008, the Human Fertilisation and Embryology (Parental Order) Regulations 2018, and Part 13 of the Family Procedure Rules 2010. When IP(s) submit a parental order application, the court will ask CAFCASS to appoint a parental order reporter to investigate the circumstances of the case and submit a parental order report.

20. Under section 54 (section 54A has similar provisions in the case of a single applicant) the court may grant a parental order to a couple in respect of a child born through a surrogacy arrangement where such an order meets the child's welfare needs in accordance with section 1 Adoption and Children Act 2002, and the following criteria are satisfied:

    (1) The child has been conceived artificially and is genetically related to one of the IPs (subsection 1)

    (2) The IPs are married, in a civil partnership or living as partners in an enduring relationship (ss. 2).

    (3) The IPs have applied within 6 months of the child's birth (ss. 3).

    (4) The child is living with the IPs and at least one of them is domiciled in the UK (ss.4).

    (5) The IPs are over 18 years old (ss.5).

    (6) The surrogate has been paid no more than reasonable expenses, unless authorised by the court (ss.8).

21. Section 54(6), with which the present case is concerned, provides that:

> "(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."

22. Subsection (7) provides that subsection (6) does not require the agreement of a person who cannot be found or is incapable of giving agreement, and that the agreement of the surrogate is ineffective if given less than six weeks after the child's birth.

23. FPR 2010 Part 13 addresses the procedural requirements for the making of a parental order. Rule 13.11 provides that:

> (1) Unless the court directs otherwise, the agreement of the other parent or the woman who carried the child to the making of a parental order may be given in the form referred to in Practice Direction 5A or a form to the like effect.

24. The form provided for in PD5A is Form A101A. It contains the same general content as Form A104, the consent form for adoption, and is in these terms:

> "I agree to a parental order being made in respect of _____ (my child), who is the child to whom the attached certified copy of the entry in the Register of Live Births relates. in favour of *[_____ (the named prospective parents)]
>
> If a parental order is made in respect of my child, I understand that I will no longer legally be treated as the parent and that my child will become part of the family of the applicant(s).
>
> I understand that I may withdraw my agreement at any time until the court makes the parental order. If I do withdraw my agreement and want my child returned to me, I understand that I must notify the court that I have changed my mind and I must, at all times, act through the court and not approach the applicants directly.
>
> I have not received any payment or reward from any person making arrangements for the parental order for my child.
>
> *[I have taken legal advice] / *[I have not taken legal advice, but I have been advised to do so], about giving agreement to a parental order being made in respect of my child and the effect on my parental rights. *(delete as appropriate)
>
> I agree unconditionally and with full understanding of what is involved, to the making of a parental order in respect of _____ (my child) in favour of *[_____(the applicant(s)]
>
> Signed.....
>
> on..... day of ..... 20…
>
> Witness statement

> This form was signed by .....
> On the.....day of .....20…
>
> before me (print full name).....
>
> Signed.....
>
> Office of witness*……
>
> Address of witness.……
>
> * In England and Wales this form must be witnessed by an officer of the Children and Family Court Advisory and Support Service (Cafcass) or, where the child is ordinarily resident in Wales, by a Welsh family proceedings officer."

25. A parental order is a fundamental legal order in relation to personal status, being even more far-reaching than an adoption order. In *AB v CD* [2015] EWFC 12 at [70], Theis J described the difference between the two orders:

> "(3) … Adoption orders create a presumption in law that the child is treated as if the biological child of the adopters. A parental order does not require that presumption to be made. Both orders are transformative, but a parental order proceeds on the assumption one of the applicants is the biological parent. That is one of the key criteria in s 54 HFEA. It doesn't change the child's lineage as an adoption order does; a parental order creates a legal parentage and removes the legal parentage of the birth family under the provisions of the HFEA 2008. Unlike adoption there is already a biological link with the applicants before the parental order application is made. Its purpose is to create legal parentage around an already concluded lineage connection.
>
> (4) From the point of view of the child the orders are different. An adopted child is seen to have had a family created for it, whereas in a surrogacy arrangement the child's conception and birth has been commissioned by the parents, the child has a biological connection and the same identity as one of the parents. The latter arrangement is more congruent with a parental order than an adoption order."

26. A further important distinction was identified by Hedley J in *G v G* [2012] EWHC 1979 (Fam) at [27]:

> "Let me say something about [the mother]'s position. Were she to have withheld her consent that would have been fatal to the application for by Section 54(6) it is a true veto and the court, unlike in adoption proceedings, has no dispensing power. That provision no doubt exists in conformity with the policy objective of the 2008 Act, that whilst gratuitous surrogacy is not unlawful, a surrogacy agreement is unenforceable."

This distinction is also followed through in section 54(7), which does not dispense with the consent of a mother who cannot be found or is incapable of giving agreement (as applies in an adoption case), but instead states that her agreement is not required.

27. It is also to be noted that the prohibition in section 54(8) on payment over and above reasonable expenses is not an absolute one, because such a payment can be authorised by the court. There is no equivalent power in respect of the consent provision in section 54(6).

28. Lack of consent led to the refusal of an application for a parental order in *Re Z (Surrogacy Agreement) (Child Arrangements Order)* [2016] EWFC 34 and the adjournment of such an application in *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), a case in which the refusal to give consent had nothing to do with child welfare. In *Re H (A Child)* [2017] EWCA Civ 1798, where a surrogacy arrangement had broken down, this court described the requirement of consent as "unique", so that a surrogate mother has "the right to change her mind" about it:

> "11. The original intention of the parties was that once the child was born they would cooperate in obtaining a parental order in favour of A and B. This would have had the effect of transferring legal parenthood from one couple to the other. However, surrogacy arrangements are unenforceable (s.1A Surrogacy Arrangements Act 1985) and parental orders are unique as they can only be made if the legal parents unconditionally agree: s.54(6) of the 2008 Act…
>
> 12. As originally framed, [counsel]'s argument proposed that as a matter of law, C and D, had the right *"to change their minds and keep H"*. It is undoubtedly correct that a surrogate mother has the right to change her mind, but [counsel] wisely withdrew from the submission that such a mother also had the right to have her own way about where the child should live. She was also forced to concede that, while the six-week "cooling off" period protects a mother in relation to the important issue of consent to a parental order, it tells one nothing about what the best welfare arrangements for the child will be after birth…"

29. By contrast, there have been two occasions on which the court has made a parental order in circumstances where the strict wording of section 54 was not satisfied. In *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), a case heard at a time when a parental order could not be made in favour of a single applicant, the commissioning father had died between the making of the application and the final hearing. Theis J made a parental order in favour of both commissioning parents, interpreting section 54(4) and (5) in a manner that gave effect to the purpose of the legislation and to the rights under the European Convention on Human Rights and Fundamental Freedoms 1950 ('the Convention'). In *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), Sir James Munby P determined that the court was not prevented from making a parental order merely because the application was made after the expiration of the six-month period specified in section 54(3).

30. We were taken to the history of surrogacy legislation in the United Kingdom, starting with the Warnock Report in 1984 (Cmnd. 9314) and proceeding via the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 1990 to the

present HFEA 2008. At the Third Reading in the Upper House of the Bill which became the 1990 Act, an amendment was proposed that would have allowed a surrogate mother to give pre-birth consent to not being treated as the mother of the child. That amendment was rejected by the Lord Chancellor, Lord Mackay of Clashfern, and the 1990 Act inserted Section 1A into the 1985 Act, which provides that:

> "No surrogacy arrangement is enforceable by or against any of the persons making it."

Section 27 of the 1990 Act (now section 33 of the 2008 Act) provided 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."

31. We also note the current review of surrogacy law being undertaken by the Law Commission. In its consultation paper, *Building families through surrogacy: a new law*, at 11.22-11.58 it discusses the option of giving the court the power to dispense with the surrogate's consent on welfare grounds in circumstances where the child lives with the intended parents. The current legislation, however, requires the court to be satisfied about consent and about welfare: it does not permit them to be mixed up with each other.

*The hearing before the judge in this case*

32. The hearing took place between 10.08 am and 10.30 am. We have been provided with a transcript and have also listened to the recording. It is necessary to set out some parts of the transcript to fairly understand the course of the hearing, with editing to maintain anonymity.

33. The effective part of the hearing started with an introduction from the Respondents' counsel. She explained that the parties had agreed the terms of a child arrangements order, and although the court could not make such an order on its own initiative in the parental order proceedings, it could grant permission for an application to be made under the Children Act, and then make an order. However, she noted the requirements of section 54(6) and informed the judge that Ms A would be saying that her consent to a parental order was conditional on the making of a child arrangements order. Counsel nonetheless invited the court to consider making a parental order on the basis of Ms A giving her consent, with a child arrangements order being made "as a separate matter".

34. After some consideration of the Children Act provisions and the proposed contact arrangements, the judge then addressed the Appellant:

> "THE JUDGE: Ms A, Ms Maxwell has outlined the position to me and, as I think you probably know, there are a number of matters in the statute, section 54, that I have to be satisfied about and one of those Ms Maxwell has rightly reminded me is that you, freely and with full understanding of what is involved, agree unconditionally to the making of the order. If you only agree to the making of the order if there is a

child arrangements' order, then that would obviously not be freely and unconditionally given consent.

The other matters in the statute are all dealt with amongst the papers in particular and also in Mrs Chapman's report, so I do not think any of those cause me a difficulty in making the order. The only one that does is the consent because, although I understand there is an agreement that there will be contact, and I will be asked to make a child arrangements order, I cannot do that as a condition of making the parental order. I can only make the parental order if you freely consent and without conditions, so, first of all, does that make sense to you, what I have just said? I know sometimes for a non-lawyer it gets a bit convoluted. You are nodding so that is helpful, thank you.

Then, I suppose, first of all, is there anything you want to ask me and then is there anything you want to say in response, as it were?

35. The Appellant then replied in these terms:

MS A: Thank you, your Honour, there is nothing I want to ask you but in terms of the condition, the unconditional consent, I think I would be lying if I said that I unconditionally consent to it because it is a-- I would like to see C and so I am making the parental-- the consent on that I see C. If I-- I don't unconditionally give it because I am fearful that I won't have time to spend time with C and so that's why I can't quite unconditionally consent.

However, I do believe it is in all of our interests to move on with our lives and to kind of start rebuilding our relationship again and I do feel that having a child arrangements order is best for all of us along with a parental order being made, but I couldn't lie and say that I do give my consent unconditionally. If that helps, your Honour."

36. The judge responded at some length, starting in this way:

"THE JUDGE: Well, it is very clear and I fully understand what you are saying. It does not help me-- and this is not a criticism of you, it does not help me get over the legal obstacle. Let me look at it in a different way and, please, let me be very clear, I am not trying to put any pressure on you at all because that would be wrong, because the whole point is that I make an order only if everybody consents… I cannot make a child arrangements order in this particular proceedings probably for very good reason, because if it was part of the issues, then it probably would not be freely consented to…

She then explained that she would be content to hear an oral application for a child arrangements order, saying:

> "So in terms of trying to reassure you, I am told that application would not be opposed. You could make it orally once I have concluded the making of a parental order but I cannot make the parental order unless you do consent to it… -- and if you do not consent, and again I am not saying this in any way to put pressure on you-- sometimes it may sound a bit like that but of course if you do not consent, you will all be in this limbo moving forward until somebody attempts to make a different application which obviously the
> ' applicants may do but I cannot adjudicate on that in advance.
>
> So we are in a slightly difficult position… I think you consent to the concept that the applicants are, as it were, C's parents and that is recognised in law. I think the issue is one of concern about the way forward for contact, so-- but unless I have you unconditionally consenting I think we cannot move on from this limbo, so I am not-- try to think about what I have just said for a minute and while you are thinking about that, I am going to go to Mrs Chapman to see if she would like to add or say anything because I think apart from this difficulty she feels that the criteria are met but I just want to check with her.

37. The judge then turned to Mrs Chapman, who confirmed that the Appellant was happy with the parenting C was receiving but that she did not want to consent because she wanted a legal right to spend time with C and was scared of having no contact.

38. The judge then returned to the Appellant for these important exchanges:

> THE JUDGE: … so, Ms A, we are in the position that as a matter of law and also considering C's welfare, I think all of us agree that a parental order is the right thing for him. Everybody agrees that it is right for him to see you and to know you but it is just coming back to the original question, so having heard what has been said, what is your thinking now?
>
> MS A: Then the only way forward is for me to give my unconditional consent, your Honour.
>
> THE JUDGE: I am sorry?
>
> MS A: I will provide my unconditional consent.
>
> THE JUDGE: And you are quite sure about that?
>
> MS A: I don't see that there is any other way for us to move forward without it.
>
> THE JUDGE: Well, I think that was the right decision and I think that is extremely helpful for everybody, for all of you and perhaps most importantly of course for C. I am very grateful to you and I expect the

applicants are as well. So what I will do is I will make the parental order… Then in terms of a child arrangements' order, now that the parental order has been made, everybody agrees that it is… right for Ms A to have contact and under the Children Act you can make an application or I can treat an oral application as having been made and given the amount of information I have about all of you, I do not need you to go through the normal process of getting enquiries from Cafcass because obviously I already have that information from Mrs Chapman, so I would be content to make a child arrangements' order and Ms Maxwell has said that the agreed way forward is the every six weeks-- I appreciate there will be a little bit more detail to this but every six weeks for a day, holidays and Christmas and-- so that is her position. So from your side, Ms A, is that agreed by you as the way forward?

MS A: It is, yes.

THE JUDGE: In that case, I had better go back to Mrs Chapman in case from a welfare point of view she has any concerns. Mrs Chapman, from a welfare point of view for C would you be happy to endorse that order?

MRS CHAPMAN: Yes, I am happy to endorse that order.

THE JUDGE: So in that case that order will then follow, so we have a parental order and there will then be a child arrangements' order. I think then I hope very much that all of you can relax a little after what has been quite a difficult time and move forward. C is going to be one soon and I think it would be very nice to move forward knowing all the decisions have been made, so if I go back to Ms Maxwell; Ms Maxwell, is there
anything else you want to add?

MS MAXWELL: Your Honour, no, thank you very much.

THE JUDGE: Okay. Ms A, is there anything else you want to add?

MS A: No, thank you.

THE JUDGE: Well, thank you very much, and, Mrs Chapman, is there anything else you want to add?

MRS CHAPMAN: No, I have got nothing more to add, thank you.

THE JUDGE: Well, thank you very much for your help and my thanks to everybody for their help because I know it can be quite stressful in a situation like this, so I am very grateful to everybody for having achieved the right way forward for C…

Okay, thank you all very much for attending. I know it has been

> difficult for everybody and I can see for Ms A in particular, so I will thank you all for attending and I will let you all go now. Thank you very much everybody.
>
> MS A: Thank you, bye.
>
> THE JUDGE: Bye."

*The appeal*

39. The Appellant appeals on two grounds:

    1) The Court was wrong to make a parental order when it was clear that the Appellant's consent was being given conditional on the making of a child arrangements order and therefore was not given 'unconditionally' as required by s.54(6) HFEA 2008.

    2) The Court was wrong to make a parental order when the consent provided by the Appellant was not provided 'freely' as required by s.54(6).

40. For the appeal, both parties have had the advantage of pro bono legal representation by solicitors and counsel. We recognise their commitment and are grateful for the quality of their presentations.

41. On behalf of the Appellant, Ms Bazley KC, leading Ms Magennis and Ms Elsworth, submitted that the court should not have made a parental order. To the extent that the Appellant said she was consenting, she was not doing so freely and unconditionally. There can be no complaint about the content of the hearing up to the point where she stated her position but at that point the hearing should have ended with the application for a parental order either being dismissed or adjourned. By going on to address the Appellant at such length, the judge unintentionally placed pressure upon her, in particular by referring to her stance as an obstacle that created difficulty and to the parties as being in limbo with no other way forward. In referring to the promise of a child arrangements order she attempted to give reassurance that she was not in a position to give. A degree of judicial encouragement is acceptable in many cases, but it was not appropriate here, particularly as the Appellant was alone and unrepresented and the hearing was a remote one. The judge should have recognised that the Appellant had an absolute right to withhold her consent for any reason whatever and that it could not be dispensed with on the basis of welfare factors. At the end of the hearing, the Appellant was crying.

42. Ms Bazley traced the evolution of the surrogacy legislation. She argued that the requirement for free and unconditional consent is fundamental. Parliament could have included a provision for contact in connection with surrogacy in the same way as it has done in relation to adoption by section 26 Adoption and Children Act 2002, but that is not to be found. It could have said that consent that was conditional on contact being provided would be sufficient, but it did not do so.

43. If the appeal is allowed, Ms Bazley stated that her client would agree to an order that C lives with the Respondents. She will not consent to a parental order and there would therefore be no purpose in adjourning that application.

44. On behalf of the Respondents, Mr Vine KC, leading Ms Amonoo-Acquah, submitted that the judge was entitled to consider that the Appellant had given free and unconditional consent and to make the parental order. He accepted that consent is a fundamental part of the legislation and that the starting point for the hearing was that the Appellant was not consenting, as seen in her statement and the parental order report. However, he argued that if the Appellant wanted both orders to run alongside each other, that would satisfy the requirement for consent. The making of the parental order and the child arrangements order could be made in sequence in what he described as "sealed deliberations".

45. Mr Vine acknowledged that the judge had been wrong to say that the Appellant would be entitled to apply for contact, but suggests that permission to apply would readily be granted under section 10 of the Children Act 1989. He characterised the judge's presentation of the issues to the Appellant as neutral. He pointed to the fact that the Appellant twice said that she unconditionally consented: the judge was entitled to evaluate the quality of what she had seen and heard and to accept it as sufficient.

46. As to the situation that would arise if the appeal were allowed, Mr Vine expressed concern that C's Children's Guardian, appointed in the ongoing Children Act proceedings, had chosen to play no part on the appeal. The welfare consequences for C of undoing the parental order are profound. The decision affects C's very identity but he has been left with no voice and no protection for his Convention rights. For that reason Mr Vine made an application in the middle of the hearing for the appeal to be adjourned for CAFCASS to take part. We declined to take that course on the basis that all the relevant arguments were before us.

47. If the appeal were to succeed, Mr Vine did not seek to argue that the consent provisions in HFEA 2008 are incompatible with the Convention, but he referred to the obligation under section 3(1) of the Human Rights Act 1998 that the court must, so far as it is possible to do so, read and give effect to primary and secondary legislation in a way which is compatible with Convention rights, and to section 6(1) of that Act which makes it unlawful for public authorities, including a court, to act in a way that is incompatible with a Convention right. He asserted that C and the Respondents and their wider families have a mutual right to respect for their family life under Article 8 and that this court is under a positive obligation to ensure effective protection for those rights, which fall to be balanced with the Appellant's own rights.

48. C has lived with the Respondents all his life and has been subject to a parental order for over a year. If the order is set aside, the First Respondent would hold parental responsibility for C under the 'lives with' order but would have no legal relationship with him. A fair balance between the competing rights can, Mr Vine argues, no longer be struck if the Appellant's consent represents a permanent barrier to the making of a fresh parental order. He contends that a bespoke interpretative solution is therefore required in this particular case in order to avoid a Convention violation.

49. Mr Vine notes that in ordinary circumstances an appeal court will review a first instance judge's Article 8 evaluation and the necessity/proportionality of the original

decision but will not make its own evaluation: *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 at paras. 36, 83-90 and 136; *In the matter of H-W (Children) (No 2)* [2022] UKSC 17, [2022] 2 FLR 533 at para. 48. However, that approach is not apt in a case where the appeal has been brought so late. This court should carry out its own assessment as at the present date, the result of which should be that the parental order is not set aside.

50. In the result, Mr Vine asks us not to set aside the parental order but to uphold it on a different basis. We should, he says, read sub-sections 54(6) and (7) as if they ended with the words "such consent not to be unreasonably withheld", and exercise a dispensing power ourselves. Questioned, Mr Vine revised this submission to say that we should read words into subsection 54(7) that would give the court the power to dispense with consent because S's welfare requires it. This reading of the statute is justified by the fundamental importance of the matter for C. Mr Vine relies by analogy on *Re X* (above) at paras. 54-55 concerning the "transcendental importance" of a parental order in comparison to the justification for the six-month time limit for making applications. He also refers to *Mennesson v. France* Application no. 65192/11, 26 September 2014, as showing that there is a limit to the State's margin of appreciation when there is uncertainty about a child's legal status. He accepts that parental status can be created through adoption but argues that a parental order is the only bespoke order for a surrogacy. He supplemented these submissions with references to *Ghaidan v Godin-Mendoza* [2004] UKHL 30, arguing that reading the statute in this way would not be inconsistent with the scheme of the legislation or with its essential principles but would instead 'go with the grain of the legislation' (see Lord Rodger at paras. 121-122).

51. Responding, Ms Bazley submits that there is no obstacle, created by Article 8 or otherwise, to this court discharging the parental order. It would not interfere with the rights of the Respondents and the child as the Second Respondent would remain the child's legal father (he is named on the child's original birth certificate) while the First Respondent would retain parental responsibility via the 'lives with' order. The Strasbourg court has held that legal connections amounting to less than full parenthood are sufficient in Article 8 terms for non-biological parents, and nothing would change for C in terms of practical, day-to-day arrangements. Ms Bazley cites the recent decision in *AM v Norway* Application no. 30254/18, 24 June 2022, at paras.131-134 as showing the margin of appreciation enjoyed by States in circumstances of this kind. She argues that there are alternatives to a parental order that will properly reflect C's actual and legal relationships, in the manner noted in the concurring opinion of Judge O'Leary in that case at para. 16. In addition, the Appellant's lack of free and unconditional consent is a weighty and, in fact, determinative factor in the balancing exercise, as is the fact that there is no way for the Appellant (who is C's biological mother) to be his legal parent other than by setting aside the parental order. Further, even if setting aside the parental order would interfere with the Article 8 rights of the Respondents and the child, it would be justified as it (i) is in accordance with law (section 54(6) HFEA), (ii) pursues a legitimate aim (to protect surrogate mothers and women more generally), and (iii) is necessary in a democratic society (and clearly falls within the wide margin of appreciation left to States in this area).

52. Finally, Ms Bazley disputes that the statute can be read so as to include a power to dispense with consent on welfare grounds when that would be directly contrary to the scheme of the legislation. Other elements of section 54 have previously been construed in a way that is compatible with the Convention but they have never taken such an approach with section 54(6). That is because the provision is a central and fundamental requirement for the making of a parental order and interpreting it in any other way would be impermissible.

*Analysis and Determination*

53. There are three questions to be answered in this case. The first is whether, on a straight reading of s.54(6), the Appellant gave free and unconditional consent to the making of the parental order. The second is whether, if that is not the case, the Convention requires the court to assume and exercise a power to dispense with consent, and thereby to preserve the parental order. The last question is what order this court should make in respect of the underlying application for a parental order if the answer to each of the above questions is 'No'.

54. The requirement that a person has "freely, and with full understanding of what is involved, agreed unconditionally to the making of the order" means exactly what it says. Although it may be forensically convenient to separate out the individual elements, what is required is a consent that is free, informed and unconditional. If that is achieved, it is immaterial whether the consent is given gladly or reluctantly.

55. Where there is any doubt about consent, it will be a matter for the court to judge, giving consideration to all the circumstances. One relevant factor is likely to be the means by which consent has been expressed. Because of the profound consequences of the underlying choice, it is normal for there to be a degree of formality. This is reflected in the preference in FPR 13(11) for consent to be in writing, using Form 101A and with the parental order reporter as witness. Even then, consent can be withdrawn at any stage before the order is made. This degree of formality is not mandatory but its absence should put the court on its guard to ensure that the proffered consent is valid. In the present case, the disputed consent was given orally in the face of the court and via CVP. In that unusual situation, a sharp eye had to be kept on the possibility that the court process might of itself be exerting pressure to the extent that any stated consent was devalued.

56. The judge started from the right place. She correctly identified the statutory test:

> "…there are a number of matters in the statute, section 54, that I have to be satisfied about and one of those Ms Maxwell has rightly reminded me is that you, freely and with full understanding of what is involved, agree unconditionally to the making of the order. If you only agree to the making of the order if there is a child arrangements' order, then that would obviously not be freely and unconditionally given consent."

She was also alive to the importance of consent being freely given:

> "…please, let me be very clear, I am not trying to put any pressure on you at all because that would be wrong, because the whole point is that I make an order only if everybody consents…"

She equally recognised the danger of mixing up the issues:

> "I cannot make a child arrangements order in this particular proceedings probably for very good reason, because if it was part of the issues, then it probably would not be freely consented to…"

57. However, by that point the Appellant had stated her position, in the same terms as had appeared in her statement and in the parental order report:

> "I don't unconditionally give it because I am fearful that I won't have time to spend time with C and so that's why I can't quite unconditionally consent… I do feel that having a child arrangements order is best for all of us along with a parental order being made, but I couldn't lie and say that I do give my consent unconditionally."

Faced with that statement, which she herself described as "very clear", the judge should have held to the line that it was inappropriate to pursue the matter further, at least during that hearing. She might have adjourned to give the parties a further opportunity to consider their positions, but it was not right to expect the Appellant to do that during the course of the hearing: "try to think about what I have just said for a minute". Even if it was reasonable to have explored the matter further, the judge should certainly have paused at the point where the Appellant appeared willing to relent, so that her consent could be taken in writing in a non-pressured and witnessed setting. Instead, and motivated by an understandable desire to help the parties to achieve what the Appellant herself had described as the "best for all of us", the judge immediately made the order. This was an attempt to square a circle that could not be squared in that way.

58. Further, although the hearing was conducted with complete courtesy, there were a number of other objective features to put the judge on her guard. In the first place this was a remote hearing in a sensitive case, with the Appellant being alone and unrepresented. The inevitable stress on any litigant was then inadvertently exacerbated by the way in which the Appellant found herself out on a limb, with her position on consent being represented as the only obstacle to an overall solution: "if you do not consent, you will all be in this limbo". Also, an unrepresented litigant who is addressed by a judge at some length may be influenced by feelings of deference. Again, I recall that the judge was motivated by her assessment of what was in the best interests of C, the Respondents and indeed the Applicant herself. That welfare assessment was very probably sound but it had nothing to do with the question of consent. Had the resulting arrangements been satisfactory to all concerned, the problems with consent would no doubt have faded from memory, but the fact that the outcome has been so disappointing so far tends to show that the order was not built on solid foundations.

59. I would accept as a matter of principle that it is possible to conceive of a parental order and a child arrangements order coexisting. None of the reported cases has had that outcome, but they may not be representative of all problematic surrogacies. Some unproblematic surrogacies do not lead to parental orders at all, and contact with a surrogate will sometimes take place without any thought of a child arrangements order, even where a parental order has been made. However, in cases where there is less trust, there must still be a narrow path available to parties who genuinely agree

that dual orders are the solution. While the statute does not envisage such orders, it does not expressly exclude them and to that extent I would accept Mr Vine's submission that it might be possible for this outcome to be achieved. What the statute does, however, unequivocally exclude, in order to protect the surrogate, is twin orders in circumstances where one order is the price for the other. That is what occurred in this case.

60. For these reasons, the answer to the first question is that the Appellant's consent was not merely reluctant but neither free nor unconditional. It was given in reliance on the promise of a child arrangements order and the Appellant's statement that she gave it unconditionally did not reflect the reality. Furthermore, the eventual expression of consent was given under unwitting but palpable pressure. The parental order should not have been made.

61. Coming to the second question, I unhesitatingly reject the submission that section 54(6) can be read in such a way as to confer a dispensing power upon the court. The right of a surrogate not to provide consent is a pillar of the legislation and the assumption by the court of such a power would go far beyond permissible judicial interpretation of the kind found in *A v P* and in *Re X*. It is beyond doubt that the proposed setting aside of the parental order would clearly fall within the scope of the private and family life aspects of Article 8: *Mennesson* at paras. 87 and 96. However, the rights of the Respondents and of C are not violated by the setting aside of the order for want of consent on the part of the Appellant. The Strasbourg court has recognised a considerable margin of appreciation in this area and the potential availability of adoption to secure C's legal relationships is also relevant, even if that route would be sub-optimal: *Valdis Fjölnisdóttir v Iceland*, Application no.71552/17, 18 August 2021. I would take this view even if this court were to make its own Article 8 assessment at the present date. I therefore conclude that the Convention does not require the parental order, made without valid consent, to be left in place.

62. The final question is what order should be made in respect of the underlying parental order application. The choice is between dismissing it or remitting it. I would look favourably on remitting if a parental order could possibly result from the parties being given another opportunity to take stock. I have noted that the judge might have adjourned the hearing for that purpose, and Ms Bazley has accepted that this option was open to her. But that was in the middle of 2021 and we are now in early 2023. In the meantime, relationships between the parties have deteriorated further, as the ongoing Children Act proceedings show. Even with the benefit of their current representation, the parties have been unable to devise a solution of their own. The Appellant's position is that she will not consent to a parental order.

63. In these circumstances, I am driven to conclude that to remit the parental order application would perpetuate the process that led to the making of the original order. I would therefore allow the appeal and dismiss the application for a parental order. That C should be brought up by the Respondents and have contact with the Appellant was intended by all. It remains agreed by all that C will continue to be brought up by the Respondents, but the appropriate legal mechanism for that, and the question of contact with the Appellant are matters that are beyond the scope of this appeal.

**Lady Justice Thirlwall:**

64. I agree.

**Lady Justice King:**

65. I also agree.

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