IMPORTANT NOTICE

The judge has given leave for this judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Neutral Citation Number: [2025] EWHC 339 (Fam)

Case No: ZC151/23 & ZC152/23

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19th February 2025

Before:

THE RT HON SIR ANDREW MCFARLANE
(President of the Family Division)

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Re Z (Unlawful Foreign Surrogacy: Adoption)

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- -

Ms H Hollmann, of **Dawson Cornwell LLP** for the **Applicants**
The identity and whereabouts of the **1st Respondents** to each application are **unknown**
Mr S Marks of Counsel (instructed by **Ms J Rider**, of the **London Borough of Camden)** for the **2nd Respondent**
Mr O Rhys James (instructed by **Ms B Buchanan**, of the **Government Legal Department** on behalf of **the Secretary of State for the Home Department)** for the **3rd Respondent**
Mr J Niven-Phillips, of **CAFCASS Legal** for **the 4th and 5th Respondents**

Hearing date: 30/07/2024

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Judgment Approved by the court for handing down

Sir Andrew McFarlane P:

1. Some months ago, I determined applications for the adoption of two four-year-old children, Y and Z. This further judgment is now being handed down and made public in order to draw attention, in entirely anonymous terms, to the circumstances of the case which are likely to be a matter of public interest and concern, and to offer some advice for those who may, in future, unwisely seek to follow the path taken by the two applicants in this case by engaging in an unlawful, commercial, foreign surrogacy arrangement.
2. The two children who were the subject of the application were born on the same day and each is the full genetic sibling of the other, having been conceived in embryo form as a result of a donation by an anonymous donor of eggs and an anonymous donor of sperm. They are not, however, fully twins as the embryos that resulted in the birth of Y, and separately of Z, were carried by two different surrogate mothers. A surrogacy arrangement had been commissioned by the two applicants, Ms W and Ms X, who were in a long-established and enduring relationship and who were resident here in the United Kingdom. In addition, Ms X was domiciled here and had been a UK resident effectively all of her life. A significant feature of the case was that, by the time of the hearing before me, one of the applicants was over 70 years old and her partner was fast approaching that age.
3. The couple had decided to investigate the possibility of having children some years ago. Both of them, by then, were well into their middle age and beyond child-bearing years. They considered adoption and they considered other arrangements that could be made in this jurisdiction. However, none of these enquiries led to any firm plan and thus they found themselves investigating other options and, in some way, established a connection with a foreign surrogacy clinic, which they had understood, was based in Southern Cyprus.
4. It was only after the arrangements had been advanced to a significant degree that they came to understand that the clinic was in fact operating in the Turkish Republic of Northern Cyprus, where surrogacy, on my understanding, is unlawful and where the placement of children with same-sex couples is also not permitted by law.
5. The clinic, on the information this court had, seemingly operated on some scale and used women from Ukraine as surrogate mothers. The court papers contained an article from an American magazine published in 2020, which described some dozen or more Ukrainian women at the clinic who were engaged in surrogacy. Assuming that article to be broadly accurate, it gave some idea of the scale of the operation.
6. The two individuals who donated gametes to create the embryos had been chosen by Ms W and Ms X to replicate their own racial characteristics. The two embryos were successfully implanted and pregnancies became established in the two surrogate mothers. The contracts signed by the two applicants and the clinic show that a significant sum of money was paid for the creation of these two children. The court was told by the solicitor now acting for the applicants that it was in the region of £120,000.
7. Under the Human Fertilisation and Embryology Act 2008, s 54(8), the court cannot grant a parental order to applicants who apply for a parental order following surrogacy (which Ms W and Ms X cannot do because neither is genetically related to the children) unless it is satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for the surrogacy arrangements, unless the payment is authorised by the court.

8. Even allowing for the fact that this was surrogacy involving two children and two surrogate mothers, £120,000 is a very significant amount of money. It was, in reality, a commercial rate, rather than one that simply sought to recover the surrogates' expenses.
9. The children were each born on the same day as a result of delivery by caesarean section, apparently at the direction of the clinic, rather than for coincidental medical reasons relating to the surrogate mothers. The babies were transferred to Ms W and Ms X by being delivered within a day of birth to the flat in which they were living in Cyprus.
10. The applicants had anticipated that they would only have to stay in Cyprus for a short period after the births. Unfortunately, that turned out not to be the case. It is not necessary for me to rehearse the detail in this judgment, but the hurdles they encountered included the need for the birth of each of the children to be registered. Ms X was encouraged by the clinic to go on her own to the Register Office and sign a form in a foreign language (presumably Turkish). She later found out that by doing so, she had been registered as the mother of each of the two children. There was no mention in her dealings with the Cypriot authorities of the surrogacy arrangement or the fact that the children had been born to two different mothers.
11. Separately, it became clear that the fact of birth in Northern Cyprus did not afford status to the children as citizens of Northern Cyprus. The fact of birth to a Ukrainian national in Cyprus did not afford them Ukrainian nationality. In addition, of course, as yet, they had no legal connection, in terms of one that would attribute status, to either of the two applicants that would, or could, be recognised in the United Kingdom (the birth certificates having been plainly issued on an incorrect basis).
12. The clinic, which had been seemingly very cooperative and welcoming of the two intending parents prior to birth, closed down its hospitality wing to them and became far more defensive.
13. Lawyers became involved and for a time, the applicants were being encouraged to take part in developing a false story, namely that Ms X, a woman in her mid-60's, was indeed the natural mother of each of these two children. To her and her partner's credit, they would have none of that. However, the result of that was that they did not have any paperwork from the clinic to establish the surrogacy and the paperwork they did have was on the false basis that Ms X was the children's mother.
14. Thus, it was, understandably, that the Home Office refused to allow the two children to enter the UK with Ms W and Ms X. It took four years before, eventually, leave to enter was given when the First-tier Tribunal granted the applicants' applications made under European Convention on Human Rights, Article 8. The Home Office, having been refused permission to appeal by both the First-tier Tribunal and the Upper Tribunal, accepted the decision and the two children were able, for the first time, to come with the applicants to England and begin establishing a life together here at the age of four.
15. The good news about that saga is that, seemingly, the couple and the children, the four of them together, have come through what will have been a very stressful and most unwelcome stage in their respective lives, not unscathed, but in a positive frame of mind. In addition, in the months that followed their return, they have done well to establish family life and an orderly way of living with the children here.
16. An application for a parental order following a conventional surrogacy arrangement may only be made if the gametes of the applicant, or at least one of two applicants, were used to bring about the creation of the embryo [HFEA 2008, s 54(1)(b) and s 54A(1)(b)]. It was, thus, not possible for the applicants to apply for parental orders. The only route by which these applicants could become, in law, parents of these two children was, therefore, to apply to adopt them and that was the application that, therefore, came before this court.

17. At the hearing before me, in the absence of orders granting parental responsibility to the two applicants, there was nobody in the world who could be identified as being a potential holder of parental responsibility for them, other than, presumably, the local authority, if a care order were to be made, or the High Court in wardship. No one suggested that either of those two courses was necessary in this case.
18. Also, it was the case that the children continued to remain stateless. They had permission to enter and be in the UK, but they did not have any passports. Therefore, whilst not being a reason in itself for making an adoption order, the fact that adoption by the two applicants would give these children British nationality, was clearly a very significant benefit to them.
19. The court had the benefit of a thorough adoption assessment by a local authority social worker, looking at the circumstances in the round and in detail, and of the welfare of each of the two children individually. The overall conclusions of the local authority report were endorsed, almost in terms, by the Children's Guardian. I was very grateful to those two professionals for the work that they had done in investigating what was, on any view, a highly unusual case.
20. During the hearing, I expressed, in strong terms, my concern about the whole project that these two adults had embarked upon. I described the wisdom, in terms of the welfare of any children created by such an endeavour, as being highly questionable. I suspected, although I obviously did not know, that if they had their time again, Ms W and Ms X, knowing what they now knew, would not embark upon this particular course in order to bring children into their family. It was, however, absolutely clear that these children were being well cared for, were meeting their milestones, stimulated, happy and thoroughly embedded in every way, socially, emotionally, psychologically with their two parental figures and no doubt the wider family and the wider community within which they now lived.
21. I held that it was in the children's best interests for that arrangement to be consolidated and made permanent by adoption orders. No lesser order, for example, a child arrangements order or even a special guardianship order, would achieve the necessary degree of life-long certainty that these two children are going to need. I then went on to say:

> 'Going forward, the children will need particular care as a result of the circumstances in which they were born and now live. The particular points of focus in that regard have been highlighted in the Local Authority's adoption report and in the Children's Guardian's report. I was struck by paragraph 39 of the Guardian's report, in which this is said:
>
> > "The applicants had not given any consideration of the impact on the children of having parents who are so much older and all the attendant age-related health issues which follow."
>
> The report goes on to stress that one of the applicants will be in her 80's when the children are in their early teens and the other will be in her mid-70's.
>
> It is surprising that two individuals embarking upon this process had not given any consideration to those matters because, to someone standing outside, the need to understand the impact on the children of the age difference is very plain.
>
> It is instructive to recall that the welfare provision in section 1 of the Adoption and Children Act 2002, is for the court to have regard to the child's welfare

'throughout his life' and that is different from the welfare provision in the Children Act, which simply looks to their welfare as children.

I do not want there to be any thought in the mind of Ms W and Ms X that the orders that I am going to make are made in some way grudgingly or without full confidence that it is the right thing for the children to be adopted.

I very much hope, and reading what I do about these two applicants, I have got confidence that they 'get it', that they will conduct their lives now, in part, making sure that arrangements for the welfare of the children throughout their lives, or at least throughout the remainder of their childhood and into their early adult years, are made and that the children grow up knowing with some confidence what those arrangements will be. In the hope that they may never kick in for years to come, but in the knowledge that if they do, then there are people in the family who will be supportive of them.'

22. I was satisfied that each of the formal requirements for the making of adoption orders had been met. The only matter that required clarification was the question of parental consent. As a matter of English law, the parent of each of the two children was their surrogate mother. An adoption order could not be made unless the court either had the consent of each of those two women to the adoption of their respective child or the court dispensed with their consent under Adoption and Children Act 2002, s 52, either on the ground that each child's welfare required it to be dispensed with or that the respective parents could not be found.
23. I was satisfied of the latter ground as nobody knew anything more than the first names of the two surrogate mothers. In addition, the clinic had been doggedly resistant to giving any information. The surrogates had been resident at the clinic four years earlier but had almost certainly returned to Ukraine after giving birth. I was fully satisfied that they could not be found and I, therefore, dispensed with consent on that ground.
24. I concluded my judgment:

> 'However, for the reasons that I have already listed, I am satisfied that the welfare of each of these two children now requires adoption. I used the unhelpful and inelegant phrase earlier, 'we are where we are', and that is the situation. If the court had been asked before these applicants set off for Cyprus whether this was a good idea, let alone one that was compatible with domestic policy in these matters, the court's view would undoubtedly have been a negative one.
>
> It is very plainly in the best interests of each of these two children to be adopted. No other course, legally, would meet their needs. There is an urgent need for them to be consolidated, legally, into this small family unit so that they are fully siblings of each other and legally, the children of these two applicants.'

Lessons to be learned

25. It should be plain, but lest there be doubt, the observations that now follow apply with equal weight to any applicants, whether in a same-sex or heterosexual relationship, who may be contemplating commissioning the birth of a child through the services of a foreign surrogacy agency.
26. The Secretary of State for the Home Department ['SSHD'] had been joined as a respondent to the adoption in order to deal with any issue of immigration. During

the hearing, and in the light of the high level of concern expressed by the Court about the circumstances of the case, it was agreed that consideration would be given to further submissions being made by the Secretary of State, following consultation with other relevant government departments. I am grateful to Owain Rhys James, counsel for the Home Secretary, for his further submissions. The submissions were expressly made on behalf of the government ['HMG'] generally and, in particular, on behalf of the Home Office [HD], the Department for Health and Social Care [DHSC] and the Department for Education [DfE]. A draft of this judgment was disclosed to HMG and, in further submissions made on the instruction of the those three departments, the approach to be taken in future cases, as described below, is 'wholeheartedly endorsed'.

27. The position of HMG, as recorded in Mr Rhys James' original submissions, can be summarised as follows:
    a. The issues raised in this case give rise to significant legal and public policy concerns;
    b. The HD is concerned there may be elements of exploitation underlying the circumstances which have led to these applications being made with the circumstances surrounding the surrogacy agreements suggesting very strongly that this was in all but name a commercial surrogacy agreement resulting in two children being rendered stateless;
    c. Where the HD, or HMG, is on notice of similar cases in future (either at the planning stage or after such plans are put into motion, or thereafter where matters are before the Courts or Tribunals) it may, in appropriate cases to be considered on the individual facts, oppose applications made before the court and/or appeals on related immigration grounds before the First-tier Tribunal or the Administrative Court; and may seek findings in respect of commercial surrogacy and/or exploitation;
    d. The HD has significant concerns on grounds of public policy that the court in the present case was placed in an impossible position where the only realistic option, evidenced by the position of the parties at the hearing, was for an adoption order to be made. In appropriate cases the HD will consider whether, notwithstanding those circumstances, an adoption order ought to be opposed on public policy grounds in any event;
    e. Despite the concerns expressed, the submissions that are now made are in no manner intended to go behind or challenge the court's decision to make adoption orders in this case.

28. Additional submissions, with which the HD expressly agreed, were then made on behalf of the Secretary of State for Health and Social Care ['DHSC'] in the following terms:

> 1. 'The DHSC notes that the conduct of this case was not consistent with guidance issued by HMG and strongly discourages the approach taken in this case and would strongly discourage others from considering this course of action.
>
> 2. UK citizens travelling overseas for a surrogacy may be at risk of being involved in arrangements that use exploitation and could be exploited themselves. The Government has published guidance on surrogacy overseas that is available online, and specialist legal advice is always recommended when considering having a child through surrogacy.

3. A number of critical issues, such as the transfer of legal parenthood and the child's ability to enter and remain in the UK, are dependent on meeting relevant statutory criteria.

4. The facts of this particular case do not fall within the provisions in UK law that transfer legal parentage through surrogacy because there is no genetic relationship between the intended parents and children.'

29. Finally, in the additional submissions that have now been filed, attention is drawn to the decision of Theis J in *Re Z (Foreign Surrogacy)* [2024] EWFC 304 which raises similar issues and which generated a comparable level of judicial concern. Theis J's judgment justifies reading in full, but I would draw particular attention to paragraph 4 where the judge set out a list of 'key issues' any person considering embarking on a surrogacy arrangement (particularly one involving a foreign jurisdiction) should consider before they proceed:

'(1) What is the relevant legal framework in the country where the surrogacy arrangement is due to take place and where the child is to be born? Put simply, is such an arrangement permitted in that country?
(2) When the child is born will the intended parents be recognised as parents in that
country, if so how? By operation of law or are the intended parents required to take some positive step and, if so, what steps need to be taken and when (pre or post birth)?
(3) What is the surrogate's legal status regarding the child at birth?
(4) If the surrogate is married at the time of the embryo transfer and/or the child's
birth what is the surrogate's spouse's legal status regarding the child at birth?
(5) If an agency is involved, what role do they play in matching the surrogate with the
intended parents?
(6) What information, preparation or support has the surrogate had about any proposed surrogacy arrangement?
(7) Does the surrogate speak and/or read English? If not, what arrangements are in
place to enable her to understand any agreement signed?
(8) Will the intended parents and the surrogate meet and/or have contact before deciding whether to proceed with a surrogacy arrangement?
(9) When will the agreement between the intended parents and surrogate be made,
before or after the embryo transfer, and what are the reasons for it being at that time?
(10) What arrangements are proposed for contact between the intended parents and
the surrogate during the pregnancy and/or after the birth? For example, is it only via the agency or can there be direct contact between the intended parents and the
surrogate.
(11)Which jurisdiction will the embryo transfer take place and which jurisdiction will
the surrogate live in during any pregnancy?

(12) Can the jurisdiction where the child is to be born be changed at any stage and, if
so, by whom and in what circumstances?
(13)What nationality will the child have at birth?
(14)Following the birth of the child what steps need to be taken for the child to travel
to the United Kingdom, what steps need to be taken to secure any necessary travel
documentation for the child and how long does that take?
(15) Will the intended parents need to take any separate immigration advice to secure
the child's travel to the United Kingdom and what is the child's status once the child has arrived in this jurisdiction.
(16) Finally, keeping a clear and chronological account of events and relevant documents is not only important for the purposes of a parental order application but also, importantly, retains key information regarding the child's background and identity.

30. Theis J emphasised the importance of intended parents seeking legal advice from a specialist solicitor before embarking on any such arrangements involving a foreign jurisdiction.

31. In his final submissions, Mr Rhys James recorded that HMG would suggest that, in keeping with the approach in this judgment, the following should be added to Theis J's list:

a. That parties should consider early and meaningful engagement with either or all
of HD, DfE and/or DHSC (depending on what the particular issues which have arisen are and bearing in mind the different responsibilities of each) – especially where there are, or there are intimated proceedings, in some court or tribunal (for
example, the First-tier Tribunal (Immigration and Asylum Chamber));
b. In particular, that if proceedings are issued in the Family Court early consideration should be given to the addition of either or all of HD, DfE and/or DHSC (again, depending on what the particular issues which have arisen are and bearing in mind the different responsibilities of each) as a party.

32. I am grateful to HMG for the submissions that have been made. I readily endorse the list set out by Theis J of relevant considerations that must be engaged with before a would-be parent begins to embark upon a foreign surrogacy arrangement, and I also endorse the two additional elements that HMG have put forward.

33. I share the high level of concern that is expressed in the government's submissions. The account of the circumstances surrounding the birth of these two children strongly suggests that all four women at the centre of the arrangements were being exploited for commercial gain by those running this unlawful operation. The motives of the two applicants in wanting to become parents of babies in their late 60's would seem to have been entirely self-centred, with no thought as to the long-term welfare of the resulting children. It was astonishing to learn, and have confirmed by their solicitor, that the applicants had not given any consideration to the impact on the children of having parents who are well over 60 years older than they are. It is likely that when they are in

their early teens, these two young people will become carers for their 80 year old adopted parents. The only sensible decision that the applicants made, as I observed during the hearing, was to commission the birth of *two* children so that, at least, these two full siblings will have each other as they grow up.

34. Finally, the fact that the court felt obliged to make adoption orders in the present case, should not be taken as any precedent that, in any future case on similar facts, an adoption order will be made. In any event, the route taken by these applicants leading to the position of even being able to apply for adoption, demonstrates the precarious nature of their circumstances and those of the children. The applicants had planned a short visit to Cyprus, yet it took four years for their entry to the UK to be granted, and that was only after the First-Tier orders and Upper Tribunal refusal to grant the Home Office permission to appeal.

35. The publication of this judgment, and the clear indication that the government may, in any future case, oppose the making of adoption orders, should put would-be parents (of any age) who are contemplating entering into a commercial foreign surrogacy arrangement on notice that the courts in England and Wales may refuse to grant an adoption order (or if HFEA 2008, s 54(1)(b) or s 54A(1)(b) is satisfied, a parental order), with the result that the child that they have caused to be born may be permanently State-less and legally parent-less. Put bluntly, anyone seeking to achieve the introduction of a child into their family by following in the footsteps of these applicants should think again.