

# Rewriting Children's Rights Judgments

From Academic Vision to New Practice

Edited by  
Helen Stalford, Kathryn Hollingsworth  
and Stephen Gilmore



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# 1

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## Introducing *Children's Rights Judgments*

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HELEN STALFORD, KATHRYN HOLLINGSWORTH AND STEPHEN GILMORE

Baroness Hale of Richmond's opinion in *R (Kehoe) v Secretary of State for Work and Pensions* opens with the following observation: 'This is another case which has been presented to us largely as a case about adults' rights when in reality it is a case about children's rights.'<sup>1</sup> What is it that enables a judge to shift his or her gaze like this, sharpening the focus of the issue(s) in a case through the lens of children's rights? This book is concerned to explore this question and the possibilities for judgment writing with greater awareness of children's rights. The collection is based on a two-and-a-half year project, *Children's Rights Judgments*, funded primarily by the Arts and Humanities Research Council, which took place between January 2015 and June 2017 and involved 56 academics and legal practitioners from across the world. Its principal aim was to revisit existing legal judgments relating to children and consider how they might have been drafted if adjudicated from a children's rights perspective. An innovative and highly effective legal methodology—that of judgment re-writing—is thus extended in this book to the topic of children's rights.

Over the last two decades, judgment re-writing has evolved into a distinct approach to critical legal scholarship by which academics step outside the comfort zone of conventional evaluative commentary and compose alternative versions of existing judgments, bound by the same constraints and legal principles that apply in real-life cases. Erika Rackley suggests three reasons—the academic, the educational and the political—why judgment re-writing is a valuable form of (alternative) academic writing.<sup>2</sup> It allows scholars to test the real-life relevance of theories<sup>3</sup> and acts as a valuable rhetorical and persuasive tool for a scholar;<sup>4</sup> it has pedagogical value, exposing students to the myth of judicial neutrality/impartiality and allows them to question the objectivity of the law and the power structures that uphold it;<sup>5</sup> and its political value lies in demonstrating so well the influence of a judge's

<sup>1</sup> *R (Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48 at para 49.

<sup>2</sup> E Rackley, 'Why Feminist Legal Scholars Should Write Judgments: Reflections on the Feminist Judgments Project in England and Wales' (2012) 24 *Canadian Journal of Women and the Law* 389. See also R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford, Hart Publishing, 2010).

<sup>3</sup> D Réaume, 'The Women's Court of Canada: The Virtues of Blending Theory and Practice' [unpublished] at 2, online: Feminist Judgments Project, [www.kent.ac.uk/law/fjp/links.html](http://www.kent.ac.uk/law/fjp/links.html), cited by Rackley, *ibid* at 397.

<sup>4</sup> Rackley, above n 2 at 400.

<sup>5</sup> Rackley, above n 2 at 403, '[feminist judgments] provide a practical demonstration not only of the extent to which the original decision is often just one way of deciding the case and writing the judgment but also of the importance of the personality and perspective of the judge.'

personality, values and experiences on how he or she reasons and decides cases, thus feeding into debates about judicial diversity.<sup>6</sup> Furthermore, it also has potential practical impact, with the possibility of informing and guiding judicial practice.<sup>7</sup>

Early published examples in North America saw legal scholars re-write versions of two landmark US constitutional judgments, *Brown v Board of Education* and *Roe v Wade*,<sup>8</sup> and Canadian feminist scholars and litigators re-wrote ‘shadow’ judgments of key Canadian Supreme Court decisions to demonstrate how substantive equality principles could be brought to bear on decision-making.<sup>9</sup> The latter inspired the *Feminist Judgments*<sup>10</sup> project which engaged 51 academics in re-drafting judgments and writing accompanying commentaries from a feminist perspective on a range of cases decided by the courts in England and Wales.

Since then, a number of other such projects have emerged,<sup>11</sup> each one with its own distinct scope and ambition. Some, for example, have placed decisions of the international and supra-national courts under the spotlight. The project *Diversity and European Human Rights* includes 18 partially re-written judgments of the European Court of Human Rights (ECtHR) to demonstrate how interpretations of the European Convention on Human Rights (ECHR) in relation to decisions affecting women, children, LGBT persons, ethnic and religious minorities, and persons with disabilities can better accommodate and respond to diversity.<sup>12</sup> Extending this ambition, the *Human Rights Integration* project, in a challenge to the persistent fragmentation of international human rights law, demonstrates through the rewriting of landmark decisions of supranational human rights monitoring bodies how different human rights principles and sources can be ‘integrated’ more symbiotically.<sup>13</sup> Our book is inspired by such earlier works and, in particular, responds to the call of the convenors of the UK *Feminist Judgments* project to develop in other contexts and other jurisdictions the methodology of judgment re-writing.<sup>14</sup>

<sup>6</sup> See inter alia, E Rackley, *Women, Judging and Judiciary: From Difference to Diversity* (London, Routledge, 2013); R Hunter, ‘More than just a Different Face? Judicial Diversity and Decision-Making’ (2015) *Current Legal Problems* 1; RJ Cahill O’Callaghan, ‘The Influence of Personal Values on Legal Judgments’ (2013) 40 *Journal of Law and Society* 596 and ‘Reframing the Judicial Diversity Debate: Personal Values and Tacit Diversity’ (2015) 35 *Legal Studies* 1; and TT Arvind and L Stirton, ‘Legal Ideology, Legal Doctrine and the UK’s Top Judges’ [2016] *Public Law* 418.

<sup>7</sup> It is anticipated that, as with feminist rewriting projects, the outputs of this project may guide judicial practice in relation to children.

<sup>8</sup> J Balkin (ed), *What Brown v Board of Education Should have Said: The Nation’s Top Legal Experts Rewrite America’s Landmark Civil Rights Decisions* (New York, New York University Press, 2002); J Balkin (ed), *What Roe v Wade Should have Said: The Nation’s Top Legal Experts Rewrite America’s most Controversial Decision* (New York, New York University Press, 2005).

<sup>9</sup> ‘The Women’s Court of Canada’ (2006) 18(1) Special Issue *Canadian Journal of Women and the Law*.

<sup>10</sup> Hunter, McGlynn and Rackley, above n 2.

<sup>11</sup> M Enright, J McCandless, and A O’Donoghue (eds), *Northern / Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity* (Oxford, Hart Publishing, 2017) and H Douglas, F Bartlett, T Luker and R Hunter (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Oxford, Hart Publishing, 2015) provide alternative jurisdiction-specific perspectives on feminist judgment writing. See also SW Smith et al (eds), *Ethical Judgments: Re-Writing Medical Law* (Oxford, Hart Publishing, 2017).

<sup>12</sup> E Brems (ed), *Diversity and European Human Rights; Rewriting Judgments of the ECHR* (Cambridge, Cambridge University Press, 2012).

<sup>13</sup> E Brems and E Desmet (eds), *Integrated Human Rights in Practice. Rewriting Human Rights Decisions* (Surrey, Edward Elgar, Forthcoming).

<sup>14</sup> Hunter, McGlynn and Rackley, above n 2.

*Children's Rights Judgments* is concerned to explore precisely how children's rights can be integrated into judicial reasoning. The project is distinctive and innovative in several ways. First, it is the only project so far to have focused exclusively on children and to attempt to bring children's rights theories, law, principles and methods to bear on the re-written versions. It is also more ambitious than other judgment-writing projects in terms of its jurisdictional scope and the number of cases included. The project engages with 28 judgments spanning seven domestic jurisdictions, with 14 from England and Wales, six from other jurisdictions (Australia, the Netherlands, the USA, South Africa, Canada and Pakistan), and eight judgments from the international courts, including the International Criminal Court (ICC), the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), and the European Committee on Economic and Social Rights (ECESR). In adopting this broad scope, *Children's Rights Judgments* has a strong international and comparative element: contributors have been able to explore the role of the judiciary in enabling states' authorities to discharge effectively their obligations under international human rights law, and particularly the United Nations Convention on the Rights of the Child (CRC). This enables the project to tease out and draw comparisons between how (universal) children's rights standards are interpreted and applied in different jurisdictions to reflect the variable contexts, cultures and value-systems within which they are located; and to offer the first systematic analysis of how children's rights are and could be adjudicated more effectively in the *supra-national courts*, specifically the ECtHR, the CJEU and the ICC. Finally, the collection seeks to compare and contrast how children's rights can be interpreted and applied across different substantive areas of law, thereby avoiding the common tendency to locate children's rights' discussions within a single legal context (particularly family law and medical decision-making).

Extending the rewriting judgment methodology to children's rights is important for two primary reasons that point to the legitimacy of a judicial approach that seeks to prioritise the rights of one group (children) over another (adults).<sup>15</sup> First, it is in the courts that children acquire a legal voice (individually, and as a group) that is denied them in other decision-making processes (private and civic).<sup>16</sup> Therefore, the role of the courts in protecting and securing children's rights, promoting children as *active* legal protagonists, carries greater significance than for other groups. Second, it focuses on children as *central* legal subjects. Children's dependence on adults (usually their parents) means that cases concerning children and their rights often emerge in the context of disputes between adults: typically between doctors and parents (medical decision-making); one parent and another (residence, contact, relocation or abduction); or the parent and the state (care and protection, adoption, immigration, criminal justice or education). The child is central to the dispute and yet arguments have often been framed in terms of the rights of adult others or in paternalistic terms. This project allows such cases to be re-imagined with the child as the primary rights-bearing subject rather than a passive object of concern.

<sup>15</sup> On the question of bias in the adoption of a feminist perspective, see R Hunter, 'An Account of Feminist Judging' in Hunter, McGlynn and Rackley, above n 2.

<sup>16</sup> A Nolan, 'The Child as "Democratic Citizen": Challenging the "Participation Gap"' [2010] *Public Law* 767; and J Tobin, 'Courts and the Construction of Childhood: A New Way of Thinking' in M Freeman (ed), *Law and Childhood Studies: Current Legal Issues* (Oxford, Oxford University Press, 2012).

## I. Towards Collaboration

While some judges have embraced and foregrounded children's rights, particularly over the last five years or so,<sup>17</sup> with some even going as far as to draft their judgments in child friendly language,<sup>18</sup> such examples remain few and far between. Judgments at all levels and across all jurisdictions routinely pursue limited, often distinctly disempowering approaches to children's rights. Many judgments fail to engage with children's rights issues, confining their adjudication to a factual review of the available evidence rather than a more nuanced understanding of how that evidence might be interpreted in the light of established children's rights norms and research intelligence. This tendency is symptomatic of a persistent gulf between legal practice on the one hand and academic research relating to children and their rights on the other. And yet we are living in an era in which international and domestic guidance on the nature, scope and meaning of children's rights, in which intelligence on children's cognitive, emotional, social, political and psychological capacities, and in which opportunities for promoting interdisciplinary and inter-professional knowledge exchange and capacity-building are abundant and supremely accessible. The challenge lies in bringing those insights to bear on judicial decision-making.

Existing doctrinal research has critiqued the application and conceptualisation of children's rights in specific judgments and has analysed the impact of international rights standards on judicial decision-making.<sup>19</sup> Similarly, there is a long tradition of academics providing detailed, critical commentary of specific judgments in the form of case notes. But while judges may be accused of adjudicating on children's lives in an empirical and theoretical vacuum, many academic theoretical and conceptual expositions of children's rights remain detached from the real life situations in which these issues are negotiated, impervious to the complex economic and structural, practical and emotional constraints that impede judges (examined in chapter two). And whilst there is a growing body of work exploring how front-line practitioners understand and negotiate children's rights and interests in various clinical and legal contexts, particularly in medical decision-making, criminal justice, family justice, education and social work, practical engagement between children's rights scholars and judges and magistrates has been largely confined to critical assessments of isolated judgments or judicial processes. There has been no systematic attempt to demonstrate how these judgments would actually look were they decided through a children's rights lens. Few have attempted to demonstrate, on judges' own terms and observing judicial conventions, how judgments could have looked had

<sup>17</sup> See for example in the United Kingdom (the jurisdiction with which the editors are most familiar): *R (on the application of ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; *R (on the application of SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; *Nzolameso v City of Westminster* [2015] UKSC 22; *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47.

<sup>18</sup> *Lancashire County Council v M & Ors (Rev 1)* [2016] EWFC 9; *A (Letter to a Young Person)* [2017] EWFC 48.

<sup>19</sup> See inter alia T Liefwaard and J Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Dordrecht, Springer, 2015); U Kilkelly 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 *Human Rights Quarterly* 308; M Freeman 'Children's Rights as Human Rights: Reading the UNCRC' in J Qvortrup, W Corsaro and M Honig (eds), *The Palgrave Handbook of Childhood Studies* (London, Palgrave Macmillan, 2009) 377.

they been adjudicated in a way that is more faithful to what we understand to be a children's rights-based approach.<sup>20</sup>

This disjunction—between academic children's rights on the one hand and judicial expression on the other—not only perpetuates shortcomings in children's rights protection by the courts, but deprives academics and other children's rights advocates of a full appreciation of judges' profound and unique experience of transposing rights from abstract expressions into meaningful, fruitful and enduring commitments by all of those associated with the child. *Children's Rights Judgments* is therefore presented as a unique method of addressing this theory/practice gulf in children's rights and children's invisibility as legal and political citizens, by re-examining legal judgments in light of established and emerging theoretical, doctrinal and empirical research. It also provides a testing ground for exploring the relevance and potential influence of academic research on real life decisions confronting judges.<sup>21</sup>

The judgments and commentaries in this collection draw inspiration from a range of sources not commonly tapped by the judiciary, including children's rights theories, empirical research, participatory methods and international guidance, including the Council of Europe Guidelines on Child Friendly Justice and the General Comments of the UN Committee on the Rights of the Child. We also highlight and seek to emulate best practice across different jurisdictions and different levels of decision-making—drawing attention to existing judgments or elements of judgments that adopt (whether explicitly or more subtly) a children's rights-based approach.

We hope ultimately that the collection will be used not only as an example of how the method of judgment writing can be used to enable us better to understand and innovate in judicial decision-making, but as a practical training guide for judges and other legal practitioners who have a commitment to bringing children's rights to bear more fully on the adjudicatory process. We hope that this, in turn, will provide us with a more informed appreciation of the challenges and tensions confronting judges which may inhibit their potential to engage more fully in children's rights-based decision-making, and to expose opportunities for more creative and open correspondence with broader children's rights research, practice and theory/discourse.

## II. The Organisation of the Book

Part I of the book, including this introductory chapter (which explains and outlines the content of the project), sets the scene for engagement with the contributors' work. Chapter two, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities', explains the conceptual foundation for the project, highlighting the extensive international provisions endorsing children's rights, yet also the highly contested nature of children's rights and their struggle to gain traction in political discourse and legal practice. The chapter discusses the transformative role the judiciary can play in upholding and advancing

<sup>20</sup> Various interpretations of what constitutes a children's rights based approach are explored in chapter 3.

<sup>21</sup> Chapter 3 illustrates how this has been achieved across the various judgments.

children's rights. At the same time, it contextualises the challenges for judgment writers by illustrating some of the tendencies, tensions and constraints which may inhibit or distract judges when deciding cases involving children. These include the tendency to reinforce fixed conceptualisations of children and childhood, various forms of resistance to seeing children as rights-holders, the tendency to conflate best interests (in the sense of protected interests, or rights pertaining to the child) and welfare decision-making, and the marginalisation of children within legal processes, in particular, the tendency to pursue children's claims on adults' terms. The chapter explores other constraints which may affect a judge's propensity and freedom to adopt a substantive children's rights approach, such as: constitutional, political and institutional factors; clear statutory language, binding precedent or the inferior status of an international treaty in domestic law; their individual values, characteristics and experiences; and the multiple layers of constraint that limit the utility of research evidence by the courts in children's cases. Chapter two sets the scene for a discussion in chapter three of the primary characteristics of a children's rights judgment.

Chapter three, 'Towards Children's Rights Judgments,' illustrates with reference to the re-written judgments in this collection how some of the issues that constrain and frustrate judicial attempts to advance the rights of children can be navigated in order to reason and decide in ways that are more consistent with children's rights. It identifies and explores five markers of a children's rights judgment: (i) the utilisation of formal legal tools including the CRC in domestic proceedings and the cross-pollination potential of children's rights sources to inform judicial decision-making in the supranational courts; (ii) the use of scholarship to inform key concepts and tensions (such as the child's best interests and child autonomy); (iii) the endorsement of child friendly procedures to maximise children's participation in legal processes; (iv) the centralisation of the child's voice and experience in the narrative of the judgment; and (v) the communication of the judgment in a child-friendly way.

The rest of the book consists of the re-written judgments, each preceded by a short commentary. The commentary provides essential background information about the original decision along with an explanation of why and how the re-written version represents a more children's rights-sensitive approach. The contributions are arranged in Parts II to VI of the book under the following broad subject headings: II, Children's Rights and Family Life; III, Children's Rights and Medical Decision-Making; IV, Children's Rights and Public Authorities; V, Children's Rights and Criminal Justice; and VI, Children's Rights and International Movement.

### III. Overview of Contributions

#### A. Selection and Development of the Rewritten Judgments

The cases that feature in *Children's Rights Judgments* are the result of an open call, issued at the beginning of the project, to children's rights academics across the globe. The response was overwhelming and ranged from PhD students and early career scholars to internationally leading scholars in the field. Judgments were selected for rewriting either because of

the way in which they were originally reasoned, because their original outcome is regarded as antithetical to children's rights, or because the judgment fails to respond adequately and in a manner that is relevant to modern social, economic, legal, cultural or technological developments that impact upon children's lives.

Many of the judgments selected for rewriting attracted significant critical attention when they were originally passed down (for instance, the surrogacy case of *Re X and Y*; the child immunisation case of *F v F*; the 'celebrity's lovechild' case of *AAA*; and the US death penalty case of *Roper v Simmons*). Two (*Begum*, the school uniform case; and the conjoined twins case of *Re A*) had already been rewritten from other conceptual and ideological perspectives as part of previous judgment-writing projects.<sup>22</sup> Other children's rights cases that readers might expect to see—judgments that pushed the boundaries but could have gone further—are not included here (for example *Gillick v West Norfolk and Wisbech AHA* and *V and T v United Kingdom*). This was in part a consequence of the open call (and thus reflecting contributors' choices) and in part our editorial desire to allow the precedential legacy of some of these cases to be examined (for example in *Re W*). Some of the rewritten versions arrive at an outcome different from the original based on a different reasoning or different sources of children's rights. Others arrive at the same outcome as the original but via different (sometimes subtle, sometimes radically different) reasoning. In all cases, children are treated as central legal subjects.

Whilst *Children's Rights Judgments* is keen to push boundaries and challenge entrenched conventions in judgment writing, it has been equally concerned to produce authentic alternatives that could pass muster as genuine originals. Thus, consistent with other judgment-writing projects, a number of constraints were imposed on the authors. First, each judgment had to adhere broadly to the format, style and tone of the court from which the case originally arose. Second, consistent with the judicial function, authors were confined to interpreting and applying the law as it stood at the time of the original and were prohibited from making radical changes to the law. This was a particular challenge for the *Hudson* child burglar case, our oldest judgment (a trial transcript) dating back to 1783! Similarly, the judgment-writers had to be cognisant of evidence and fact-based limitations depending on the level at which they were adjudicating. In all cases, for practical purposes, we imposed a 5000-word limit on all of the re-written judgments.<sup>23</sup> This has, in some cases, required authors to focus on particular aspects of the original for rewriting and to be judicious in their editing of the factual background and legal context.

That said, writers were given significant scope for creativity in producing a persuasive 'cover version' of the original. Some have invented a fictitious appeal to a higher court or a new dissenting judgment. Some have presented the facts of the case from a different perspective to highlight from the outset the focus on the child's voice, interests and rights. A few (*Valsamis*, *Grootboom*, and *Re T*) have developed an additional, child friendly version of the judgment with a view to conveying the decision to the child or children affected by the decision.

Early drafts of the judgments and commentaries were developed through a series of workshops organised throughout the UK during 2015–16 and involving feedback from

<sup>22</sup> See Hunter, McGlynn, and Rackley, above n 2.

<sup>23</sup> Except *Hudson* which necessarily has a shorter 'judgment' (in fact, a rewritten trial transcript) and a longer commentary.

leading judges, practitioners, academics (including from the field of psychology as well as law) and children's rights advocates, some of whom were involved in representing the parties and adjudicating on the original cases.<sup>24</sup> These enabled participants to explore what it means to adopt a children's rights-based approach to decision-making and to examine both the opportunities and constraints on the judiciary in protecting children's rights. It also enabled participants to receive training and feedback on the art and craft of judgment writing from leading academics and judges such as Professor Rosemary Hunter, Professor Sonia Harris-Short, Sir Mark Hedley and Baroness Hale of Richmond.

## B. Themes

As captured by the quotation from Baroness Hale's opinion at the beginning of this chapter, a theme which emerges in many of the contributions is just how easily the interests of the child can become subsumed by, or lost in discussion of, adults' interests. Not surprisingly, the problem arises frequently in the contributions in Part II of the book, which broadly examines children's rights in the context of family life. Many of the judgments in this part focus on the forging of legal family connections between adults and children (for example in the context of surrogacy or adoption), yet they also illustrate how in such decision-making a greater focus might be placed on the separate interests of the children involved. This is often achieved by drawing, to a greater extent than the original judgment, on supra-national authority, such as the ECHR and the CRC.

Jo Bridgeman's re-write of *Re X and Y (Foreign Surrogacy)* reaches the same conclusion as the original judgment in making a parental order in respect of twins who were born as a result of a foreign surrogacy arrangement. However, her judgment is also much more mindful of the need, in scrutinising the relevant legislation, to focus on the children's rights to respect for private and family life under Article 8 ECHR, interpreted in light of Articles 3, 7 and 8 CRC. Similarly, Eugenia Caracciolo di Torella's re-written judgment in *CD v ST*, addressing whether maternity leave should be available to the intended mother of a surrogacy arrangement, expands the reasoning of the CJEU to place centre stage the rights of the child to care and protection under Article 3 of the CRC and Article 24 of the Charter of Fundamental Rights. Claire Fenton-Glynn's imagined dissent in *Re C v XYZ County Council* examines the issue of whether there should be an investigation of the child's father's potential to care for the child in the context of proposed adoption outside the child's family. Concluding that the majority view, with its emphasis on avoiding delay, subverted the required focus on the welfare of the child, the re-written judgment places greater focus on the child's identity rights with reference to Articles 7 and 8 of the CRC. The dissent thus produces a judgment with the child at the centre, as opposed to the original which, as Brian Sloan in his commentary observes, could be described as 'glaringly mother-centred.' Similarly, in Lydia Bracken's re-write of the ECtHR judgment in *Gas and Dubois v France*,

<sup>24</sup> Direct involvement of children and young people in the project was considered but it was concluded that meaningful participation would require careful and considerable adaptations to the planned activities to equip young people with the necessary knowledge and understanding of the legal, theoretical and procedural issues under scrutiny.

which addressed the applicants' claim of discriminatory treatment arising from the inability of same-sex couples to adopt under French law, the judgment is re-shaped from the perspective of the child's best interests with reference to Article 3 of the CRC. As Ursula Kilkelly observes in her commentary, this highlights that 'it is not relevant to children whether their parents are same or opposite sex, married or not.' Kirsty Hughes' re-written judgment in *AAA v Associated News* addresses a claim for damages and an injunction to prevent disclosure of paternity in a newspaper and focuses much more strongly than the original judgment upon the child's substantive privacy right.

Some of the cases also illustrate that even when the child's separate interest is recognised, such as the right to be heard in proceedings, a children's rights focus may prove significant in upholding the substance of such rights in practice. This is evident in the final two judgments in Part II, which are concerned with the issue of hearing children in legal proceedings. In her re-write of *Re P-S (Children)* Jane Williams allows the appeal of a 15 year old boy, who was a party in care proceedings, holding that he be permitted to give evidence in the proceedings. She concludes that the effect of Articles 6 and 8 of the ECHR, and Articles 3 and 12 of the CRC, is that in practice he enjoys that right and any judicial discretion must be exercised so as to give effect to those fundamental human rights requirements. Similarly, Ton Liefwaard and Marielle Bruning re-write a judgment of the Netherlands Supreme Court (*De Hoge Raad* 5 December 2014) in which the core legal issue was a minor's right to access all files relating to the case in connection with his right to be heard in proceedings. In what is described as an 'aspirational document', urging the Dutch Supreme Court to show more willingness to take into account international standards beyond the ECHR, the re-written judgment examines a range of international standards (including guidance from the UN Committee on the Rights of the Child) in order to centre on the core question of whether the child can effectively exercise his right to be heard and participate effectively without having direct access to files.

Many of the themes which emerge in Part II—children's connectedness yet also the need for transparency and consideration of the separate interests that children might plausibly claim—are also evident in Part III, which focuses on children's rights and medical decision-making. In Stephen Gilmore's alternative Court of Appeal judgment in *Re W (A Minor)(Consent to Medical Treatment)*, the issue turns to the child's autonomy interest in the context of an adolescent's refusal to consent to medical treatment where refusal would lead to irreparable harm or death. While agreeing with much of the original reasoning, the re-written judgment goes further, drawing on general principle in *Gillick v West Norfolk and Wisbech AHA*<sup>25</sup> and on academic commentary to reason that judicial consideration of the child's best interests must take full account of the child's autonomy interest, with the conclusion that the fully competent, mature adolescent's views ought to be respected as conducing to his or her welfare.

In *F v F* Emma Cave grapples with a parental dispute about administration of the MMR vaccine to two children aged 15 and 11 years. Cave's re-written judgment focuses more strongly than the original on the children's perspective, characterising the issue as whether compulsory vaccination *in opposition to their wishes* is in their best interests. Unlike the original judgment, which authorised the vaccination for both children, Cave differentiates

<sup>25</sup> *Gillick v West Norfolk and Wisbech AHA* [1986] 1 AC 112.

between the children, concluding in the case of the older child that compulsory vaccination is not in her best interests in light of her maturity and understanding, and the risk to her emotional well-being of overriding her refusal.

Michael Freeman imagines a set of House of Lords' opinions on appeal from the controversial Court of Appeal decision in *Re T (A Minor) (Wardship: Medical Treatment)*. The Court of Appeal refused to authorise a life-saving liver transplantation for a two-year-old boy in the face of the mother's objection, despite unanimous medical opinion that the operation could be carried out successfully. This is another case which strikingly illustrates how easy it may be to lose sight of the child's fundamental interests, even when applying the child's welfare as the paramount consideration. The fictive majority opinion in the Lords concludes that the Court of Appeal got the balancing exercise plainly wrong, conflating the interests of the child and the mother and placing undue emphasis on the parents' views, and insufficient weight on the strong presumption in favour of prolonging life. The leading judgment also endorses a general practice of, where appropriate, producing a child-friendly judgment. An additional concurring opinion by Lord Freeman (fictitiously recently appointed to the Appellate Committee of the House of Lords from academia), allows the airing of several more adventurous obiter comments from a children's rights perspective about the treatment of children. While *Re T* illustrates the importance of separating out individuals' interests, Amel Alghrani's re-written judgment of the Court of Appeal in *Re A (conjoined twins)* reminds us also of the importance (and in this case inevitability) of children's connectedness to others.

Part IV examines children's rights in their engagement with public authorities in a variety of contexts (for example, children's freedom of expression, their education and rights to a home). It illustrates how there is a need for careful consideration in particular contexts of how children are perceived, and of the content of the protection of children's best interests. *R (On the Application of Castle) v Commissioner of Police for the Metropolis*, for example, illustrates that despite the claims of individual children in other contexts for differential treatment according to their competences, in some circumstances there may need to be acknowledgement of the vulnerabilities of all children as a group. *Castle* was a claim for judicial review of a police force's decision to 'kettle' (confine to a particular area) protesters during the protest. In particular, it raised the question whether the police's decision-making complied with its duty under section 11 of the Children Act 2004 to make arrangements to safeguard and promote the welfare of children affected. Aoife Daly's re-written judgment highlights the police's failure to classify all under 18 year olds for the purpose of section 11, and also holds that welfare must be interpreted by reference to Article 3 of the CRC, viewed in light of the wider rights contained in the Convention, such as the right to engage in political activity implied by Articles 12 and 15.

The children's protest in *Castle* was against proposed increases in university fees and it is perhaps not surprising that many of the cases in which children's engagement with public law issues occur in the context of their education, their most likely place of engagement with the public sphere of life. In *Valsamis v Greece* a child, Victoria Valsamis, who failed to attend a compulsory National Day military parade because of her pacifist beliefs as a Jehovah's Witness, was punished with suspension for a day from school. Her parents alleged breach of Protocol 1, Article 2 (P1-2) of the ECHR (state's respect for the right of parents to ensure education and teaching in conformity with their own religious and philosophical beliefs), and of the child's rights under Article 9 (freedom of religion). Unlike the original

majority judgment, which found no violations, Laura Lundy's re-write upholds the claims, relying directly on CRC Article 12 (respect for the child's views) and Article 5 (provision of parental guidance in accordance with the child's evolving capacities) in relation to the breach of the ECHR Article 9; and on the CRC Articles 3 (the child's best interests) and 29 (the aims of education) in relation to P1-2. Lundy's judgment goes even further in concluding that the child's own rights under P1-2 were also breached.

Similar issues were raised in *R (On the application of Begum) v Head teacher and Governors of Denbigh High School*, in which a Muslim schoolgirl, Shabina Begum, who wished to attend school wearing a jilbab in contravention of the school's uniform policy, sought judicial review of the school's policy. She claimed violations of Articles 9 and Article 2 of the First Protocol of the ECHR. Unlike the original opinions, Maria Moscati's imagined dissent, explicitly utilising the CRC, concludes that Begum's rights to manifest her religion or belief and to education were unjustifiably infringed. Moscati's judgment is also implicitly informed (though necessarily in a minimal way) by interviews with Shabina Begum and her counsel, Cherie Booth QC (reported in Nuno Ferreira's commentary), in order more thoroughly to contextualise in the judgment Begum's experience. The re-written judgment concentrates more concretely on the impact of the school's policy on Begum's rights and not on unfounded violations of other pupils' rights.

Neville Harris' imagined judgment on appeal from Elias J's judgment in *S v Special Educational Needs and Disability Tribunal (SENDIST) and Oxfordshire County Council* addresses the issue of whether a child's exceptional ability combined with her emotional, social and behavioural difficulties warranted a statutory assessment of her Special Educational Needs with the possibility of a confirmed placement at an independent residential school at the Local Education Authority's expense. While Harris upholds the lower court's conclusion that the child did not have special educational needs by virtue of a learning difficulty or disability by reason of high ability level, he quashes the decision and remits it for reconsideration by the SENDIST on the basis that there is a difference in treatment in enjoyment of the right of education based upon a status within Article 14 of the ECHR, which required justification. In his reasoning, Harris highlights Articles 28 and 29 of the CRC focusing on inclusive education with the objective of 'development of the child's personality, talents and mental and physical abilities to their fullest potential'. Harris also examines Article 12 of the CRC, urging that the child's views should, consistently with that provision, play a part in the SENDIST's determination.

Some of the decisions in Part IV touch on children's socio-economic rights, such as a right to housing provision. Simon Hoffman's re-write of *Collins v Secretary of State for Communities and Local Government* provides insight into the content of children's best interests in the context of planning decisions. *Collins* concerned an appeal by an extended family of Irish Travellers, including 39 children, against the refusal of planning permission to stay on their land. Hoffman is concerned to ensure that there is proper compliance with Articles 3 and 12 CRC where the child's right to respect for private and family life are at stake. He thus highlights the need to hear the views of the children in the planning process, and also to ensure that the best interests of the children are given considerable weight in decision-making. The issue of children's rights to adequate shelter and housing was also raised in the South African Constitutional Court's decision in *Government of the Republic of South Africa and Others v Grootboom*, which examined the constitutional right of everyone to

have access to adequate housing and the constitutional right of children to shelter.<sup>26</sup> Unlike the original ruling, which concluded that there was no primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families, Anashri Pillay's re-write, drawing on international children's rights sources, concludes that the Constitution must be interpreted as obligating state provision of shelter to children within their families.

The final case in Part IV, Sonja Grover's reimagined dissent in the Canadian Supreme Court in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, examines whether section 43 of the Canadian Criminal Code infringes the Canadian Charter of Rights and Freedoms. Section 43 provides a defence justifying the reasonable use of force by way of correction in the context of an assault under the criminal code, which applies to schoolteachers, parents and persons standing in the place of parents. Grover argues that the provision infringes section 12 of the Charter, the right not to be subjected to cruel and unusual treatment or punishment, as an infringement of a human right of dignity which should apply equally to adults and children.

Part V of the book focuses on children's rights and criminal justice, a subject matter in which tensions between children's cognitive abilities and notions of responsibility for their actions play out, often upon a broader political canvas, and with reference to the constraints of perceptions of social acceptability. Barbara Bennett Woodhouse re-writes the United States Supreme Court decision in *Roper v Simmons*, which held that sentencing juvenile offenders to death violated the US Constitution's Eighth Amendment prohibition against cruel and unusual punishment. Woodhouse reaches the same outcome on different reasoning, claiming special treatment for children as a distinct class. Having regard to the nature of childhood, she grounds her decision instead in children's fundamental rights protecting their potential for development, which she bases on the Constitution's due process and equal protection principles.

A focus on the child's developmental interest also surfaces in Ray Arthur's re-examination of *R v JTB*. In that case the UK House of Lords held that section 34 of the Crime and Disorder Act 1998 abolished not only the *presumption* that a child over the minimum age of criminal responsibility (10 years) but under the age of discretion (14 years) is incapable of committing a criminal offence (ie, *doli incapax*), but also removed the notion of *doli incapax* completely as a defence. Arthur's re-written opinion illustrates how there can be choice in the narrative adopted in a judgment, rejecting that adopted by Lord Phillips in the original opinion, which portrayed a benevolent youth justice system and the difficulty of securing prosecution which section 34 sought to address. Unlike the original opinion, Arthur cites both common law decisions and Articles 40 and 3 of the CRC to interpret section 34 as retaining the defence. But as Kathryn Hollingsworth observes in her commentary, even this is a compromise adopted against the backdrop of an extremely low minimum age of criminal responsibility.

The final three judgments in Part V highlight how the realities of children's lives and protection of their rights must sometimes contend with the political setting and prevailing societal attitudes to children. Trevor Buck's alternative majority judgment in the International Criminal Court in the trial of Thomas Lubanga Dyilo for enlisting and conscripting

<sup>26</sup> Ss 26 and 28 of the Final Constitution of South Africa.

children under 15 years into the Force Patriotique pour la Libération du Congo and using them in hostilities (*Prosecutor v Thomas Lubanga Dyilo*) shines a light on the plight of child soldiers. In convicting the defendant, Buck develops more detailed arguments based on international child law provisions than the original judgment, including drawing on the child's right to be heard in Article 12 of the CRC in support of greater participation of children in the proceedings as victims of the offences.

In *Farooq Ahmed v Pakistan* Abdullah Khoso imagines the Supreme Court of Pakistan's examination of the decision of the Punjab High Court to strike off the statute book the Juvenile Justice System Ordinance 2000 (JJSO), despite the Court's lack of competence to strike down legislation. This Ordinance provides various protections for persons under 18 within the criminal justice system, such as to be tried separately from adults, and protection from the death penalty. The High Court held that the age of 18 is arbitrary and inappropriate in a country where a hot climate and the 'consumption of hot and spicy food all lead towards speedy physical growth and an accelerated maturity'. It was concerned that the JJSO was being abused by criminals who were using children to commit serious crimes on behalf of their family, knowing that they would not be subject to the death penalty. Khoso rejects the anti-human rights and anti-child rights approach of the High Court, which, as Urfan Khaliq's commentary highlights, may have been motivated by wider political considerations.

Sue Farran and Rhona Smith's contribution is very different from others in the collection, being a re-write of a trial transcript of an eighteenth century criminal trial of an eight year old boy, John Hudson (*December 1783, trial of John Hudson (t17831210-19) Burglary case*). Hudson was found guilty of stealing and sentenced to transportation. Farran and Smith reach a different result, assisted by the addition of fictitious defence counsel, William Garrow, to employ defence techniques (such as cross-questioning) which were in their infancy at that time. The case is a reminder that the treatment of children is often temporally and culturally contingent and that what may seem appropriate in one generation can be looked on with horror in another, and yet also how difficult it may be for the current generation to see its own horrors.

The final part of the book (Part VI) engages with children's rights and international movement. In the first case in this part, Brian Simpson examines the issue of procedural fairness to children in the context of proceedings for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction. His re-write of the Australian High Court decision in *RCB as Litigation Guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest of the Family Court of Australia & Ors* concludes (unlike the original judgment) that procedural fairness to the children warranted their separate representation to test the veracity and reliability of the conclusions of a court report which advised as to the children's best interests. Developing the same theme in a European context, the rewritten version of *Povse v Austria* highlights the rigidity of the CJEU and ECtHR in addressing the children's rights implications of parental child abduction. Specifically, the policy of automatic return of the child, supported by EU law (the Brussels IIa Regulation)<sup>27</sup> can sit at odds with children's expressed objections and right

<sup>27</sup> Reg 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, [2003] OJ L338/1.

to respect for family life under Article 8 ECHR. As Ruth Lamont notes in her commentary, 'The protection of children's rights is restricted to an assessment of *where* rights may be considered, rather than interrogating *whether* the procedural legal framework itself is compliant with Article 8.' Whilst accepting the constitutional and legal limitations of the European courts, Lara Walker re-writes *Povse* to achieve a more children's rights sensitive interpretation of Article 8, concluding that forcing a child to leave her mother to live with her father after years of only limited contact with him does, indeed, constitute a disproportionate breach of her ECHR rights.

Staying with the European courts, Helen Stalford reimagines the CJEU's treatment of the residence, welfare and employment rights of the third country national parents of EU citizen children in Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*. In doing so, the children's (rather than the parents') rights are placed at the forefront of the court's reasoning and full use is made of the children's rights architecture to which the EU has access (but which it routinely fails to exploit). The status of migrant children is considered also by Maria Papaioannou who examines the ECtHR decision in *Antwi v Norway*, concerning a 10 year old Norwegian girl whose father was threatened with deportation to Ghana. In concluding that there was no violation of Article 8 of the ECHR in deporting the father, the ECHR applied its doctrine in immigration cases that the court would only in exceptional circumstances find such a violation in the case of a person who is aware that his or her immigration status is precarious. The Court was of the view that the family could enjoy family life in Ghana. By contrast the re-written judgment recognises the child as an independent rights holder rather than simply an extension of the parents, considering the detrimental impact of a move on the child's interests, and characterising the issue as whether a separation of the father and child would violate Article 8 ECHR.

Remaining with the migration theme, Wouter Vandenhoele brings children's rights principles and approaches to bear on an often overlooked quasi-judicial monitoring body, the European Committee on Social Rights. *DCI v Belgium* concerns a collective complaint brought against the Belgian authorities in respect of their failure to provide adequate medical treatment and protection for child asylum seekers, many of whom had arrived unaccompanied. Whilst the original ruling finds Belgium to be in breach of its obligations under the European Social Charter, Wouter Vandenhoele drafts a fictitious concurring decision to highlight the specific vulnerabilities of unaccompanied minors and to draw attention to the vacuous nature of children's rights in the absence of adequate material resourcing.

These rewritten judgments have therefore explored, in a multitude of ways and across a variety of legal contexts and jurisdictions, how a children's rights judgment can be better achieved even within temporal, doctrinal and jurisdictional constraints. Some may disagree with the approach to certain judgments; some may think the fictive judges have gone too far, and others not far enough. Ultimately, our hope is that this book will prompt more serious consideration of the possibilities and, indeed, importance of embedding children's rights more firmly in judicial decision-making.

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## Commentary on *Re X and Y (Foreign Surrogacy)*

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EMMA WALMSLEY

### I. Introduction

*Re X and Y (Foreign Surrogacy)*,<sup>1</sup> a decision of Hedley J in the Family Division of the High Court, concerned a Parental Order which was made pursuant to section 30 of the Human Fertilisation and Embryology Act 1990 (HFEA 1990) in the context of an international surrogacy arrangement. In this case the arrangement resulted in the birth of twins to a married Ukrainian surrogate. The intended parents seeking the order were an English married couple, the surrogate having been implanted with embryos conceived with the intended father's sperm and eggs from an anonymous donor. The original and rewritten judgments expose major shortcomings with the laws regulating surrogacy in the UK, particularly for the rights of the child. This commentary compares the original and rewritten judgments to discover whether Bridgeman J's children's rights approach can resolve some of the difficulties caused by international surrogacy arrangements. The commentary also explores subsequent legislative amendments and case law and whether these changes have resulted in children's rights becoming more centralised in this context.

### II. Background

Surrogacy is a rapidly developing and ethically controversial practice, which raises legal questions for children's rights, for example with reference to their nationality, identity and parentage. In the UK, the practice is currently regulated by the Surrogacy Arrangements Act 1985 (SA Act 1985), the Human Fertilisation and Embryology Act 2008<sup>2</sup> and the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 no. 985. The HFEA 1990 was drafted following the publication of a White Paper: 'Human Fertilisation and

<sup>1</sup> *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), Hedley J, hereafter '*Re X and Y*'.

<sup>2</sup> S 54 HFEA 2008 amended s 30 HFEA 1990. The other parenthood provisions of the 1990 Act remain in force in relation to determining motherhood and fatherhood.

Embryology: A Framework for Legislation' in 1987.<sup>3</sup> The HFEA 1990 'introduced a more positive recognition of surrogacy' than the SA Act 1985:<sup>4</sup> intended parents were allowed to formalise their relationship with their children through the award of a Parental Order which provided an alternative to adoption for some intended parents. The effect of a Parental Order is to confer joint and equal legal parenthood and parental responsibility upon the intended parents whilst fully extinguishing the parental status of the surrogate.<sup>5</sup> This ensures 'each child's security and identity as lifelong members of the applicants' family.'<sup>6</sup> At the time of *Re X and Y*, the Parental Order Regulations 1994<sup>7</sup> were in force, which meant the child's welfare was the court's 'first consideration'. Following the 2010 Regulations, which imported section 1 of the Adoption and Children Act 2002 (ACA 2002) into section 54 Parental Order applications,

welfare is no longer merely the court's first consideration but becomes its paramount consideration ... it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making.<sup>8</sup>

*Re X and Y* exposes how some of the provisions in sections 27–30 HFEA 1990 are incompatible with children's rights. When the twins were born, the Ukrainian surrogate was recognised by the law in England and Wales as the legal mother of the children.<sup>9</sup> Moreover, her husband was recognised as the children's legal father.<sup>10</sup> However, under Ukrainian law neither the surrogate nor her husband had legal responsibility for the twins once they had been born.<sup>11</sup> This meant the children were 'marooned stateless and parentless' with no right to remain in the Ukraine and no right to enter the UK.<sup>12</sup> The same issue has arisen in subsequent cases.<sup>13</sup> In the rewritten judgment *Bridgeman J* proposes 'an international response such as with the conventions on inter-country adoption and international child abduction.'<sup>14</sup> This commentator supports the solution proposed by Kirsty Horsey to pre-authorise Parental Orders before the child is born 'so that legal parenthood is conferred on intended parents at birth.'<sup>15</sup> In order to protect the child, a Parental Order reporter from CAFCASS could still visit the family after the child is born, as it currently does, to confirm that the award of a Parental Order is justified.<sup>16</sup>

In *Re X and Y*, the children were given permission to enter into the UK once the intended parents had satisfied the UK immigration authorities that the intended father was related

<sup>3</sup> Cm 259 (London, HMSO).

<sup>4</sup> K Horsey and S Sheldon, 'Still Hazy After All These Years?' (2012) 20 *Medical Law Review* 67–89, 70.

<sup>5</sup> *J v G* [2013] EWHC 1432 (Fam) [27].

<sup>6</sup> *ibid.*

<sup>7</sup> Parental Orders (Human Fertilisation and Embryology) Regs 1994 (SI No 2767) Sch 1(1)(a).

<sup>8</sup> *Re L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam) [5], [9]–[10] (Hedley J).

<sup>9</sup> S 27 (1) HFEA 1990.

<sup>10</sup> S 28 HFEA 1990 recognises the common law presumption of legitimacy whereby the child is treated as the legitimate child of the parties to a marriage.

<sup>11</sup> Above n 1 [8] (Hedley J).

<sup>12</sup> *ibid* [10] (Hedley J).

<sup>13</sup> *Re: IJ (A Child)* [2011] EWHC 921 (Fam); *AB v DE* [2013] EWHC 2413 (Fam).

<sup>14</sup> Rewritten judgment [10] (Bridgeman J).

<sup>15</sup> K Horsey, *Surrogacy in the UK: Myth Busting and Reform. Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (November 2015), available at [www.kent.ac.uk/law/research/projects/current/surrogacy/surrogacy%20in%20the%20UK%20Report%20FINAL.pdf](http://www.kent.ac.uk/law/research/projects/current/surrogacy/surrogacy%20in%20the%20UK%20Report%20FINAL.pdf).

<sup>16</sup> It is acknowledged that this could leave the surrogate in a vulnerable position as she would need to consent to the Parental Order before the child is born.

to the twins.<sup>17</sup> The intended parents then sought to regularise their status as parents of the children by applying for a Parental Order. Although neither the original nor rewritten judgments mention this, an adoption order would have been inappropriate given the biological connection between the twins and the intended father. The importance of awarding a Parental Order (compared to an adoption order) was stated in *Re X (A Child) (Surrogacy: Time limit)*:<sup>18</sup>

A parental order presents the optimum legal and psychological solution for X and is preferable to an adoption order because it confirms the important legal, practical and psychological reality of X's identity; the commissioning father is his biological father and all parties intended from the outset that the commissioning parents should be his legal parents.<sup>19</sup>

As noted in the rewritten judgment, despite the importance of a Parental Order for the child's welfare, current law does not compel intended parents to apply for an order.<sup>20</sup> Consequently, where the intended parents do not apply for an order there will be no opportunity for a court to create a legal relationship between the child and the parents. Fortunately, in this case the intended parents did apply for an order and both judgments were able to award a Parental Order for each of the twins respectively, having found that the conditions in section 30 HFEA 1990 had been satisfied. A number of the conditions for the making of a Parental Order were uncontentious. As required by section 30(1) both applicants were lawfully married to each other and the husband's sperm was used. Section 30(2) provides for a non-extendable time limit for issuing the application, of six months from the date of the child's birth. This provision had been complied with in this case. Nevertheless, as Hedley J observed, 'this requirement may especially cause problems where immigration issues have led to delay.'<sup>21</sup> The applicants were also domiciled in England and Wales and the children had their home with them, as required by section 30(3). Both applicants were aged over 18 (as provided by section 30(4)) and the surrogate's consent was given 'not less than six weeks' after the birth (thus fulfilling section 30(6)). The legal issues in the case centred on the interpretation to be given to section 30(5) and (7).

### III. A Comparison of the Original and Rewritten Judgment

The first condition that required closer analysis by Hedley J and Bridgeman J was section 30(5) HFEA 1990: 'The Court must be satisfied that both the father of the child ... and the woman who carried the child have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.' Hedley J found that the Ukrainian surrogate had given the requisite consent. The intended parents argued that although the surrogate's husband had given consent, it was not required as a matter of law because section 28(2) should not be applied extra-territorially.<sup>22</sup> Hedley J did not accept this and found

<sup>17</sup> Above n 1 [10] (Hedley J).

<sup>18</sup> *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam).

<sup>19</sup> *ibid* [7].

<sup>20</sup> Rewritten judgment [33] (Bridgeman J).

<sup>21</sup> Above n 1 [12] (Hedley J).

<sup>22</sup> *ibid* [14] (Hedley J).

that Parliament cannot be taken to have had any different intention in relation to husbands of foreign domicile.<sup>23</sup> By contrast, the rewritten judgment criticises the provision which allows the surrogate's husband to 'withhold consent and prevent a parental order being granted ... whilst the laws of his own country relieve him of any responsibility for the children.'<sup>24</sup> Bridgeman J laments that this is yet 'another way in which the current law fails to protect the rights of children who are born in such circumstances.'<sup>25</sup> The rewritten judgment explains that there is nothing to suggest Parliament has even considered whether the law should apply extra-territorially, thereby implying that the issue needs to be examined.

The second requirement that needed closer examination was section 30(7) HFEA 1990: 'The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or wife ... unless authorised by the court.' Hedley J and Bridgeman J agreed that the sums paid significantly exceeded 'expenses reasonably incurred',<sup>26</sup> but both applied Wall J (as he then was) in *Re C (Application by Mr and Mrs X under Section 30 of the Human Fertilisation and Embryology Act 1990)*<sup>27</sup> to conclude that 'retrospective authorisation was legally possible.'<sup>28</sup>

In the original judgment Hedley J weighed up the competing policy considerations: (I) commercial surrogacy is undesirable and (II) a Parental Order is in the long term best interests of the child. On the facts of the case Hedley J had 'no doubt that the applicants were acting in good faith and that no advantage was taken (or sought to be taken) of the surrogate mother who was herself a woman of mature discretion.'<sup>29</sup> Therefore, he was able to authorise the payments and make a Parental Order. Nevertheless, Hedley J noted his unhappiness with the process of authorisation which required the court to balance 'two competing and potentially irreconcilably conflicting concepts.'<sup>30</sup>

It is also almost impossible to imagine a set of circumstances in which ... the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.<sup>31</sup>

In other words, public policy concerns with commercial surrogacy will rarely trump the best interests of the child, even where more than reasonable expenses are involved. Both the original and rewritten judgments conclude with some criticisms of the law. In the original judgment Hedley J warns of the obvious difficulties of inconvenience, delay, hardship and expense<sup>32</sup> of international surrogacy. Conflicts of law issues and serious immigration problems are also anticipated.<sup>33</sup> In the rewritten judgment, Bridgeman J also reflects upon these problems.<sup>34</sup>

<sup>23</sup> *ibid* [16] (Hedley J).

<sup>24</sup> Rewritten judgment [22] (Bridgeman J).

<sup>25</sup> *ibid* [22] (Bridgeman J).

<sup>26</sup> *ibid* [24] (Bridgeman J) and above n 1 [18] (Hedley J).

<sup>27</sup> *Re C (Application by Mr and Mrs X under Section 30 of the Human Fertilisation and Embryology Act 1990)* [2002] 1 FLR 909.

<sup>28</sup> Rewritten judgment [24] (Bridgeman J) and above n 1 [19] (Hedley J).

<sup>29</sup> *ibid* [21] (Hedley J).

<sup>30</sup> *ibid* [24] (Hedley J).

<sup>31</sup> *ibid*.

<sup>32</sup> *ibid* [26] (Hedley J).

<sup>33</sup> *ibid*.

<sup>34</sup> Rewritten judgment [33] (Bridgeman J).

## A. The Rewritten Judgment: Maximising the ECHR and UNCRC

Although the original and rewritten judgments reach the same conclusion and award a Parental Order, the latter adopts a more ‘substantive children’s rights approach’<sup>35</sup> by engaging with European sources of law, and with the United Nations Convention on the Rights of the Child (CRC) which the UK ratified in 1991. According to Bridgeman J, ‘European and international law makes us now much more attuned to the rights of children than we were in the twentieth century.’<sup>36</sup> Bridgeman J interprets the twins’ Article 8 European Convention on Human Rights (ECHR) right to respect for private and family life using Articles 3, 7 and 8 CRC and concludes that the HFEA 1990 ‘fails to fulfil our international obligations to safeguard and promote these rights.’<sup>37</sup>

The rewritten judgment uses Article 3 of the CRC to show that courts and legislative bodies must have the best interests of the twins as a ‘primary consideration.’<sup>38</sup> By contrast, Hedley J was unable to say that the children’s welfare was a ‘primary’ concern, ‘given that there is a wholly valid public policy justification lying behind Section 30(7),’<sup>39</sup> that being the undesirability of commercial surrogacy arrangements. In this respect, the rewritten judgment interprets section 30 more purposively than the original to protect the twin’s best interests. Bridgeman J again departs from the original judgment in her engagement with Article 7 of the CRC, which states that every child has a right to be ‘registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents’. Clearly, this could be violated where a child is ‘marooned stateless’ and the UK couple has no right to remain in the foreign jurisdiction.

Furthermore, Article 8 of the CRC, which stipulates that the State has a duty to ‘respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without lawful interference’ is used by Bridgeman J to engage with the importance of the intended parents providing their children with information about their origins. This issue is one the original judgment does not engage with. Bridgeman J credits the surrogate as an important figure for the child and their identity, and envisages circumstances where the surrogate can be involved in the child’s life: ‘It goes without saying that all of us find our lives enriched by healthy relationships, of differing degrees of care and affection, with a wide variety of people.’<sup>40</sup> The rewritten judgment rightly encourages ‘full, evidenced, examination and debate’ about the complex questions of origin and identity that arise for children born following lawful surrogacy arrangements including ‘whether the children’s right to respect for a family life includes legal recognition of the place of the surrogate in their family.’<sup>41</sup> In British Columbia for instance, surrogates can be registered on the child’s birth certificate alongside the intended parents, providing the

<sup>35</sup> J Tobin, ‘Judging The Judges: Are They Adopting The Rights Approach In Matters Involving Children?’ (2009) 33(2) *Melbourne University Law Review* 579–625.

<sup>36</sup> Rewritten judgment [32] (Bridgeman J).

<sup>37</sup> *ibid* [27] (Bridgeman J).

<sup>38</sup> *ibid* [25] (Bridgeman J).

<sup>39</sup> Above n 1 [20] (Hedley J).

<sup>40</sup> *ibid* [30] (Bridgeman J).

<sup>41</sup> *ibid* [30] (Bridgeman J).

parties agree beforehand.<sup>42</sup> This approach, which recognises the surrogate's gestational, epigenetic and sometimes genetic ties with the child, is something policy-makers need to look at in the UK.

The main difference between the two judgments is that Bridgeman J undertakes a purposive interpretation of the Parental Order requirements. She relies on section 3 of the Human Rights Act 1998, 'which requires the court to have regard to the intention of Parliament when considering the interpretation of legislation and to adopt any possible construction of legislation compatible with and upholding convention rights.'<sup>43</sup> Interestingly, Bridgeman J talks to the twins directly at the end of her judgment, with the view that they will read the decision one day.<sup>44</sup> This reinforces the children's rights approach that positions the twins at the centre of her decision.

#### IV. Legal Developments since *Re X And Y (Foreign Surrogacy)*

Since the original judgment, the HFEA 1990 has been amended by the HFEA 2008. Nevertheless, the Parental Order requirements have remained largely unchanged.<sup>45</sup> As a result of the Parental Order Regulations 2010, the courts have read section 54 HFEA 2008 permissively to protect the best interests of the child. By contrast to *Re X and Y (Foreign Surrogacy)*, where Hedley J described the six month limit as 'non-extendable',<sup>46</sup> Munby P read down section 54(3) in *Re X (A Child) (Surrogacy: Time limit)*<sup>47</sup> on the basis that 'given the transcendental importance of a parental order, with its consequences stretching many, many decades into the future' Parliament cannot have intended the difference between six months and six months and one day to be determinative.<sup>48</sup> He found that even if the statute could not be interpreted in this manner, his conclusions could be justified by the requirements of Article 8 of the ECHR. Relying on Theis J in *A v P*<sup>49</sup> Munby P found that the HFEA 2008 must be read down to ensure the child's right to identity, which could only be protected through the making of a Parental Order.<sup>50</sup> The case law is also increasingly taking a permissive approach to section 54(8) in international commercial surrogacy cases, by awarding a Parental Order even where payments have exceeded reasonable expenses.<sup>51</sup>

More recently, the courts have reached their limit in reading down section 54. In *Re Z*<sup>52</sup> the High Court issued a declaration of incompatibility in respect of section 54(1) HFEA 2008, which precludes single parents from applying for a Parental Order. Unlike Bridgeman J's rigorous evaluation of the twins' rights under the CRC and ECHR, Munby P did not

<sup>42</sup> P Gerber and P Irving Lindner, 'Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?' (2015) 18 (2) *New York University Journal of Legislation and Public Policy* 225–76, 271.

<sup>43</sup> Rewritten judgment [28] (Bridgeman J).

<sup>44</sup> *ibid* [35] (Bridgeman J).

<sup>45</sup> The only significant change was to allow unmarried and same-sex couples to apply for a Parental Order.

<sup>46</sup> Above n 1 [12] (Hedley J).

<sup>47</sup> *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam).

<sup>48</sup> *ibid* [55] (Munby P).

<sup>49</sup> *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145.

<sup>50</sup> Above n 47 [58] (Munby P).

<sup>51</sup> *J v G* [2013] EWHC 1432 (Fam); *Re C (Parental Order)* [2013] EWHC 2413 (Fam).

<sup>52</sup> *In the matter of Z (A Child) (No 2)* [2016] EWHC 1191 (Fam).

utilise these instruments. In particular, the judgment does not acknowledge that the child, Z, was discriminated against because he was born to a single parent.<sup>53</sup> Instead, Munby J couches the judgment in the intended father's rights to respect for private and family life under Articles 8 and 14 of the ECHR.

The focus on the adult's rights rather than Z's, does not sit easily with the European Court of Human Rights' (ECtHR) approach in *Mennesson v France*.<sup>54</sup> In that case, France refused to register the intended parents as the twins' legal parents because the children were born as a result of a commercial surrogacy arrangement in California. The ECtHR unanimously held there had been no violation of the intended parent's Article 8 right.<sup>55</sup> However, the refusal to recognise the parent-child relationship left the children in a state of 'legal uncertainty' and undermined their identity within French society.<sup>56</sup> Therefore, the ECtHR concluded that the children's (but not the parent's) Article 8 right was violated. Although the decision is more child-centred than *Re Z*, it is questionable whether the parent's Article 8 right should have been disentangled from that of the twins. As Herring argues, 'it is impossible to construct an approach to looking at a child's welfare which ignores the web of relationships within which the child is brought up'.<sup>57</sup> Moreover, because supporting the child also means supporting their care-giver,<sup>58</sup> a truly child-centred 'relational' approach would have found that the parent's Article 8 right, in *Mennesson*, had also been violated. The declaration of incompatibility in *Re Z* is likely to catalyse much needed engagement with these children's rights issues by Parliament.

## V. Conclusion

The courts' increasingly permissive interpretation of section 54 may provide some relief from the effects of international arrangements. However, in order to centralise children's rights new surrogacy legislation is required. Unsurprisingly, there is increasing pressure for the law to change.<sup>59</sup> First, the motherhood and fatherhood provisions need to be re-examined because it is not necessarily in the best interests of the child for the surrogate and her spouse or civil partner to be the child's legal parents. Second, the entirety of section 54 HFEA 2008 requires reconsideration. Third, Parliament needs to consider how to regulate international commercial surrogacy and how best to resolve the conflicts of law that arise. The rewritten judgment offers an insight into how a children's rights interpretation of the rights to identity, nationality and respect for private and family life, within the CRC and the ECHR, can guide law reform in this area. As both the original and rewritten judgments emphasise, it is now up to Parliament to reform the law and ensure children's rights are at the centre of surrogacy law in the UK. The declaration of incompatibility issued in *Re Z* could now provide the catalyst for this process.

<sup>53</sup> Art 2 CRC.

<sup>54</sup> *Mennesson v France* (Application no 65192/11).

<sup>55</sup> *ibid* [102].

<sup>56</sup> *ibid* [97].

<sup>57</sup> J Herring, 'Farewell Welfare?' (2005) 27(2) *Journal of Social Welfare and Family Law* 159–71, 166.

<sup>58</sup> *ibid*.

<sup>59</sup> Above n 15. See also, C Fenton-Glynn, 'The Regulation and Recognition of Surrogacy under English Law: An Overview of the Case-law' (2015) 27 *Child and Family Law Quarterly* 83–96.

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**Family Division of the High Court  
(England and Wales)**

*Re X and Y (Foreign Surrogacy)*

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Bridgeman J:

This judgment, consisting of 35 paragraphs, is being handed down in public on 9 December 2008 and has been signed and dated, and I hereby give leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

1. X and Y are twin baby girls who are the subject of an application for a Parental Order pursuant to section 30 of the Human Fertilisation and Embryology Act 1990 (HFEA 1990). They are much cherished and loved by the applicants (whom I shall refer to as ‘Mr W and Mrs W’). Mr and Mrs W, with other routes to parenthood exhausted, entered into an international surrogacy arrangement with a Ukrainian surrogate who then conceived X and Y in IVF treatment using donor eggs and the sperm of Mr W. Until this court made the Parental Order sought by Mr and Mrs W in respect of X and Y these children were, as a result of the application of the laws of the Ukraine and England and Wales, parentless and stateless. This is the first application to come before the courts of England and Wales arising from an arrangement entered into by a British couple and a surrogate abroad. As such, it serves to highlight the extent to which the current statutory provisions fail to address the welfare, interests and rights of children born as a consequence of surrogacy arrangements.

2. Whilst Mr and Mrs W took all possible steps to secure reliable legal advice, such is hard to come by as a consequence of the prohibition upon the commercial negotiation of surrogacy arrangements in the current law which I outline later in my judgment. The couple entered into an arrangement with a married Ukrainian woman who was offering to carry a child as a surrogate for another. Terms were agreed, to which I shall return, as they are central to the question whether the current law permitted me to make the order with respect to X and Y that Mr and Mrs W sought. Under Ukrainian law, once the Ukrainian surrogate had delivered the babies to the couple, neither the Ukrainian surrogate nor her husband had any rights, duties, powers, authority or responsibilities with respect to the children. Indeed, it may be the case that under Ukrainian law the agreement was enforceable and

they could have been compelled to complete the bargain. Happily, in this instance, the adult parties have all been true to their word so the court is not concerned with a dispute between the adults involved over their parental rights and responsibilities. This is not a case of legal problems caused by deception or change of heart on the part of the surrogate mother (as in the matter of *N (a Child)* [2007] EWCA Civ 1053; *W v H (Child Abduction: Surrogacy)* [2002] 1 FLR 1008). It is the laws of England and Wales together with those of their country of origin, the Ukraine, that made these much loved babies, created by a partnership of five adults, legal orphans.

3. The Ukrainian surrogate and her husband have no responsibilities towards the babies to whom she gave birth, but neither does the Ukrainian State other than those of basic humanity such as placing the child in basic institutional care. Alarming, for a short while, State care of the babies was a genuine prospect given that Mr and Mrs W had no right to remain in the Ukraine once their temporary visa expired. X and Y are not Ukrainian citizens. They have no right to reside in the Ukraine. Under Ukrainian law, Mr and Mrs W are registered as parents on the babies' birth certificates and are their parents. Under Ukrainian law the girls are British nationals. Under English law they are not. Thus, the babies were not only rendered legal orphans they were also stateless. Abandoned by Ukraine law and not embraced by English law. Mr and Mrs W had no right to bring X and Y home, unless possibly Mr W could have sought leave to do so as putative father or relative of his biological children.

4. A small dose of common sense and humanity prevailed. DNA tests enabled Mr W to establish that he was the biological father of X and Y and the couple were given discretionary leave to enter in order to apply for a Parental Order. It requires little imagination to appreciate the unsettled start to these babies' lives. They are in the loving care of the couple who, in addition to the challenges of first-time parenting of twin babies, have had to deal with an extended stay in Ukraine away from their wider family, in the face of uncertainty over their ability to bring the babies home, arranging DNA testing, fearing whether they had complied with the law and the unknown consequences of having failed to do so.

5. With the babies in the care of the couple, interim orders were made under section 8 of the Children Act 1989 to enable them to continue to care for and take responsibility for the babies, pending a decision of this court.

6. In these proceedings, X and Y are represented by the Guardian, who is also the Parental Order Reporter. It is fortuitous that representation of the interests of X and Y has been secured. X and Y are not passive objects of adult choices nor property to be allocated. They are individuals with rights and interests which the law must protect; rights to be loved, cared for, nurtured, rights to an identity, to relationships, to a home, to be protected from harm (Michael DA Freeman, 'Taking Children's Rights More Seriously' (1992) 6 *International Journal of Law and the Family* 52–71, 56). Through these proceedings we have been able to assure the protection of the interests and rights of these two baby girls.

7. On 5 November 2008 I made the Parental Order sought with respect to X and Y, pursuant to section 30 of the Human Fertilisation and Embryology Act (HFEA 1990). The two issues to be determined before I could make the order were, first, whether the consent of the surrogate's husband was required and, secondly, whether I could retrospectively authorise the expenses paid to the surrogate.

8. Whilst of fundamental importance to X, Y, Mr and Mrs W, as the first case of an agreement between a British couple and a surrogate overseas to reach the courts, the issues raised are of wider significance. Given the importance of the issues raised by this case for the protection of the rights and interests of children born as a consequence of international surrogacy arrangements, I reserved my reasons to be handed down in writing in this judgment. English law renders surrogacy arrangements unenforceable (section 36 HFEA 1990). In the modern world, however, technology makes it easy to find advertised services overseas and international travel is common place such that the practice of surrogacy will continue and no doubt grow. Across the world there is a range of legislative approaches to the regulation of surrogacy: nations where there is no regulation and others where surrogacy is prohibited. Those who travel abroad to enter into a surrogacy arrangement have to comply with the laws of both the United Kingdom and those of their destination country. Children born as a consequence of such international agreements will be subject to two legal systems which may be incompatible or inconsistent, with alarming consequences for the children who are born and their families.

9. The law of England and Wales, found in the Surrogacy Arrangements Act 1985 (the 1985 Act) seeks to prevent domestic commercial surrogacy arrangements. Broadly based upon the proposals of the Warnock Committee (Warnock Report, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd 9314, (1984)), the Act was introduced as a panicked response to the birth of Baby Cotton (*Re C (A Minor) (Wardship)* [1985] FLR 846). The primary policy concerns of the legislation are to protect children from commodification and surrogate mothers from exploitation. Critical comment upon the practice of surrogacy often refers to the vulnerabilities of the participants. Here, it is the outmoded state of the current law, which has failed to grapple with the issues of international surrogacy, which placed Mr and Mrs W, X and Y into an uncertain legal, and hence, vulnerable position. We must not permit the rights of children to fall from view by focusing upon the enormous difficulties which the law has caused to this couple despite their best efforts to ascertain their legal obligations and comply with them.

10. Whilst criminalising commercial arrangements, the law does not prevent couples from entering into unenforceable surrogacy arrangements. Babies, the Warnock Committee emphasised, should not be born 'subject to the taint of criminality' (Warnock Report, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd 9314, (1984), 8.19); after all, the birth of a much loved baby, when all other avenues to parenthood have been exhausted, is to be celebrated. It is not a cause for criminalisation. However, drafters of the reactive 1985 Act thought that the legislation would discourage surrogacy, limiting its occurrence to altruistic agreements made between friends, siblings or other relatives with the consequence that 'the phenomenon of surrogacy [would] go away' (as explained by Michael Freeman, 'After Warnock—Whither the Law?' [1986] *Current Legal Problems* 33, 46). Instead, the practice has grown by crossing national borders. Surrogacy is an ethically controversial practice; international surrogacy raises further complex ethical issues which have not been exposed to full scrutiny or debate. Without meaning to question the integrity of couples who, after trying all the alternatives, find themselves denied the children they so desperately want to love and care for, judges are currently being placed in the difficult position of trying to reconcile implementation of the policy of legislation whilst also fulfilling our duties to protect the interests, welfare and rights of children

born through surrogacy arrangements. Thus judges are being asked to protect children that it was envisaged would, as a result of the legislation, rarely exist, or not exist at all. If international surrogacy is to be an acceptable road to parenthood, a matter upon which I express no view, it seems to me unarguable that the full range of issues needs to be subjected to rigorous examination and debate. It may be that a solution demands an international response such as with the conventions on inter-country adoption and international child abduction. That prospect does not diminish our responsibility to our nation's children.

11. X and Y have legal rights. Notably they each have a right to respect for their private and family life, as protected by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), within Schedule 1 to the Human Rights Act 1998. In addition, in 1991, the UK ratified the United Nations Convention on the Rights of the Child (UNCRC) and courts must interpret ECHR rights in harmony with its key principles. While provisions of the UNCRC are not directly incorporated into English law and consequently not enforceable, I bear in mind throughout this judgment the rights therein to nationality (Article 7), to identity (Article 8) and to consider the best interests of these children as a primary consideration (Article 3). The state through this court thus has obligations to these children when deciding the legal relationships which X and Y will have.

12. The effect of section 27 of the HFEA 1990 is clear. Under English law, at birth and until the making of the Parental Order, the Ukrainian surrogate was the mother of X and Y. Mrs W is not biologically related to the children; she was not their legal mother pursuant to section 27. At that time, and until the making of the Parental Order, Mrs W was not the children's legal mother although she was (and still is) their social and psychological mother.

13. Who is the father of the twins is determined by section 28 of the HFEA 1990. The Guardian contends that, as the Ukrainian surrogate was married and her husband agreed to the arrangement, the effect of sections 28(2) and (4) was to make the Ukrainian surrogate's husband the father of the children. Miss Lucy Theis QC, on behalf of Mr and Mrs W, argued that these subsections should not be applied extra-territorially and, consequently, Mr W, as biological father, is a legal parent of X and Y.

14. Sections 27 and 28 of the HFEA 1990 are, however, directed at the parental status of adults undergoing fertility treatment without the additional involvement of a surrogate mother gestating the children. The HFE Bill initially addressed surrogacy only to specify that surrogacy arrangements are unenforceable (which became section 36). A further provision was inserted late into the Bill as a consequence of a complaint by a couple to their MP that they were required to adopt their 'own' child born following a surrogacy arrangement. Section 30 was introduced into the law to permit adults commissioning a surrogacy arrangement to secure the status as parents of any children born in such arrangements. The detailed requirements, which must be fulfilled before the court can make a Section 30 Parental Order, are considered below, taking each, as it applies here, in turn.

15. The applicants are, as they are required by section 30(1) to be, a married couple.

16. As proven by the DNA test performed to establish paternity before leave was given for the babies to be brought into the country, Mr W is the biological father of X and Y, as required by section 30(1)(b). If he were not, I could not make a Parental Order even if to do so were, as in this case, manifestly in the interests of the children.

17. Mr and Mrs W have made the application within six months of birth of X and Y, (section 30(2)).

18. Mr and Mrs W are domiciled in England and Wales and the temporary leave they have been given has enabled X and Y to have their home with them here, as required by section 30(3).

19. Mr and Mrs W are both over the age of 18, thus fulfilling section 30(4).

20. The consent of the Ukrainian surrogate was given six weeks and thus not 'less than six weeks' after the birth of X and Y, thus complying with sections 30(5) and (6).

21. Thus the majority of the requirements of section 30 are fulfilled in this case. The first issue which remains to be determined is the matter of the consent from the surrogate's husband. Section 30(5) provides as follows:

The Court must be satisfied that both the father of the child (including a person who is the father by virtue of Section 28 of this Act), where he is not the husband, and the woman who carried the child have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

Who, then, in law is the father of the children? That is for this court to determine by application of the provisions of the HFEA 1990, noted above. There is nothing to suggest that Parliament intended the law to apply differently to husbands of surrogates who are of foreign domicile. Indeed, there is nothing to suggest that it even considered the issue.

22. The plain meaning of the provisions of the HFEA 1990 is that the Ukrainian surrogate's husband is the legal father of the babies. In a case such as this, the law thus permits the surrogate's husband to withhold consent and prevent a parental order being granted to a commissioning couple who wish to take responsibility and care for a child born into a surrogacy arrangement, whilst the laws of his own country relieve him of any responsibility for the children. This is another way in which the current law fails to protect the rights of children who are born in such circumstances. Happily, both the Ukrainian surrogate and her husband have given their consent to the making of an order. The state of the law thus perchance presents no obstacle to the protection of the interests of these babies.

23. The question is whether the obstacle provided by section 30(7) does so. Section 30(7) provides:

The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or wife for or in consideration of—

- (a) the making of this order,
- (b) any agreement required by subsection (5) above,
- (c) the handing over of the child to the husband and the wife or
- (d) the making of any arrangements with a view to the making of the order unless authorised by the court.

24. I do not need to go into the detail of the payments agreed between the couple and the Ukrainian surrogate, other than to state that, whilst recognising that the Ukrainian surrogate incurred expenses as a consequence of the pregnancy, the sums paid were significant amounts exceeding reasonable expenses. Therefore, the court must authorise

these payments if a parental order is to be made conferring the legal status as parents upon Mr and Mrs W. This is not a new issue for the courts arising only as a consequence of the international nature of the agreement. The courts have been faced with this issue on a number of previous occasions. The case law permits me to give retrospective authorisation to payments which go beyond reasonable expenses (*Re C (Application by Mr and Mrs X under Section 30 of the Human Fertilisation and Embryology Act 1990)* [2002] 1 FLR 909; *Re Q (Parental Order)* [1996] 1 FLR 369; *Re Adoption Application (Payment for Adoption)* [1987] 3 WLR 31). The Surrogacy Arrangements Act 1985 sought to prohibit commercial surrogacy in which organisations profited but did not prohibit informal arrangements in which reasonable expenses were paid. Section 30(7) envisages that payments may have been made which exceed reasonable expenses but that the requirement for authorisation by the court will prevent those who enter into such agreements from arrangements exploitative of either the commissioning couple or the surrogate.

25. Regulations require me to place as my first consideration the ‘need to safeguard and promote the welfare of the child’ (Parental Orders (Human Fertilisation and Embryology) Regulations 1994, (SI No 2767), Sch 1(1)(a)). Article 3 of the UNCRC goes further to provide that with respect to all actions concerning children undertaken by social welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child is a ‘primary consideration’. The Parental Order Reporter informed the court of the couple’s commitment to the children with whom they have bonded, their parenting capacities and appreciation for the long term well-being of the children and of the importance of being open about their genetic and gestational origins. The lifelong welfare of the babies so very clearly rests in the loving care of Mr and Mrs W.

26. It is important to respect the children’s rights under the ECHR, including the Article 8 right to respect for a private and family life. X and Y are siblings. X and Y have a family life with Mr and Mrs W; they are biologically related to Mr W. If an order is not made, the fact of that family life will be interfered with as it will not be recognised in law. If an order is not made X and Y will have no legal connection with anyone (except each other). Article 8 imposes a positive obligation upon the State to ensure that *de facto* relationships are recognised and protected by law (*Marckx v Belgium* (1979–80) 2 EHRR 330, [31]). In circumstances such as these it is a Parental Order which transforms the factual relationship between X and Y and Mr and Mrs W into a legal relationship. A Parental Order will not only ensure that the rights and responsibilities to make decisions about the upbringing of X and Y will rest with their intended parents who have, since birth, taken loving care of them; importantly, it will give to X and Y the security of lifelong belonging in relationship with each other in their family unit. For that reason, the alternatives within the Children Act 1989 of a residence order or special guardianship order, both of which would confer parental responsibility upon Mr and Mrs W but not the legal status as parents, fail to protect the rights of X and Y.

27. But that is not the end of the matter. I must also have regard to the principles of the UNCRC in my interpretation of Article 8 of the ECHR. Under Article 7 of the UNCRC every child has a right to be ‘registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.’ Under Article 8 of the UNCRC the state has a duty to ‘respect the right of the child to preserve his or her identity, including nationality, name

and family relations as recognised by law without lawful interference.’ In my judgment, the current law does not fulfil these international obligations. However, recognising that as a guiding principle of the UNCRC, Article 3 requires the interpretation of all of the Convention rights in accordance with the best interests of the child, in my judgment the starting point must be to identify the legal parents of X and Y. Mr W is, as noted above, the genetic father of X and Y. Together Mr and Mrs W are their social and psychological parents. It is these latter relationships which are key to the current and future wellbeing of these children and which should be given legal recognition.

28. As noted at the beginning of my judgment, the children enjoy the protection of their legal rights by virtue of the Human Rights Act 1998 (HRA 1998). Legislation must be read in such a way as to give effect to the provisions of the Human Rights Act 1998 and section 3 of the HRA 1998 requires this court to have regard to the intention of Parliament when considering the interpretation of legislation and furthermore to adopt any possible construction of legislation compatible with and upholding convention rights (*R v A* [2001] UKHL 25 [44]; *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [41–51]). The primary purpose of section 30 is to enable couples who enter into a surrogacy agreement to become the legal parents of the child so that they do not have to adopt the child to whom one or both of them are genetically related (*Re W (Minors)(Surrogacy)* [1991] 1 FLR 385).

29. Reading Article 8 of the ECHR and Articles 3, 7 and 8 of the UNCRC in order to give a purposive interpretation to section 30 led me to the conclusion that the law should recognise the relationship between X and Y and Mr and Mrs W. Therefore on 5 November I authorised the payment made to the Ukrainian surrogate and made the Parental Order sought. The babies now have legal parents. The couple can now apply for them to have British citizenship.

30. As noted above, X and Y have their family life with Mr and Mrs W who, as a consequence of the Parental Order, are now their legal parents. But Article 8 of the ECHR requires States to respect not only family life but also private life, including identity. Article 8 of the UNCRC, as noted above, places obligations upon the State to ‘respect the right of the child to preserve his or her identity’. Identity is a complex concept which is not defined in law. Samantha Besson has argued that the ‘right to know one’s *origins* amounts to the right to know one’s parentage, ie, one’s biological family and ascendance, and one’s conditions of birth. It protects each individual’s interest to identify where she comes from’ (Samantha Besson, ‘Enforcing the Child’s Right to Know her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the Convention on Human Rights’ (2007) 21 *International Journal of Law, Policy and the Family* 137–59, 140). The personal history of the twins, X and Y, includes their birth to a Ukrainian surrogate who conceived them using donated eggs. The existence of X and Y is the result of the combined actions of Mr and Mrs W, the egg donor and the Ukrainian surrogate (and the non-objection of her husband). I am certain that Mr and Mrs W, who have demonstrated such enormous care in their approach to the journey to parenthood and capacity to care since the arrival of X and Y, despite being first time parents confronted by some enormous complications, will demonstrate the same care in their consideration of whether, when and how to provide the children with information about their origins as an integral part of their upbringing. X and Y certainly have an interest in knowing their origins. Whether they are told is currently up to their legal parents who themselves enjoy Article 8 rights to respect for their private

life. The arrangement with the Ukrainian surrogate has blossomed into friendship so, without affecting the security of this family, she may well continue to be part of their lives; no doubt, the extent to which she does so will be determined by all of these responsible adults according to the best interests of the children. It goes without saying that all of us find our lives enriched by healthy relationships, of differing degrees of care and affection, with a wide variety of people. This family are, like others before them, and no doubt many more to follow, entering uncharted waters in navigating the relationships of a number of adults with these children. There are institutions and professionals available to advise, support and guide should that be necessary. The right to respect for a private life includes being able to establish details of an individual's identity (*Gaskin v United Kingdom* (1990) 12 EHRR 36 [39]). I consider there is a further question, upon which I did not hear argument and thus must be fully examined elsewhere, as to whether the children's right to respect for a family life includes legal recognition of the place of the surrogate in their family. As has occurred with adoption and donor conceived children, the complex questions of origin and identity that can arise for children born following lawful surrogacy arrangements need full, evidenced, examination and debate, so all competing rights can be balanced, before clarification in law.

31. Criticism of the highly unsatisfactory state of the current law of surrogacy has already been made by highly experienced family court judges, distinguished review committees and academic commentators. In a recent case, a very experienced family court judge, McFarlane J, was prompted by the circumstances of the case before him to state, 'given the importance of the issues involved when the life of a child is created in this manner, it is questionable whether the role of facilitating surrogacy arrangements should be left to groups of well-meaning amateurs' (*Re G* [2007] EWHC 2814 [29]). And the judge took the unusual step of ensuring that a copy of his judgment was sent to the Minister of State for Children, Young People and Families. A decade ago, the Brazier Review recommended reform of the law including a new Surrogacy Act, registration of Surrogacy Agencies and a Code of Practice which placed the welfare of the child as the paramount concern of all involved (*Surrogacy: Review for Heath Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team*, Margaret Brazier, Alastair Campbell, Susan Golombok, 1998, Cm 4068, [Executive Summary, 5–7]).

32. The chair of that review, Margaret Brazier, concluded her subsequent article 'Regulating the Reproduction Business?' (1999) 7 *Medical Law Review* 166–93, with the astute observation, 'the international ramifications of the reproductive business may prove to be a more stringent test of the strength of British law than all the ethical dilemmas that have gone before' (at 193). Furthermore, European and international law makes us now much more attuned to the rights of children than we were in the twentieth century. The current law on surrogacy puts the judiciary in the uncomfortable position of ignoring the policy of the existing legislation in an attempt to fulfil the duty of the State to protect the welfare, interests and rights of children created through assisted reproductive technology and international agreements between adults. I considered it my duty to do so to protect the rights of these twin baby girls.

33. In recent Parliamentary debates on the Human Fertilisation and Embryology Bill, the government said that it was considering reviewing the law of surrogacy. The Act to which Royal Assent was given on 13 November makes very minor amendments to the terms of

section 30 which are not yet in force. I note that these amendments do not require an application for a Parental Order. Without these proceedings there would have been no consideration of the welfare of these children who, furthermore, would have remained parentless. Not all who enter into surrogacy arrangements are as well informed and careful to understand the legal position as these parents. As is evidenced by this case, the circumstances in which children are born following international surrogacy arrangements raise complex issues of parenting, nationality, origins, identity and relationships. There are issues of the provision of information, legal advice, immigration, registration and of the extra-territorial application of any laws which are not addressed in the current legal framework. It is not for the judiciary to tell Parliament what to do. But we cannot deny that the current law neglects the interests and rights of children which should surely be at the centre of legislation on this matter.

34. X and Y who are, I must say, delightful babies, are here due to the relentless efforts of Mr and Mrs W and the honourable conduct of the Ukrainian surrogate who carried them. It fell to this court to steer a way through the legislation whilst protecting the rights, interests and welfare of these children. X and Y are at the very beginnings of their journey through life, a start which, through no fault of any of the parties, has been unsettling for all concerned; I share the hope of Mr and Mrs W that X and Y can now enjoy a more stable and secure future.

35. I reserve my final comments for X and Y in the hope that, at the right time, your parents will show you the judgment of this court which now forms part of your personal history. I want you to know what guided me in making my decision. The law which I have had to apply is very old and was passed without any consideration of the circumstances into which you came into this world. So I thought very carefully about what was best for you and also the rights which the law protects. I could see that your parents, who had tried so hard to become your parents, even when the law and the British authorities caused them problems, are honest, considerate and loving people. I could see that they were already taking good care of you. I hope that my decision has enabled your parents to care for you in the way they intended and that you know, and are proud, of the contributions of both the donor and the surrogate to what makes you both the unique individuals you are.