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

Case No: RM14P01215

Neutral Citation Number: [2015] EWHC 2080 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2015

Before:

MRS JUSTICE THEIS

- -

Between:

A and B	**Applicants**
- and -	
X and Y	**1 and 2nd Respondents**
- and -	
C & D (Through their Children's Guardian Mrs Lillian Odze)	**3rd and 4th Respondents**

- -
- -

Ms Barbara Connolly Q.C. & Mr Edward Bennett (instructed by **Dawson Cornwell**) for the **Applicant A**
Dr Bianca Jackson (instructed by the Bar Pro Bono for the **Applicant B**
Ms Penny Logan (of **Cafcass Legal)** for the **3rd and 4th Respondents**

Hearing date: 17th June 2015
Judgment date: 17th July 2015

- -

Judgment

Mrs Justice Theis DBE:

Introduction

1. Once again the court is being asked to deal with the legal consequences for two very young children following a foreign surrogacy arrangement. Since their birth they have been cared for by either, or both, the commissioning parents. Yet, subject to the outcome of this application, their legal parents are the surrogate mother and her husband, who live in India and have had no involvement with the children since their birth.

2. The commissioning parents, A and B, (the applicants) have applied for a parental order in relation to two girls C and D, twins born in December 2011, now 3 years of age. The surrogate mother and her husband are the respondents to the application, although they have taken no active part in the proceedings.

3. The children were made parties and have been represented through their Guardian, Mrs Odze, by Ms Logan of Cafcass Legal.

4. This case raises important issues as to the extent the court is able to purposively interpret or 'read down' the criteria in section 54 Human Fertilisation and Embryology Act 2008 (HFEA 2008) following the decision of Sir James Munby P in *Re X (A Child) (Parental Order: Time Limit) [2014] EWHC 3135 (Fam).*

5. The particular matters that need to be addressed in this case are:

    (1) Whether the court should permit the application to proceed, bearing in mind the application was made in November 2014, 17 months after the expiry of the six month requirement in s 54 (3):

    (2) Whether the applicants satisfy the requirement in s 54 (4) (a) that the child's home must be with the applicants at the time of the application and the making of the order. The applicants were living separately at the time they made the application in November 2014 and at the time the court was considering whether to make the parental order:

    (3) Whether one of the applicants satisfies the requirement in s 54 (4) (b) that either, or both, of the applicants must be domiciled in the United Kingdom at the time of the application and the making of the order. Although both applicants were born abroad they are British Citizens. They both assert this jurisdiction is their domicile of choice:

    (4) Whether there is sufficient material for the court to be satisfied the consent to the making of the parental order given by the surrogate mother and her husband has been given freely, unconditionally and with full understanding of what is involved as required by s 54 (6): and

    (5) Whether the limited information the court has available about the payments that were made, in particular the level of payments to the surrogate mother

other than for expenses reasonably incurred, prevent the court from authorising the payments pursuant to s 54 (8).

6. A striking feature of this case is the lack of knowledge the applicants had about the need for a parental order to secure their legal position in this jurisdiction in relation to children born as a result of the surrogacy arrangement. This observation is not meant as any criticism of the applicants. They had diligently researched the position on the internet prior to entering into the surrogacy agreement with the clinic in India.

7. B told me in evidence he had drawn up a list of things that needed to be done and ticked them off as he did them. Despite his research he was not aware of the need for a parental order. Their names were on the Indian birth certificates and he understood that was sufficient to secure their status here in relation to the children.

8. A told me she had nagging doubts about whether the Indian birth certificates was enough. Upon her return here she was very open with all professionals who came into contact with the family (for example, general practitioner and health visitor) about the circumstances of the children's birth. No-one suggested to her the need for a parental order. It was only when it was raised by a family support worker in the summer of 2014 that she conducted further internet research and contacted a specialist solicitor, Natalie Gamble. She was advised then that she was too late to make a parental order application, as the six month period had expired. At that time, that was in accordance with the reported cases. The decision in *Re X (ibid)* published in October 2014 permitted an application to proceed even though it was made after the expiry of six months. The applicants made their application in November.

9. I recognise that when the applicants conducted their initial research in 2008 there may have been limited information available on the internet. That was probably still the position in 2011, when they entered into the surrogacy arrangement. In their submissions, the advocates for the parties suggested that there remains some confusion amongst the general public about the need for a parental order.

10. The legal position is clear. Unless a parental order is made the legal mother of any child born following a surrogacy arrangement entered into here or abroad is the surrogate mother who gives birth to the child, she will also have parental responsibility (s 33 HFEA 2008). If the surrogate mother is married her husband is the legal father of the child, even though he may have no biological relationship with the child (s35 HFEA 2008). If the surrogate mother has a civil partner that partner will be the child's legal parent (s 42 and 44 HFEA 2008). If the surrogate mother is unmarried, does not have a civil partner, and the commissioning father has a biological connection with the child he is the legal father, but he may not have parental responsibility. That usually depends on whether his name is on the birth certificate or he and the child's mother have made an agreement for him to have parental responsibility for the child.

11. A parental order, if made, results in the commissioning parents becoming the child's legal parents and extinguishes the surrogate mother's status as the child's legal mother, together with her husband and any other legal parent. Importantly, such an order gives the commissioning parents parental responsibility.

12. Without a parental order the commissioning parents will not be the legal parents of the child they have probably cared for since birth, and whom the child regards as their de facto parents. Whilst this in itself may not affect their ability to provide day to day care for the child, it may have long term consequences, for example affecting inheritance rights. If there are no other orders in place the commissioning parents may not have parental responsibility, which may affect their ability to take certain steps on behalf of the child (for example, apply for a passport).

13. There is no obligation on commissioning parents who have children following surrogacy arrangements to make an application for a parental order; it is entirely a matter for them. In reaching such a decision it is clearly important for the child that the decision is an informed one. My fear is, in many cases, it may not be so.

14. This court, which exercises jurisdiction on matters relating to children's welfare, is anxious to ensure the legal consequences of surrogacy arrangements are properly understood by the commissioning parents. I am not concerned about the children who are the subject of parental order applications, but am more concerned about those who are not. There is a real risk that those who care for children born as a result of these arrangements may be inadvertently sleepwalking into an uncertain legal future for their much wanted child. That uncertainty is very likely to be detrimental to that child's long term welfare. I sincerely hope publication of this judgment will assist people who may be in that situation.

15. The procedure for making an application is relatively straightforward. Many applicants do not have legal representation, some obtain initial legal advice and then represent themselves. After issuing the application the court will appoint a Parental Order Reporter who will visit the applicants and the child and make his or her own enquiries and assessment about the criteria under s 54 and the welfare considerations the court has to consider in section 1 Adoption and Children Act 2002. In the majority of cases there will be a first directions hearing, when the court will raise with the applicants any further information or evidence that is required to satisfy the s 54 criteria, direct the applicants to file a statement addressing those matters and for the Parental Order Reporter to file a report. This is with the intention of the second hearing being the final hearing, when the court will expect to be in a position to make a parental order.

16. For the reasons set out below, I am going to make a parental order in this case. This is supported by Mrs Odze.

17. Before turning to consider the matter in more detail I would like to express the court's gratitude to the advocates in this case. Both parties have the benefit of experienced legal representation, all of whom acted pro bono. No doubt the applicants share the courts appreciation of the expertise that has been available. It would have been extremely difficult for them to navigate the complex issues in this case without that assistance. Both Mr Bennett and Dr Jackson represented them at the fact finding hearing pro bono. Mr Rogerson, A's solicitor, has done all he can, using his considerable expertise in this area, to ensure all the relevant information is before the court. Ms Logan has represented Mrs Odze with her customary skill and the report provided by Ms Odze is a detailed and perceptive analysis of the issues in the case.

Background

18. B and A, the commissioning parents, were born in 1966 and 1967 respectively. They are now 49 and 47 years. They both came to live in this jurisdiction with their respective families when they were very young, B when he was 4 and A when only a few months old. They have both remained here since then, as have their wider families, and have no intention of living in any other jurisdiction.

19. They married in April 1992. Following difficulties in conceiving a child and having explored the options they decided to enter into a surrogacy arrangement with the surrogate mother through a clinic in India, The Origin International Fertility Centre (the 'Clinic'). The surrogate mother was married at the time. She conceived using eggs donated from a third party and B's donor sperm.

20. C and D were born in December 2011 in India. They returned to the United Kingdom on British Passports in March 2012.

21. There were difficulties in the parents' relationship and they separated, albeit remaining in the same home, in April 2012. As the result of an alleged argument B left the family home in May 2014 and A obtained a non molestation order from a District Judge on 12 May 2014.

22. On the 27 June 2014 the court continued the injunctions, directed a First Hearing Dispute Resolution Appointment (FHDRA) on 5 August 2014 and directed a Cafcass safeguarding letter.

23. At the hearing on 5 August 2014 issues concerning s 54 were first raised and the matter was transferred to be heard by a High Court Judge.

24. Russell J considered the matter on 2 September 2014. She made the children wards of court, directed contact 3 times a week and made other consequential directions. When the matter returned before her on 8 October 2014 she made comprehensive directions, including joining the children as parties and timetabling the matter for a fact finding hearing before me.

25. Pauffley J considered interim contact in November.

26. I first dealt with the case in January 2015 and have retained judicial continuity since then.

27. I heard the oral evidence of the parties on 13 and 20 March and gave judgment on 20 April 2015. That judgment is reported at [2015] EWHC 1059 (Fam). In that judgment I found the majority of the allegations made by A against B were not established to the required standard.

28. On the ground the applicants have remained living separately. A and the children remain in the jointly owned matrimonial home. B has been in rented accommodation. Since September 2014 he has been having regular contact with the children, this has been observed by Mrs Odze who supports it continuing. The current arrangement is he sees the children every Thursday and 3 weekends out of four (but not overnight). He

would like the girls to stay overnight, but recognises his accommodation is not suitable. By agreement between the applicants he took the girls to stay in a hotel in May. The applicants have been able to agree a framework of future contact, supported by mediation and attendance at a Separated Parents Information Programme (SPIP). With the assistance of Mrs Odze I am cautiously optimistic that the applicants will be able to reach an agreement over the next few months.

29. B and A have filed statements detailing the circumstances surrounding the surrogacy arrangement. As is often the case, and particularly so here due to the passage of time, the information that is available to the court is not always as clear as it could be.

30. Two of the matters that have caused this court particular concern have been the issue of consent and payment.

31. Very recently the Clinic had made arrangements for the surrogate mother and her husband to attend the clinic and sign documents purporting to give their consent to the parental order being made. They did not sign the prescribed Form A101A but a separate agreement, which the court can consider (pursuant to rule 13.11 (1) Family Procedure Rules 2010 (FPR)).

32. The separate consents signed individually by the surrogate mother and her husband on 26 May 2015 were translated into Marathi and were notarised (in accordance with rule 13.11 (4) FPR). The signed agreements make it clear that they understand B and A wish to be recognised as the legal parents of the children and if a parental order is made, the person signing the consent will no longer be treated as a parent. The agreement confirms that the agreement is given unconditionally and with full understanding of what is involved. The covering email from the Clinic confirms that the surrogate mother and her husband were given a copy of the parental order application as well.

33. In the email exchanges with the Clinic and Mr Rogerson concerning the issue of payments for the extra work this has entailed for the Clinic there is reference to payments to the surrogate mother and her husband. It is clear from the emails and the oral evidence of B that payments made to the Clinic for this extra work totalled Rs 155,000 (about £1500). Rs 130,000 was paid to the Clinic prior to the signing of the documents and a payment of Rs25,000 was paid after the documents had been signed. This later payment was less than the sum the Clinic had originally requested as a payment for the surrogate and her husband.

34. Ms Logan in her written submissions rightly raised the question as to whether the consent given was conditional on any payment being made to the surrogate and her husband. Having considered the emails and the oral evidence of B I am satisfied the consent was not conditional on any payment being made. It is clear from B's evidence the sums sent for the surrogate and her husband were sent after they had signed the consents and there is no evidence to suggest that such consent was subject to that payment being made. Having heard the evidence of B Ms Logan did not pursue that point.

35. Turning to the question of payments. The applicants initially found the Clinic through an agent, after that they dealt direct with the Clinic. The total payments made by the applicants to the Clinic were $25,870 (about £16,500). All payments were made to the

Clinic, they made no payments direct to the surrogate mother or her husband and had no details as to precisely what payments were made to them by the Clinic. In his statement in January 2015 B stated *'We were never told of the distribution of the costs but believe without any proof the surrogate got approx. $2,500 (£1650)'.*In his oral evidence he said this figure was from a newspaper article he had seen when they were in India. He said he had no contact with the surrogate and was informed by the Clinic that surrogates entered into these arrangements to help fund education for their children.

36. In her oral evidence A said she had met the surrogate mother after the children's birth. The children had been born by caesarean and the Clinic provided post procedure support for the surrogate mother for 1 ½ weeks. She saw the surrogate mother with the lead clinician for the Clinic. A said they were together for about 15 minutes, A wanted to thank her for what she had done, she said they hugged, the surrogate asked if the children were healthy and said they were a precious gift. A spoke in Hindi, she said the surrogate understood some Hindi but the clinician spoke Marathi and was able to translate. She did not see her again although she was told by the Clinic that the surrogate mother had written her a letter but A has not received it. A said when she got married her mother gave her a sari which was a traditional gift in the expectation she would wear it when she had children. She said she gave that sari to the surrogate mother and wanted to give her some money (about £200). The Clinic told A the surrogate mother accepted the sari, but refused the payment.

Legal Framework

37. The primary application I have before me is the joint application by B and A for a parental order. In order to make such an order the applicants have to satisfy the court that the criteria in s 54 are satisfied.

38. Section 54 provides

"Parental orders
(1) On an application made by two people ("the applicants"), the court may make an order providing for a child to be treated in law as the child of the applicants if –

(a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,

(b) the gametes of at least one of the applicants were used to bring about the creation of the embryo, and

(c) the conditions in subsections (2) to (8) are satisfied.

(2) The applicants must be –

(a) husband and wife,

(b) civil partners of each other, or

(c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.

(3) Except in a case falling within subsection (11), the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born.

(4) At the time of the application and the making of the order –

(a) the child's home must be with the applicants, and

(b) either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man.

(5) At the time of the making of the order both the applicants must have attained the age of 18.

(6) The court must be satisfied that both –

(a) the woman who carried the child, and

(b) any other person who is a parent of the child but is not one of the applicants (including any man who is the father by virtue of section 35 or 36 or any woman who is a parent by virtue of section 42 or 43),

have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

(7) Subsection (6) does not require the agreement of a person who cannot be found or is incapable of giving agreement; and the agreement of the woman who carried the child is ineffective for the purpose of that subsection if given by her less than six weeks after the child's birth.

(8) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of –

(a) the making of the order,

(b) any agreement required by subsection (6),

(c) the handing over of the child to the applicants, or

(d) the making of arrangements with a view to the making of the order,
unless authorised by the court.

(9) For the purposes of an application under this section –

(a) in relation to England and Wales, section 92(7) to (10) of, and Part 1 of Schedule 11 to, the Children Act 1989 (c. 41) (jurisdiction of courts) apply for the purposes of this section to determine the meaning of "the court" as they apply for the purposes of that Act and proceedings on the application are to be "family proceedings" for the purposes of that Act,

(b) in relation to Scotland … , and

(c) in relation to Northern Ireland …

(10) Subsection (1)(a) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination.

(11) An application which –

(a) relates to a child born before the coming into force of this section, and

(b) is made by two persons who, throughout the period applicable under subsection (2) of section 30 of the 1990 Act, were not eligible to apply for an order under that section in relation to the child as husband and wife,
may be made within the period of six months beginning with the day on which this section comes into force."

39. In *Re X* at paras 15 – 17 the President describes the lack of detail as to the underlying policy or rationale for the six month time limit in s 54 (3).

40. In his analysis in *Re X* at paras 52 – 55, in the context of s 54 (3), the President concluded that given the importance of a parental order, with its consequences stretching many, many decades into the future it was unlikely Parliament intended an application outside the six month time limit was fatal to the application. He assumes that Parliament intended a sensible result. At para 55 he states

‘*Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe section 54(3) as barring forever an application made just one day late is not, in my judgment, sensible.’*

41. He continues at paras 56 – 61

56. I have considered whether the result at which I have arrived is somehow precluded by the linguistic structure of section 54, which provides that "the court may make an order ... if ... the [relevant] conditions are satisfied." I do not think so. Slavish submission to such a narrow and pedantic reading would simply not give effect to any result that Parliament can sensibly be taken to have intended.

57. I conclude, therefore, that section 54(3) does not have the effect of preventing the court making an order merely because the application is made after the expiration of the six month period. That is a conclusion which I come to, without reference to the Convention and on a straightforward application of the principle in Howard v Bodington *(1877) 2 PD 203.*

58. If for some reason that is wrong, if to go that far is in truth to take a step too far, the same conclusion is, in my judgment, amply justified having regard to the Convention. The two key authorities here are the decision of Theis J in A v P (Surrogacy: Parental Order: Death of Applicant) *[2011] EWHC 1738 (Fam), [2012] 2 FLR 145, and the later decision of the Supreme Court in* Pomiechowski v District Court of Legnica, Poland and another *[2012] UKSC 20, [2012] 1 WLR 1604. Although, as I have pointed out, Theis J founded her analysis on Article 8, whilst the Supreme Court's analysis was based on Article 6, the reasoning in both cases is fundamentally the same: the statute must be 'read down' in such a way as to ensure*

that the "essence" of the protected right is not impaired and that what is being protected are rights that are "practical and effective" and not "theoretical and illusory."

59. I agree entirely with Theis J's powerful and compelling reasoning. Her focus was on section 54(4)(a), but in my judgment her reasoning applies mutatis mutandis with equal force to section 54(3).

60. I add two things. First, I draw attention to the fact that Theis J was prepared to read down – and in my judgment correctly prepared to read down – section 54(4)(a) to enable her to make a parental order after one of the commissioning parents had died notwithstanding that section 54(4)(a), in contrast it may be noted to section 54(3), seemingly requires the relevant condition to be satisfied both "at the time of the application" and "at the time of … the making of the order." If that degree of 'reading down' is permissible in relation to section 54(4)(a) – and Theis J held that it was, and I respectfully agree – then the lesser degree of 'reading down' required in relation to section 54(3) is surely a fortiori.

61. The other point is this. Theis J focused on that aspect of Article 8 which protects "family life", but Article 8 also protects "private life", and 'identity', on which she appropriately laid stress, is an important aspect of "private life". So, any application for a parental order implicates both the child's right to "family life" and also the child's right to "private life". The distinction does not matter in the circumstances of the present case (see further below) but I make the point because it is, I suppose, possible to conceive of a case where, on the facts, it might be more difficult or even impossible to demonstrate the existence of "family life."

62. Having got thus far in the analysis, the remaining question is whether in the present case the commissioning parents are to be allowed to pursue an application made some two years and two months after X was born. In my judgment, they are.

He then went on to consider the facts of that case and made a parental order.

Submissions of the parties

42. Sections 54 (1), (2) and (5) are satisfied.

(1) The biological connection with one of the applicants, in this case B, has been established by DNA testing. The surrogate mother has confirmed in the surrogacy agreement that she carried the children. Section 54(1) is thus satisfied.

(2) The applicants' marriage certificate is in the papers. Neither of them have commenced divorce proceedings (although there is some suggestion A may have done with her previous solicitors but no decree has been granted); so s.54(2) is complied with.

(3) Both applicants are over eighteen years of age as verified by their passports in accordance with s.54(5)

43. In relation to the requirement in s 54 (3) and (4) (a) I am invited to adopt the guidance given by the President in *Re X* and apply the same principles in relation to section 54 (4) (a). It is submitted I should adopt a purposive interpretation of the requirement that at the time of the application and the making of the order the child's '*home must be with the applicants'* and having regard to Article 8 the court is able to 'read down' the statutory provision in order to construe it in such a way to enable it to comply with the Convention.

44. In her excellent written submissions Dr Jackson refers to the starting point in construing the statutory requirement following the approach identified in *Howard v Bodington* (1877) 2 PD 203 and reiterated in both *Newbold and Others v Coal Authority [2013] EWCA Civ 584* and *Re X (ibid).* Dealing with each point in turn:

(1) The statutory subject matter;
Whilst the HFEA 2008 regulates a number of areas of assisted reproduction s 54 is specifically to enable commissioning parents to become to become the legal parents of children that are already their intentional and psychological (and possibly biological) child.

(2) The background;
As described by the President at paragraph 16 in *Re X* section 30 of the HFEA 1990 was introduced into the Act at the last minute as a result of the issues raised in *Re W (Minors)(Surrogacy) [1991] 1 FLR 385.* That case concerned a surrogacy arrangement where the local authority issued wardship proceedings insisting that the commissioning parents issue adoption proceedings. Section 30 allowed married couples to obtain parental rights for their child born as a result of a surrogacy arrangement without relying on adoption law providing certain criteria were met. The HFEA 2008 extended the categories of applicants who can make parental order applications, but did not change the other requirements for a parental order to be made.

(3) The purpose of the requirement (if known);
Despite the researches of counsel, as with s 54 (3), there is no specific reference to the underlying purpose of the requirement in s 54 (4) (a).

(4) The importance of the requirement;
The fact of the inclusion of the requirement in s 54 (4) (a) in both section 30 HFEA 1990 and section 54 HFEA 2008 means that it has importance as one of the criteria for the granting of a parental order. Its importance needs to be balanced against the overall purpose of the section to secure the legal status of the children of a de facto family, where it is in their best interests to do so.

(5) Its relation to the general object intended to be secured by the Act;
The general object of section 54 is to extinguish the legal relationship between the surrogate mother (and her civil partner or husband, if relevant) and any child born as a result of the surrogacy arrangement and, simultaneously, to confer legal status on the relationship between the commissioning parents and the child. It is a transformative order. A strict reading of section 54 (4) (a) would undermine the general object intended to be secured by the HFEA 2008, in particular for the

existing parental relationship that the children have with the commissioning parents to be recognised in law.

(6) The actual or possible impact of non-compliance on the parties;
If the application is not permitted to proceed the impact on the commissioning parents, the children and the surrogate mother would be significant. The commissioning parents, who have been the de facto, psychological, intentional, and in the case of B the biological, parent would be denied the status of legal parent. The surrogate mother and her husband would remain the legal parents to the children, even though they have stated they do not want to raise the children. The children would remain in a legal vacuum, with the people who provide for all their needs and who intended to be their parents in the fullest sense, not being able to secure that status. No one would suffer any detriment should the parental order be granted. There are clear and obvious benefits to the applicants and the children if the order was made.

(7) Can Parliament have fairly been taken to have intended total invalidity;
It is submitted that Parliament could not have intended that a designation as important as legal parenthood should be denied because the commissioning parents occupied separate physical homes, notwithstanding that the children enjoyed family life with them. Had the parental order application been made within six months of the children's birth the requirement under s 54 (4) (a) would have been met. If the applicants separated shortly after the order is granted it does not vitiate the making of the parental order.

(8) Is any departure from the precise letter of the statute, however minor, fatal?
Departure from the statute using a purposive construction is not fatal to the overall intention. The children are currently in a legal vacuum in terms of their parental relationships. Their de facto parents are not currently recognised as their legal parents, and the surrogate mother and her husband who are their legal parents do not seek to exercise those parental rights. A purposive construction promotes the welfare of the children in ensuring the applicants are recognised as their legal parents.

It is submitted that once the court has undertaken that analysis the final principle that the court should have regard to is the assumption that Parliament intended a sensible result (*Re X para 52).*

45. In relation to the time limit both B and A have filed written evidence about why they did not make their application within 6 months. This has been supplemented by B's oral evidence. Put shortly, they were unaware of the need to make such an application, when A became aware she made enquiries and was advised that any application would be out of time. Once they became aware of the decision in *Re X* they promptly made their application. It is submitted they have been candid about why they did not make an application; there is nothing to suggest they have deliberately flouted the requirement and they have made their application in good faith.

46. Turning to the requirements under s 54 (4) (a) it is submitted at the time of the application the children were living with A and were having contact with B. This should

be viewed in the context that the children lived with B and A up until the time he left the family home in May 2014.

47. If de facto family life is established, which it is submitted it is on the facts of this case, then there is a positive obligation to construe statutes in a way as to enable them to comply with the Convention. Reliance is placed on Lord Nicholls of Birkenhead in *Ghaidan v Godin-Mendoza [2004] AC 557*

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

48. In *Re X* the commissioning parents were separated at the time the application was issued, although had reconciled by the time the matter was heard by the President. At the time they made their application there was a shared care arrangement between the parties with the child splitting his time between the two homes. The President considered the child had his home with the commissioning parents, with both of them, albeit that they lived in separate houses. The President laid emphasis on the fact that the child in that case did not have its home with anyone else. The same applies in this case. The fact that B is unable to have the children to stay in his home at present does not, in itself, mean that the times when he does see the children is any less important or should be treated in a less significant way.

49. In relation to domicile reliance is placed on the summary of the relevant principles in the context of parental order applications set out in *Z v B v C (Parental Order: Domicile)* [2011] EWHC 3181 (Fam) at para 13.

> *"The general principles of domiciliary law (described in the Dicey text as 'rules') are set down in Dicey Morris and Collins, on the Conflict of Laws 14th edition 2006 ("Dicey"). In the bankruptcy case* Barlow Clowes International Ltd (In Liquidation) & Ors v Henwood *[2008] EWCA Civ 577, the Court summarised a number of the Dicey principles of law on domicile as un-contentious (paragraph [8] per Arden LJ). Relevant to the domicile of choice issues raised in this case the un-contentious principles include:*
>
> > *(1) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it.*
> > *(2) No person can be without a domicile.*
> > *(3) No person can at the same time for the same purpose have more than one domicile.*
> > *(4) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired.*
> > *(5) Every person receives at birth a domicile of origin.*
> > *(6) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite*

residence, but not otherwise.
(7) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice.
(8) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious.
(9) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely, and not otherwise. A person who has formed the intention of leaving a country does not cease to have his home in it until he acts according to that intention.
(10) When a domicile of choice is abandoned, a new domicile of choice may be acquired, but if it is not acquired, the domicile of origin revives"

And further:-

"The burden of proving the abandonment of a domicile of origin and the acquisition of a domicile of choice is upon the person asserting the change. The standard of proof is the balance of probability (see Barlow Clowes International Ltd (In Liquidation) & Ors v Henwood *[2008] EWCA Civ 577 per Arden LJ at paragraphs 85-88)"*

50. In this case A was born in Uganda and B in Kenya. Both were British Citizens at birth and were brought here as young children when they had no choice in the matter. Neither has any other home nor laid claim to any other home other than ones they have resided in here. They have lived here permanently as children and adults, and neither has evinced any intention to reside elsewhere. It is submitted there is therefore no dispute that this is their domicile of choice.

51. In relation to consent all parties submit the documents signed by the surrogate mother and her husband on 26 May 2015 satisfy the requirement that the consent to the making of a parental order has been given freely, unconditionally and with full understanding of what is involved. A recent email from the Clinic states they had legal advice before signing the consent. Whilst the signed consent is not in the prescribed form the document signed is to like effect, it was translated, read through and notarised. The email from the Clinic states the surrogate mother and her husband were given a copy of the document they signed.

52. Finally, turning to payments. Following B's evidence the total figure is slightly less than set out in his statement. Although there is limited information about how much was paid to the surrogate mother it is submitted when the court considers all the evidence, in particular A's meeting with the surrogate mother, the way she dealt with the gifts from A and her co-operation with the recent signing of the consent point towards her having taken part in this arrangement freely. There is no evidence to suggest the applicants acted in bad faith or sought to get round the relevant authorities. As a result, it is submitted, that it is more likely than not payments other than for expenses reasonably incurred were paid to the surrogate and the court should exercise its discretion to authorise those payments pursuant to s 54(8).

Service

53. One matter that arose during the hearing was whether the surrogate and her husband had been served with the application in accordance with rule 13.6 FPR. That requires the applicants to serve upon the respondents (a) the application (b) a form for acknowledging service and (c) notice of proceedings, within 14 days before the hearing or first directions hearing.

54. The applications were made on 12 November 2014. They were issued by the court on 11 December. On the 12 December Mr Rogerson emailed Dishna Ratnani at the Clinic notifying her of the application for a parental order, attaching consent forms for the surrogate and her husband to sign. There was no response to that email.

55. When the matter came before me on 14 January 2015 although the applications for parental orders had been issued the sealed applications had not been received by Mr Rogerson. This is recorded on one of the orders I made.

56. On 4 February Mr Rogerson emailed Ms Ratnani chasing information and attaching the issued applications and acknowledgement of service that had been received from the court. The email asks for them to be sent to the surrogate mother and her husband or for someone to take them through the documents and for them to sign the acknowledgement of service form.

57. At the hearing on 9 February I made directions for the final hearing in June.

58. The matter returned to court on 6 May when further directions were made regarding the consents. Following that hearing on 8 May Mr Rogerson re-sent the parental order applications to the Clinic with the order made on 6 May. The email from the Clinic on 18 June confirms the applications were read through to the surrogate mother and her husband prior to them signing the consents on 26 May.

59. Therefore it appears service of the application was effected on 26 May, more than 14 days prior to the hearing. I agree with Ms Connolly Q.C. that there is no prejudice suffered by the documents being served 8 days earlier than required.

60. Rule 13.7 requires the respondents to the application within 7 days of service to file an acknowledgment of service. The purpose of this is to confirm service of the application, together with an indication as to whether the respondent consents, or not, to the making of a parental order.

61. Rule 13.9 (1)(f) includes provision for the court giving directions at the first hearing with regard to tracing the surrogate mother and service of the documents. Although rule 13.6 states the applicants must serve applications, there will be cases where the surrogate cannot be found. Rule 6.36 FPR 2010 gives the court a general power to dispense with service of any document which is to be served in proceedings.

62. In the circumstances of this case I dispense with the requirement for service of the acknowledgment of service. I am satisfied the surrogate mother and her husband were served with the application and the purpose of the acknowledgement of service was overtaken by the consents that were signed.

Discussion and Decision

63. The non-controversial s 54 criteria outlined in paragraph 42 above are clearly satisfied for the reasons given there.

64. In relation to the time limit the President in *Re X* made it clear a purposive construction can be given to the time requirement in s 54(3) and, that in any event, it is possible to 'read down' the provision to give effect to the Convention rights engaged, in particular Article 8.

65. On the facts of this case it is quite clear the applicants have acted in good faith. The enquiries they undertook did not reveal the need to apply for a parental order. No-one has suggested that they overlooked anything. They thought they had done all that was necessary by their names being on the birth certificate. Following their return to this jurisdiction they were open with all professionals who came into contact with the children about the circumstances of their birth and no-one suggested the need to apply for a parental order. When A was alerted to this issue in the summer of 2014 she sought specialist advice. Following the decision of *Re X* they made their application for a parental order.

66. I am satisfied, in the circumstances of this case, the application should be permitted to proceed even though it was issued more than six months after the children's birth.

67. Turning to the issue as to whether it can be said that the children's '*home'* was *'with'* the applicants at the time of the application and at the time when the court was making the order as required by s 54 (4) (a) some assistance can be derived from what the President said in *Re X*.

68. In *Re X* the commissioning parents were separated at the time the application was issued although had reconciled by the time the matter was heard by the President. At the time they made their application there was a shared care arrangement between the parties with the child splitting his time between the two homes. The President considered the child had his home with the commissioning parents, with both of them, albeit that they lived in separate houses. The President laid emphasis on the fact that the child did not have his home with anyone else. His living arrangements were split between the commissioning parents, the President concluded *'It can fairly be said he lived with them'* (para 67).

69. The President continued that even if he was not correct in that analysis the Convention applied and the statute should be 'read down' to achieve the same result. It involved a lesser reading down than I was prepared to accept in the case of *A v P (Surrogacy: Parental order: Death of Applicant) [2011] EWHC 1738 (Fam).* He referred to *Kroon v The Netherlands (1994) 19 EHRR* where the Strasbourg court accepted that family life existed between two parents and their children even though the parents had never married, did not cohabit and lived in separate houses.

70. It seems to me that I can, and should, purposively construe this provision in a way that results in this requirement being satisfied in the circumstances of this case. I do so for the following reasons.

71. Firstly, I agree with the submissions outlined in paragraph 44 above. Having undertaken any analysis of relevant considerations that underpin this requirement I consider there is nothing that militates against the court purposively construing this provision.

72. Secondly, to not construe it in such a way could have detrimental long term consequences for the children and the applicants, which is precisely what the section sets out to prevent.

73. Thirdly, there is nothing on the particular facts of this case that indicate such a course will be detrimental to the welfare of these two young children. On the contrary, all the indications are that their lifelong welfare requires such orders are made.

74. Fourthly, although the parents have separated, they remain married. The evidence indicates that despite the differences between them they both remain committed to the children and ensuring their needs are met.

75. Fifthly, whilst the time B spends with the children is less than in *Re X* that is in part dictated by the limitations from his current accommodation and the fact that he works full time. It is not suggested that this is due to a lack of commitment by him to the children.

76. As in *Re X* I am satisfied that if I am not correct in that analysis the Convention applies, Article 8 is undoubtedly engaged, and the statute should be 'read down' to achieve the same result. As the President rightly points out at paragraph 61 Article 8 not only protects 'family life' but also 'private life' and 'identity'. I am satisfied, relying on *Kroon* that family life is established here, despite the fact the applicants live in separate homes. In addition the identity of the children is also an important consideration.

77. I can take the three remaining s 54 criteria relatively shortly.

78. First, the issue of domicile. It is clear from the evidence both applicants have lived in this jurisdiction most of their lives. They were born as British Citizens, came here as very young children and have not lived anywhere else. Every aspect of their lives are based here, they have never returned to their country of birth, neither have their respective families. They have each said they have no intention of living anywhere else. It is clear they have both discharged the evidential burden on them of proving that this is their domicile of choice.

79. Second, the issue of consent. The documents signed by the surrogate mother and her husband on 26 May 2015 clearly signify that they have fully understood the effect of a parental order in extinguishing their parental rights and they have signed the consent freely, unconditionally and with full understanding. The consent was translated and notarised. I am satisfied that any payment made to them by the Clinic was after they gave their consent and there is no evidence to indicate that the giving of the consent was conditional on any payment being made. It is reasonable to infer from the information the court has that despite the passage of time they were willing to attend the clinic to sign the documents and are likely to have incurred some limited expense in making the journey to the Clinic.

80. Thirdly the question of payments. The court is somewhat hampered by the lack of detail. I can only re-iterate the call made by this court and others (notably Baker J in *D and L [2012] EWHC 2631 (Fam)* at para 35*)* of the need for commissioning parents to, at the very least, meet the surrogate mother or establish an effective line of communication and have some understanding of the financial arrangement between her and the Clinic. Although the court lacks the detail it has in other cases I am satisfied that any payments other than for expenses reasonably incurred should be authorised.

81. In reaching that conclusion I have borne in mind the considerations I set out in para 35 in *Re WT (Foreign Surrogacy) [2014] EWHC 1303 (Fam),* which were approved by the President in *Re X* at para 75.

82. The court can infer that the sums paid were not disproportionate to reasonable expenses. There is reference in the papers to the surrogate's husband working, although no details are given of the level of his income. The total sum paid is not significantly different than the sums authorised by Baker J in *Re D and L (ibid).* In this case the sums were higher as the applicants paid for an additional surrogate and the successful surrogate was carrying twins. A's evidence about the way she observed the conditions at the Clinic that supported the surrogate mother after the birth, her observations of the surrogate when she met her and the way the surrogate dealt with her gifts all support the surrogate having freely entered into this arrangement.

83. There is nothing to suggest the applicants have acted other than in good faith and have co-operated with the authorities both here and abroad.

84. For those reasons, even though the court has limited information about the precise payments made to the surrogate, the court should exercise its discretion and authorise payments made other than for expenses reasonably incurred.

Welfare

85. The lifelong welfare interests of each of these children are the courts paramount consideration pursuant to section 1 Adoption and Children Act 2002.

86. In her analysis of the welfare checklist in section 1 (4) ACA 2002 in her report Mrs Odze observes these two young children have never known any other family, as from the moment of their birth the applicants assumed responsibility for their day to day care and continued to provide this jointly until their separation in May 2014. Since then they have been in the care of one or other of the applicants.

87. Although Mrs Odze raises concern in her report about the emotional harm the children have suffered she considers that whilst their physical and educational needs are met their emotional needs are not. This is in large part due to the difficulties in the relationship between the applicants. As set out at the start of this judgment a plan has been put in place to assist the parties to help restore effective communication between them, particularly on issues concerning the children.

88. In her report Mrs Odze does not advocate the court should not make a parental order. She carefully considers the other orders the court could make, a child arrangements order, special guardianship order or an adoption order. In my judgment she rightly

rejects each of those orders as not meeting the welfare needs of the children. A child arrangements order or special guardianship order would only last until the children's majority and the surrogate mother and her husband would remain the legal parents. Whilst she recognises an adoption order would sever the legal ties with the surrogate mother and her husband it is not what she has termed the 'bespoke' order for children born through surrogacy, particularly where, as here, there is already a biological connection between the children and one of the applicants.

89. I agree with Mrs Odze. Even though, unusually in my experience, the court shares her concern about the emotional needs of the children being met by the applicants that does not mean their lifelong welfare needs will not be met by a parental order being made. I consider it is very likely that once the uncertainties of these proceedings concerning the parental order are concluded, that is going to help the applicants re-focus their attention on the children. Having observed the parties during both substantive hearings it is clear the uncertainty surrounding their legal position regarding the children has been stressful for them both, particularly A.

90. I will therefore make a parental order in relation to each child. I approve the directions agreed between the parties regarding a future hearing to consider the time the children spend with each parent, together with the programme of support (including attendance at a SPIP) to facilitate the parties being able to reach agreement.