

## Private Law Children

February 2025

**H, Re (Anonymous Surrogacy) [2025] EWHC 220 (Fam)**

**6 February 2025**

**Link to full judgment [here](#).**

### Overview

Sir Andrew McFarlane P heard this case surrounding whether a parental order could be granted under s54 Human Fertilisation and Embryology Act 2008 with respect of a baby girl who was born via surrogacy, where the applicant was the child's biological father but the biological mother was the surrogate who remained anonymous.

The key issue was whether, in a situation where a surrogate is anonymous, an order was capable of being granted given s54(6) and (7) Human Fertilisation and Embryology Act 2008 states that the court must be satisfied the surrogate mother agreed unconditionally to make the order unless they cannot be found or were incapable of giving agreement.

Despite warning future applicants in a similar position to the present against engaging in anonymous surrogacy, it was held that, as the prospects of tracing the surrogate mother were so remote, she could be held as being not able to be found for the purpose of s54(7) Human Fertilisation and Embryology Act 2008. Consequently, a parental order was made for the applicant non-biological mother.

### Facts

In 2022 Mr and Mrs H went to Nigeria to visit Lifelink Fertility Clinic, where, after preliminary testing, they signed an agreement, along with paperwork with the Nigerian court to engage with surrogacy. Throughout the surrogacy process and with the agreement of Mr and Mrs H, the surrogate remained anonymous. A was born due to successful embryo transfer using Mr H's sperm. Whilst Mr and Mrs H attended appointments by telephone and video calls with the surrogate present, the surrogate kept her face covered and remained anonymous throughout. Mr and Mrs H were present at A's birth in Nigeria and A has been in their sole care ever since. Mrs H remained in Nigeria for 9 months following A's birth and since then has resided in England alongside A and Mr H.

### The legal context - [6]-[8]

Sir Andrew McFarlane P detailed the relevant law, focusing on s54 Human Fertilisation and Embryology Act 2008. The judge held that subsections (1)-(5) of this section were met. It was held that despite the fact that Mr and Mrs H did pay a sum of £4000 to the clinic, against s54(8), the judge

was prepared to authorise that sum under s54(8)(d) due to A being settled with Mr and Mrs H and there being no prospect of her returning to the care of any other person.

The main issue in this case was under s54(7). This section states:

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

Here it had to be discussed whether the anonymous surrogate could be held to be a 'person who cannot be found' for the purpose of this section.

## **The evidence [9]-[17]**

When ordered by Theis J to file a statement disclosing the steps Mr and Mrs H had took to identify the surrogate, they filed a statement which stated no more than the surrogate was anonymous without highlighting the steps taken. A Parental Order Reporter filed a national identity document purporting to be related to a surrogate, but it was observed that there was no actual documentation establishing that the individual identified was the surrogate for A or the person who entered into an agreement with Mr and Mrs H.

In a further hearing, further documents were provided which, amongst other things, included an undated letter from a firm of legal practitioners and arbitrators in Nigeria stating that the surrogate mother had given her consent prior to and after the birth of A. However, the parental order reporter view was that this did not take the matter any further.

In a further hearing, Sir Andrew McFarlane P ordered the applicants to file copies of bank statements showing all of the payments made with relation to surrogacy agreement, a letter as to why the surrogate was anonymous, why she could not be found and what attempts they had made to find the identity of the surrogate. Mr and Mrs H complied with this and in a letter detailing why they requested anonymous surrogacy, Mr and Mrs H detailed that it was usual practice for the surrogate to remain anonymous, and that they believed it to be their best option to not meet with the surrogate mother because of reasons such as not wanting unnecessary attachment.

The applicants later filed a copy of the surrogacy agreement where the initials 'O.S' were signed where the surrogate's name should have appeared. The parental order report stated that these documents supported there being a surrogacy agreement, that the initials coincided with identification documents filed earlier in the proceedings and that the agreement was dated one week before first payment was said to have been received. The reporter completed an analysis which balanced the welfare benefits to A by being brought up with Mr and Mrs H against the lack of documentation clarity. The conclusion of such analysis was that the reporter now supported the making of a parental order as it was in A's best interest to do so and that this was a better course of action for A than the present position which allowed Mr H to have parental responsibility but left Mrs H without parental responsibility or recognition of parental status.

## **Discussion and Conclusion [18]-[24]**

Accepting that the court 'must scrutinise parental order applications with care to ensure compliance with the statute, particularly so when the application includes a foreign element', Sir Andrew

McFarlane P emphasised that there was a need for extra caution in parental order applications involving Nigerian Surrogacy. This was due to the fact that the UK imposed further restrictions on adoptions from that country (Special Restrictions on Adoptions from Abroad (Nigeria) Order 2021) due to specific concerns including unreliable documentation, corruption and evidence of organised child trafficking.

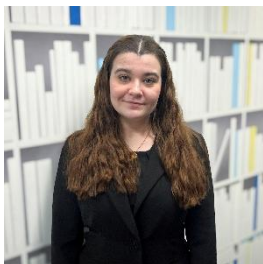
Sir Andrew McFarlane P also detailed the concern around the anonymity of the surrogate mother, as the court could not be satisfied the mother consented to or was even aware of the application before the court. He went so far as to state that applicants in a similar position to Mr and Mrs H in the future 'would be well advised to avoid engaging with an anonymous surrogate' [20].

Despite these concerns, Sir Andrew McFarlane P was satisfied that:

- Mr and Mrs H entered into a surrogacy agreement,
- Mr H was the biological father, and the surrogate mother was represented by the initials of O.S.
- The surrogate mother could be considered 'not to be found' for the purpose of S54(7) as the prospects of tracing her were so remote.

Due to all of this, the court could proceed with the order without the surrogate mother's consent. The parental order was made due to being held to be in the best interests of A, therefore making Mr and Mrs H, A's parents under the law.

This decision broadened the scope of s54(7) Human Fertilisation and Embryology Act 2008, as it allowed for a surrogate to be considered 'not to be found' due to remote tracing possibilities, coupled with weight being placed on what was in the best interests of the child involved.



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