Neutral Citation Number: [2017] EWHC 50 (Fam)

Case numbers omitted

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 January 2017

**Before**:

**SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION**

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**In the Matter of the Human Fertilisation and Embryology Act 2008**
**(Case K)**

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**Ms Deirdre Fottrell QC and Mr Thomas Wilson** (instructed by Goodman Ray Solicitors LLP) for the applicant
**Mr Leon Glenister** (instructed by the Government Legal Department) for the Registrar General on 18 July 2016
**Ms Katherine Olley** (instructed by the local authority) for the local authority on 13 October 2016

Hearing dates: 18 July 2016, 13 October 2016

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

**This judgment was handed down in open court**

**Sir James Munby, President of the Family Division :**

1. Since I handed down judgment in *In re A and others (Legal Parenthood: Written Consents)* [2015] EWHC 2602 (Fam), [2016] 1 WLR 1325, I have had to consider a number of cases raising issues very similar to those which confront me here. The most recent judgment was in *Re the Human Fertilisation and Embryology Act 2008 (Cases P, Q, R, S, T, U, W and X)* [2017] EWHC 49 (Fam). They were the sixteenth to twenty-third of the cases in which I have given a final judgment. This judgment relates to the twenty-fourth case. A further five cases have recently been issued. I am told that at least another two cases are in the pipeline and likely to be issued in the near future.

2. For the purposes of this judgment I shall take as read the analysis in *In re A* and the summary of the background to all this litigation which appears in *Re the Human Fertilisation and Embryology Act 2008 (Case O)* [2016] EWHC 2273 (Fam).

The facts

3. For reasons which will by now be familiar, I propose to be extremely sparing in what I say of the facts and the evidence in these cases.

4. This case relates to treatment provided by CARE Nottingham, a clinic which is and was regulated by the Human Fertilisation and Embryology Authority. I shall refer to the applicant as X, the respondent as Y and their twin children as C1 and C2. X seeks, together with other relief (see below) a declaration pursuant to section 55A of the Family Law Act 1986 that he is, in accordance with sections 36 and 37 of the Human Fertilisation and Embryology Act 2008, the legal parent of C1 and C2. Y is wholeheartedly supportive of X's application. The clinic, the HFEA, the Secretary of State for Health and the Attorney General have all been notified of the proceedings. None has sought either to be joined or to attend the hearing. Given the nature of the issues (see below) I decided that there was no need for C1 and C2 to have a guardian appointed.

5. The final hearing had been fixed for 18 July 2016 but in the circumstances I refer to below had to be adjourned part heard. The final hearing took place on 13 October 2016. X was represented throughout by Ms Deirdre Fottrell QC and Mr Thomas Wilson. At the hearing on 18 July 2016 the Registrar General was represented by Mr Leon Glenister. At the hearing on 13 October 2016 the relevant local authority (see below) was represented by Ms Katherine Olley. At the end of the hearing on 13 October 2016 I indicated that I was making the orders sought. I now (19 January 2017) hand down judgment explaining my reasons.

6. Although I am acutely conscious of the stress, worry and anxiety burdening the parents in these cases, and of the powerful human emotions that are inevitably engaged, this case is fundamentally, in terms of the applicable legal analysis, straight-forward and simple. The evidence, which there is no need for me to rehearse in detail, is compelling. The answer in relation to the primary point is clear.

7. Just as in each of the other cases I have had to consider, so in this case, having regard to the evidence before me, I find as a fact that:

i) The treatment which led to the birth of C1 and C2 was embarked upon and carried through jointly and with full knowledge by both the woman (that is, Y) and her partner (X).

ii) From the outset of that treatment, it was the intention of both X and Y that X would be a legal parent of any child born. Each was aware that this was a matter which, legally, required the signing by each of them of consent forms. Each of them believed that they had signed the relevant forms as legally required and, more generally, had done whatever was needed to ensure that they would both be parents.

iii) From the moment when the pregnancy was confirmed, both X and Y believed that X was the other parent of the children. That remained their belief when C1 and C2 were born.

8. The first X and Y knew that anything was or might be 'wrong' was when, shortly after their birth, they attempted to register C1's and C2's births. The registrar refused to register X as their father.

9. I add that there can be no suggestion that any consent given was not fully informed consent. Nor is there any suggestion of any failure or omission by the clinic in relation to the provision of information or counselling.

Parentage

10. X is a man. He is not married to the respondent mother. Adopting the terminology I have used in previous cases, the problem in this case is very shortly stated. There was neither a Form WP nor a Form PP. However, both X and Y signed a Form IC which, in all material respects, was in the same form as the Forms IC I have considered in previous cases. I need not go into the details.

11. In the circumstances, X is, in principle, entitled to the declaration he seeks: see *In re A*, para 63(iii).

Registration of the children's births

12. Uniquely amongst the twenty-four of these cases that I have now had to consider, in this case the registrar refused to register X as the children's parent – their father. In accordance with directions I had given, I had witness statements on this point from X and Y, from the "person responsible" at the clinic, from the relevant Superintendent Registrar, and from the head of civil registration policy at the General Register Office (GRO) on behalf of the Registrar General. Because of the course events have taken, I can take the evidence quite shortly.

13. Instructions and guidance to registration officers and GRO staff is issued by the Registrar General in the form of a Handbook for Registration Officers. Chapter B2a in the Handbook covers the registration of births following assisted conception. For present purposes the relevant paragraphs are B2A.1(iii), 2 and 3:

> "1 The Human Fertilisation and Embryology Act 2008 provides the following parenthood definitions regarding who is

> the father or second female parent (i.e. the mother's female partner) of a child born to a woman as a result of the placing in her of an embryo or of sperm and eggs or her artificial insemination:-
>
> Opposite-sex couples
>
> …
>
> (iii) where a woman received fertility treatment from a licensed person in the United Kingdom and no husband is to be regarded as the father … or no spouse or civil partner is to be regarded as the second female parent … , the man with whom the mother has a parenthood agreement (see B2a.2) is regarded as the father;
>
> …
>
> 2 Parenthood agreement means where the mother has given to the clinic written notice stating that she consents to her male partner being regarded as the father and the partner has given written notice consenting to being regarded as the father, or where the mother has given to the clinic written notice stating that she consents to her female partner being regarded as the second female parent and the partner has given written notice consenting to being regarded as the second female parent, and that such consent has not been withdrawn.
>
> 3 It is not necessary routinely to see copies of the consent notices in order to confirm that the necessary consent had been given and/or that treatment was carried out by a licensed person in the United Kingdom. However, if there is doubt as to the accuracy of information given by an informant in these respects or there is any conflict between the parents as to the facts, copies of their consent notices should be requested in order to establish the correct parenthood before registering. Copies of consent notices should be readily available from informants if needed as UK clinics automatically give copies to their patients at the time of giving consent."

It is conceded that the Handbook had not been up-dated following my judgment in *In re A*.

14. The evidence filed on behalf of the Registrar General refers to the fact that paragraph B2a.2 does not specify any more than "written notice", but acknowledges that:

> "in the context of parenthood agreement [this] means the WP … and PP … forms."

That reading of the Handbook, I might add, is borne out by the use of the phrase "consent notices" (plural) in paragraph B2a.3.

15. X and Y attended twice before a registrar, on the second occasion accompanied by someone from the clinic. Both registrars declined to register X as the children's father, because X and Y could not produce the necessary written consents as required by the Handbook – that is, a Form WP and a Form PP. Because of the course events have subsequently taken, what took place on these two occasions has not been probed in evidence and neither registrar has filed a witness statement, though, as I have mentioned, the Superintendent Registrar has. According to X and Y, they asked what they could do and were advised by the registrar that they could register the births showing Y's details as mother, with the father's details blank, and then take legal advice as to obtaining a declaration of parentage. They say they were told that, having obtained the declaration, they could then commence the process of re-registering the children (that is, in accordance with section 14A of the Births and Deaths Registration Act 1953) to show X as the father. I should make clear that in the circumstances I make no finding as to precisely what advice X and Y received, either from the clinic or from either of the registrars.

16. With heavy hearts X and Y followed the advice they thought they had received. "We felt that we had no choice." Their witness statements are eloquent of what they were going through. According to X:

> "I was devastated. I cannot express how I feel about not being recorded on my children's birth certificates as their father … [Y] and I both felt very upset and angry. The thought of not being their father has caused me a huge amount of worry and I know that this has negatively affected [Y]. She was so upset and worried that it was affecting her milk production."

According to Y:

> "We both thought that [X] was the legal father of the children and I was devastated to hear that he was not, and that he could not be registered as their father."

17. I have had to consider the relevant provisions of the 1953 Act in this context on two previous occasions: *Re the Human Fertilisation and Embryology Act 2008 (Case L)* [2016] EWHC 2266 (Fam) and *Re the Human Fertilisation and Embryology Act 2008 (Case O)* [2016] EWHC 2273 (Fam). I need not repeat what I have previously said, except to note what are, for present purposes, the two most important points.

18. The first is that, for the reasons explained in *Re the Human Fertilisation and Embryology Act 2008 (Case L)* [2016] EWHC 2266 (Fam), if the problem in the present case is to be 'corrected' in accordance with the 1953 Act, the relevant provision is section 14A.

19. The second, which in human terms is of great significance, is that, if recourse is had to section 14A, the re-issued birth certificate will bear on its face the words "Pursuant to section 14A of the Births and Deaths Registration Act 1953 on the authority of the Registrar General": see *Re the Human Fertilisation and Embryology Act 2008 (Case L)* [2016] EWHC 2266 (Fam), para 28. Section 14A(1)(a) applies where the Registrar General has received "a notification of the making of a declaration of parentage," so a re-registration in accordance with section 14A produces a birth certificate which, in

effect, proclaims to anyone who looks at it that the child is or may be the result of assisted conception.

20. X and Y's reaction to this was very understandable:

> "We both desperately wanted [X] to be recorded on the original entry as [the children's] father, as should have happened, but having seen what an amended entry would look like, we just cannot agree to this. [We] had not intended to tell our children that they were conceived using donor sperm, it is only now that we are faced with this situation with their birth certificates that we feel this choice may have been taken away from us and we may have no option but to tell them."

21. Put starkly, the state by its actions has denied these parents the right to decide for themselves, within the privacy of the family, what in their view, as devoted parents, is in the best interests of their children – a matter which, to speak plainly, is no business of the state.

22. When the matter came on for hearing before me on 18 July 2016, Ms Fottrell and Mr Wilson asserted that the registrar had "made an error of law … owing to her lack of understanding or knowledge of" the decision in *In re A*. Their very helpful skeleton argument canvassed, by reference to various authorities which in the event there is no need for me to consider further, what remedies might be available to 'correct' or overcome this error but without, at least in so many words, articulating a claim for judicial review.

23. Mr Leon Glenister, on behalf of the Registrar General, emphasised that "upon information being presented to them, registrars have no discretion in determining whether to register a birth," this being, he said, "important to ensure there is consistency of registration between areas." He continued:

> "The consequence of this is that in a judicial review, a Registrar can be challenged on the basis of an error of law – but not on grounds of irrationality or unreasonableness."

Having taken me through the various statutory provisions, Mr Glenister submitted that "the Registrar General has no statutory power to register afresh" and went on:

> "registering afresh would require the Court to quash the initial registration, which is a remedy that must be sought by judicial review."

24. In these circumstances I raised the question whether the outcome desired by X and Y might be possible were an application to be made for judicial review. Having taken instructions, Ms Fottrell indicated that her client and Y wished to have time. Accordingly, I adjourned the matter part-heard so as to give X and Y time to consider whether or not they wished to make an application for judicial review. They decided they would.

25. On 24 August 2016 X's solicitors sent the relevant local authority (see section 13 of the Registration Service Act 1953 and sections 69-71 of the Statistics and Registration Service Act 2007) a letter in accordance with the Pre-Action Protocol for Judicial Review. It asserted that the registrar's decision was an erroneous interpretation of the 2008 Act in light of my decision in *In re A* "and amounts to an error of law." It identified the remedy sought as an order quashing the registration of the children's birth and a mandatory order requiring the registrar to "register the birth afresh without any markings or corrections in the margin."

26. In its letter in response dated 30 August 2016, the local authority acknowledged that the guidance in the Handbook "is incorrect" and stated that it did *not* intend to contest the claim. The letter helpfully pointed out that:

> "Clean birth certificates can only be obtained within 12 months of the birth of a child; after that date a margin note or footnote is the only option."

The letter anticipated that a consent order could be prepared, showing the local authority's consent to the relief being sought.

27. X's application for judicial review was issued in September 2016, seeking (1) permission to make the application out of time, (2) an order quashing the registration of the children's birth, (3) a mandatory order requiring the registrar to "register the birth afresh", and (4) an order for costs against the local authority. The Registrar General was joined as an interested party.

28. By the time the case came back before me on 13 October 2016, the parties – X, the local authority and the Registrar General – had agreed the terms of a consent order which they invited me to approve. The draft was accompanied by an 'Agreed Basis for Making Orders', a document which had likewise been agreed by X, by the local authority and by the Registrar General.

29. The central parts of the draft order read as follows:

> "By Consent it is ordered that:
>
> 1 Permission is granted to [X] to make this application out of time.
>
> 2 The decision of the Registrar [name] on [date] to register the birth of [C1 and C2] without entering [X's] name as father is quashed so that the entry in the register is deleted.
>
> 3 [X and Y] agree to meet with [the local authority] and [the local authority] agrees to make a Registrar available to meet with [X and Y] not later than [date] to register the birth of [C1 and C2] and enter [X's] name as father."

30. The 'Agreed Basis for Making Orders' document included this:

> "These proceedings are based on a single ground, namely that the decision to refuse to enter [X's] name as the children's father was an error of law.
>
> [X] argues that the correct interpretation of sections 36 and 37 of [the 2008 Act] in light of the President's decision in [*In re A*] is that [X] has been the legal father of the children since their birth. As a result, [his] name should have been entered as the children's father on the Register of Births.
>
> [X's] claim for judicial review is not defended by the local authority and not opposed by the Registrar General."

31. I am happy to make the order sought. I can state my reasons very shortly:

    i) Whatever the wider reach of judicial review may be in this context (a matter which there is no need for me to consider and on which I decline to express any view whatever), I am satisfied that, as the Registrar General concedes, judicial review lies to quash the registration of a birth if there has been error of law on the part of the Registrar.

    ii) I am satisfied that in the circumstances, and for the reasons set out in the 'Agreed Basis for Making Orders' document, the Registrar did err in law. The fact that the Registrar was acting in accordance with the common understanding of what the Handbook required is neither here nor there, for on this point the Handbook was itself erroneous in point of law.

    iii) In the circumstances, justice demands that X be given permission to apply for judicial review out of time. Though without any malign intent, the state has intruded into very private and personal matters which, as I have said, are none of its business. Unless the state's mistake is corrected, X and Y and, more particularly, the children will have to live with the consequences (see paragraphs 19-21 above) for the rest of their lives – and given the children's age that may very well be significantly into the 22nd century. For the judicial branch of the state to decline to provide a remedy because the application was made a few months out of time would be merely adding insult to injury.

Outcome

32. It was for these reasons that at the conclusion of the hearing on 13 October 2016 I made two orders: sitting in the Family Division, a declaration in the terms sought by X and, sitting in the Administrative Court, a quashing order in the agreed terms as set out above.

Costs

33. The clinic has very properly agreed to pay the applicant's reasonable costs of the proceedings in the Family Division. The issue of the costs of the judicial review proceedings is to be determined in accordance with agreed directions. There will be a separate judgment on that issue in due course.