**Questionnaire on Safeguards for the protection of the rights of children born from surrogacy arrangements**

Jurisdiction: UK (England and Wales)[[1]](#footnote-1)

Prepared by: Dr Michael Wells-Greco, Charles Russell Speechlys and Maastricht University (sent in a personal capacity)

|  |
| --- |
| * In all responses to the following questions please ensure to indicate how the primary consideration of the best interests of the child is applied. * If surrogacy is prohibited or permitted, respectively, in your State, please respond only to the relevant parts of the questionnaire. |

| **Question** | **Answer** |
| --- | --- |
| **Identity, origins and parentage**   * Describe safeguards protecting identity rights (CRC art. 7 and 8) that are currently being implemented in your State. Safeguards include laws, judicial and administrative procedures, enforcement actions, and other practices intended to prevent or remedy violations of human rights norms. Note whether and how such general safeguards protecting identity rights apply in the context of surrogacy arrangements. | **General comments**  UK law recognises that surrogacy (and assisted reproduction more broadly) requires its own rules and legal framework, which are separate from adoption law and with quite different underpinning principles and aims. Surrogacy is legal in the UK albeit subject to strict legislative requirements and, as discussed below, judicial oversight if an application for a parental order (a judicial determination on parentage). UK law does not recognise surrogacy as a binding agreement on either party.  **Identity and birth registration**  All births in England, Wales and Northern Ireland must be registered within 42 days of the child being born. The birth registration will register the surrogate mother as mother and, usually, if the surrogate is unmarried or not in a civil partnership, the intending genetic father as second parent. If the surrogate mother is married or in a civil partnership, her spouse/civil partner will be the child's other parent and must be registered on the child's initial birth certificate.  Births abroad to UK national parents do no need to be registered in the UK.  Following the issue of a parental order, the child’s name is entered on a Parental Order Register maintained by the relevant General Register Office, and the child’s original birth certificate is replaced with a new certificate that specifies the child’s name (which may be different from the name given at birth) and identifies the intending parents (as the UK legislation so defines them) as the child’s legal parents.  When the child concerned is 18 years of age, he or she has a right to find out details about his or her birth from the register. The information that can be disclosed by the courts in England and Wales is specified in the Family Procedure Rules 2010. A person who is the subject of a parental order and at least 18 years of age may apply to the Court to receive copies of the application for the Parental Order (but not any attached documents), the parental order and any other orders relating to the proceedings, any transcript of the Court’s decisions, and the report made to the Court by the Parental Order Reporter. Where the child is born as the result of a donor egg or sperm in the surrogacy arrangements, the resulting child has the right to apply for identifying information about the egg and/or sperm donor(s) in the UK once the child reaches the age of 18. If the gamete donation does not occur in the UK, the child could request copies of the documents lodged as part of any Parental Order application.  **Nationality**  The issuance of a parental order will also, as discussed below, establish British citizenship for the child provided that the child is so eligible. The UK Government has published formal guidance in relation to cross border surrogacy agreements and immigrations and citizenship rules. A child born to a foreign national surrogate mother who is married will not be automatically eligible for British nationality. In this case, the intending parents will need to first apply for Home Office registration of a child under 18 as a British citizen, before applying for a passport for the child. If the surrogate mother is single or widowed/divorced, no application for registration of the child is needed and application for a British passport for the child can be submitted provided the intending father is British, has a genetic link to the child, and is able to pass on his nationality (e.g., is a British national otherwise than by descent). In the alternative, the Parental Order Regulations 2010 ensure that where a parental order is made in the UK and one or both of the intending couple (including the intending mother with no genetic relationship with the child) are British citizens, the child – if not already so – will become a British citizen from the date of the parental order. |
| * Describe safeguards protecting the access to origins (CRC art. 7 and 8) that are currently being implemented in your State. Note whether and how such general safeguards protecting the access to origins apply in the context of surrogacy arrangements. | See above regarding birth registration and (above/below) regarding the parental order process. |
| * Describe how the right to access origins is balanced with the right to privacy of parents and gamete donors. Indicate specifically how the best interests of the child are factored in. | The balance has moved from anonymity in favour of transparency.  The Human Fertilisation and Embryology Authority Register of Information has, since 1 August 1991, recorded information about treatment at licenced fertility clinics in the UK. The law sets out how that information can be accessed.  Anyone over the age of 16 can ask the HFEA whether they were conceived with donated eggs or sperm at a clinic in the UK after 1991. They can also ask if the Register shows that they are genetically related to someone they intend to marry, register a civil partnership with or enter into an intimate physical relationship with (the application must be made jointly by both partners).  **Information about donors**  Donor-conceived people whose details are on the Register can also ask for any non-identifying information about their donor. This usually includes the donor's physical appearance, height, weight, hair colour, eye colour and occupation. It may also include any statement the donor has written describing him or herself. Donor-conceived people over the age of 16 have a right to request this information, but in practice the HFEA will also provide it to their parents before they are 16, if requested.  Some donor-conceived people can also ask for identifying information about their donor, which means his or her name, date of birth, town of birth and last known address. This information is only available to the donor-conceived person once he or she is over 18. UK law on donor anonymity changed from 1 April 2005, so whether identifying information is available depends on the circumstances.  Donor-conceived people may have donor-conceived genetic half siblings in other families if their donor donated to more than one family. Since 1 August 1991, UK law has allowed up to ten families to use the same donor.  Donor-conceived people can (from the age of 16 or, in practice, before with their parents' support) ask how many donor-conceived siblings are also recorded on the Register, whether they are registered as boys or girls and the year in which they were born. From the age of 18 a donor-conceived person who wishes to be put in touch with donor-conceived siblings can ask to join the HFEA's Donor Sibling Register. If any of their donor-conceived siblings also joins the register, the HFEA will put them in touch with each other. |
| * Describe safeguards protecting the family environment (CRC art. 7, 8, 9, 10, 20) that are currently being implemented in your State. Note whether and how such general safeguards protecting the family environment apply in the context of surrogacy arrangements. Indicate specifically how the best interests of the child are factored in. | In relation to any dispute concerning children (other than in relation to a declaration of parentage) and the child’s family environment, the family court's paramount consideration is the child's welfare (best interests) and unless the parents can reach an agreement and a judicial determination may be required. |
| * Provide information on existing laws, regulations or practices for the establishment, recognition and contestation of legal parentage. Indicate specifically how the best interests of the child are factored in. | Under UK law, the best interests of child is understood to require certainty in terms of legal parentage as at the moment of birth but accepting that a post-birth transfer of legal parentage is possible subject to the statutory conditions being satisfied.  **Establishment of legal parenthood**  The rules for establishing legal parenthood following ART are set out in the parenthood provisions contained in Part Two of HFEA 2008. Section 33(1) HFEA 2008 provides that the surrogate mother will be the legal mother of the child at birth irrespective of whether she is genetically connected to the child or not or whether the surrogacy took place in the UK or elsewhere. Moreover, HFEA 2008 makes it clear that a woman does not – and in fact cannot – acquire legal parental status merely because she has donated her egg.  In relation to a child conceived as a result of treatment with donor sperm by a married surrogate mother, her husband will be treated as the child’s father, unless it is shown that he did not consent to his wife’s treatment. If the surrogate is in a civil partnership at the time of treatment, then her partner will be treated as a parent of the child, unless it can be shown that she did not consent to the treatment.  If the surrogate is unmarried (or it is proven her husband or civil partner has not consented to the treatment), the male intending parent may be treated as the legal parent at birth if the child is created using his sperm.  In most cases, parenthood will have to be transferred from the surrogate mother and, where relevant, her partner to the intending parent(s).  **Parental order**  With the legal parent(s)’s consent, parenthood, since 1994, can be transferred to the intending couple (or exclusively to a single intending parent since 2019) by means of a parental order. A parental order has transformative effect and, if granted, is of like effect to an adoption order with the consequence that the child is for all purposes treated in law as a child of the couple and not of any other person. The provisions apply whether the surrogate is in the UK or elsewhere at the time of placing in her the embryo or the sperm and eggs or her artificial insemination and delivery.  To obtain a parental order, the intended parent/s must satisfy the family court that the order is in their child's best interests (welfare being the court's paramount consideration) and that they meet all the criteria, which are:  i. A intending parent must be a genetic parent of the child;  ii. The intending partners 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. Single parents have been able to apply since 3 January 2019;  iv. The application is made more than six weeks and less than six months after the birth;  v. At the time of the application and the making of the order, the child’s home is with the intending parent(s);  vi. At the time of the application and the making of the order, either or both of the applicants must be domiciled in the UK or in the Channel Islands or in the Isle of Man;  vii. At the time of making the order, the applicant(s) must have attained the age of 18;  viii. The applicant(s) can satisfy the court that the surrogate mother, who carried the child and any other person who is a parent of the child, but is not one of the applicants, has freely and with full understanding of what is involved agreed unconditionally to the making of the parental order. Such consent may be given only once the child has reached six weeks old;  ix. 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 parental order, (b) any agreement required, (c) the handing over of the child or (d) the making of any arrangements with a view to the making of the order, unless authorised by the court.  On 3 January 2019 new law came into force making parental orders (which give parenthood to the intended parents after the birth and extinguish the status of the surrogate) available to single parents as well as to couples.  **Welfare considerations**  A court considering an application for a parental order will be assisted by a detailed written report from a specialised guardian, known as a Parental Order Reporter (POR). The guidance requires local authority social services to make enquiries when they are aware that a child has been, or is about to be, born as a result of a surrogacy arrangement. The POR’s primary areas of investigation appear to be in respect of welfare (best interests) and consent.  The Parental Order Reporter will meet with the intending parent(s) and the child. The Parental Order Reporter will unusually:  •make checks with the local authority and the police, to see if there is any information held which might be relevant to the safety of the child;  •find out about the surrogacy arrangements so far, such as the background to the application, or why the intending parent(s) chose surrogacy  •understand the family structure and the child’s place within this  •discuss whether the child will grow up knowing about their origins.  At all times the Parental Order Reporter will be considering the welfare of the child both now and in the future.  See also: <https://surrogacyuk.org/wp-content/uploads/2018/12/Surrogacy-in-the-UK-2nd-Report-20181230.pdf> |
| * Specify how the establishment of parentage occurs in the context of surrogacy arrangements. Indicate specifically how the best interests of the child are factored in. | As discussed above, parental order secures the legal status of intended parents under UK law, and is needed even if the parents are already named on their child's foreign birth certificate. Without a parental order, one or both of the intended parents will not be a legal parent. The welfare (best interests) of the child is the paramount consideration in making a parental order (or any other child order) albeit considered principally in a post-birth legal context.  If parental order is not available, an adoption order might be possible. However, the law and process is often complicated (particularly in international situations) because adoption law was not designed for surrogacy. Other options include a child arrangements order (which confers parental responsibility but without permanently reassigning parenthood) or a special guardianship order. |
| **Sale of children**   * Provide information on the laws prohibiting the sale and trafficking of children as well as corresponding implementation measures. Note whether and how such general safeguards against the sale and trafficking of children apply in the context of surrogacy arrangements. | The intended purpose of surrogacy, as understood under UK law, is non-exploitative and aims to ensure that a child is cared for by parents who will provide appropriate love and support. UK surrogacy law does not presuppose that parents have ownership rights, and thus unfettered control, over their children. It is in that context that surrogacy is not considered to be a “sale” or a “transfer” of a child whether in a domestic or international surrogacy arrangement.  UK policy aims to prevent commercialisation and exploitative practices. These include the following:   * If there are child protection concerns, child abuse and neglect laws apply, with criminal and civil sanctions for mistreatment or trafficking. It should be noted that there are no reported cases considering sale or trafficking in the context of surrogacy. While more research is needed, it appears that there are not greater issues relating to the welfare of a child in surrogacy as compared to other forms of assisted conception where the cost of ART treatment can also be significant. * It is a strict ground under UK law that a surrogacy agreement is not legally binding – it is unenforceable. Section 1A 1985 Act provides that ‘no surrogacy arrangement is enforceable by or against any of the persons making it,’ i.e., surrogacy agreements are unenforceable in the UK courts. * Under the 1985 Act (as amended by section 59 HFEA 2008), it is an offence to publish or distribute an advertisement in the UK that someone may be willing to enter into a surrogacy arrangement or that anyone is looking for a surrogate mother or that anyone is willing to facilitate or negotiate such an arrangement. This prohibition does not apply to an advertisement placed by, or on behalf of, a non-profit-making body, provided that the advertisement only refers to activities which may legally be undertaken on a commercial basis. * To avoid the commercialisation of surrogacy and the growth of profit-driven agencies, the 1985 Act prohibits organisations, or people other than intending parents or surrogate mothers themselves, from undertaking certain activities relating to surrogacy on a commercial basis. Section 59 HFEA 2008 allows bodies that operate on a not-for-profit basis to receive payment for providing some surrogacy services. |
| * Describe any safeguards against the sale of children and child trafficking specifically created for surrogacy arrangements. | Should an intending parent make an application for a parental order, see Parental Order Report and the parental order process described above.  The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 requires the court to consider the child’s welfare as a paramount concern when making a parental order. This creates a conflict where the court is asked to make a parental order in favour of a couple who have availed themselves of (commercial) surrogacy services abroad. The court has to weigh up conflicting policy considerations – the welfare of the child and the prevention of commercial surrogacy. In most cases, the courts have authorised reasonably high payments to the surrogate, as this is the best way to regularise the child’s parentage and is ultimately in the child’s best interests. Unless there is a clear abuse of public policy, the court will not refuse to grant a parental order where the welfare of the child demands it.  The UK statute affords no guidance as to the basis of any such approval or what ‘reasonable expenses’ means. |
| * Comment on the adequacy of current safeguards against the sale of children and child trafficking in the context of surrogacy arrangements. | UK law does not, however, have all the answers. Even if the majority of the reported surrogacy arrangements pass without incident, there is, nonetheless, a pressing case for a regulatory framework that is able to deal effectively with the serious problems that have arisen in the remaining minority of cases or for those arrangements which do not form part of a parental order process.  The cases also suggest that if it is desired to control (commercial) surrogacy arrangements and combat sale or trafficking, regulatory involvement and controls need to operate before the court process is initiated and pre-birth.  See Conclusions and Recommendations in: See: <https://surrogacyuk.org/wp-content/uploads/2018/12/Surrogacy-in-the-UK-2nd-Report-20181230.pdf> |
| * Note situations and provide data, if any, where a lack of safeguards have allowed or unduly risked violations of these norms in the context of surrogacy arrangements. | There are reported cases of surrogacy disputes but I am not aware of any in the context of sale or trafficking in surrogacy cases. |
| * Note the number and types of cases where safeguards against the sale of children have been used in criminal cases in the context of surrogacy arrangements. | I am not aware of any. |
| **Data**   * Indicate if surrogacy arrangements are legal in your State and if so how many occur every year. | See: <https://surrogacyuk.org/wp-content/uploads/2018/12/Surrogacy-in-the-UK-2nd-Report-20181230.pdf> |
| * For countries where surrogacy is permitted, please indicate the number of cases, if any, of contract breaches or of refusal to transfer the child. | See: <https://surrogacyuk.org/wp-content/uploads/2018/12/Surrogacy-in-the-UK-2nd-Report-20181230.pdf>, p. 32 et seq. |
| * Indicate if intermediaries facilitating surrogacy arrangements must be registered and, if so, how many are registered in your State. | No but this is an area which the UK’s Law Commission is considering (A webpage entitled “Current project status” is available online at: <https://www.lawcom.gov.uk/project/surrogacy> ) |
| * For countries where surrogacy is prohibited, please indicate the number of cases, on an annual basis, where nationals have made a surrogacy arrangement abroad and have returned to their country of origin with the surrogate-born child. | N/A |
| * Following on the previous question, please indicate under which circumstances authorities have allowed their nationals to bring the child born from a surrogacy arrangement back into their country of origin and if so please indicate which ones (e.g. domestic parenting orders, judgements, best interests of the child determinations, etc.), and how often they have been used. | N/A |
| * Lastly, in the same context, please indicate how many cases have led to the non-recognition of parentage orders established in the State where the surrogacy arrangement occurred. | N/A |

1. In the UK, there are three separate legal systems: the law of England and Wales, the law of Scotland, and the law of Northern Ireland. This is an overview of surrogacy in the UK. While HFEA 2008 is a UK-wide legislative instrument, and it is correct to refer to the UK (and UK law) here. However, reflecting national autonomy, there are differences in the official registration documents issued in the constituent nations of the UK. As such, particular attention is given to the approach in England and Wales. [↑](#footnote-ref-1)