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Author:

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**Abstract**

This article reports the findings from empirical research focusing on international surrogacy.[[1]](#footnote-1) The document research used witness statements, parental order reports and court judgments as units of analysis in order to examine how UK commissioning couples report their experiences of international surrogacy to the courts and to map the resultant judicial response. The methodology of forensic linguistics provided an opportunity to ascribe interpretive meanings to descriptions of the personal journey of commissioning couples. In particular, the reproduced stories of the pre and post reproduction process reveal differing discourses that converge into an ideology of surrogacy as collaborative in nature. It is argued that the reported experiences of commissioning couples have the potential to affect judicial knowledge through a type of knowledge osmosis that in turn leads to transformational judicial policy in the UK that is centred on family identity.

**1. International Surrogacy – a Background**

For commissioning couples[[2]](#footnote-2) entering into a surrogacy arrangement, whereby another woman carries and/or conceives a child for them, they must go through a judicial process in the UK in order to be legally recognised as parents. This process may become more complex when the surrogate resides overseas and different national laws apply. UK law permits surrogacy arrangements as a result of section 2 (2) (a) and (b) of the Surrogacy Arrangements Act 1985. Surrogacy contracts are however unenforceable in law[[3]](#footnote-3) and thus the birth mother remains the child’s legal mother until such time as the court grants an order recognising the legal claim of others to the child. The decision is one based on the child’s welfare and lifelong needs rather than any contractual entitlement to the child.[[4]](#footnote-4)

A surrogacy arrangement for the purposes of the Human Fertilisation and Embryology Act 2008 may involve the use of the surrogate’s own gametes (eggs) and the commissioning father’s gametes (sperm) and this process is known as ‘genetic surrogacy.’ Alternatively the surrogate may be the gestational carrier of the child but without a genetic connection to the child because the gametes of another were used (for example, the commissioning mother’s eggs or the eggs of a donor) and this method is known as “gestational surrogacy.” The agreement itself may be an altruistic one between the parties where no payment is made to the surrogate other than for her reasonable expenses or a commercial arrangement whereby the surrogate is paid for her services. International surrogacy usually involves a commercial element but in the UK one of the criteria for eligibility for a parental order is that only ‘reasonable expenses’ have been paid as part of the surrogacy arrangement. However other payments can be retrospectively authorised by the court.[[5]](#footnote-5)

Commercial surrogacy, which is permitted in some parts of the world such as California, Ukraine, Russia and Georgia, has drawn accusations of a commodification of the practice of surrogacy. For example, the European Parliament has declared that the practice undermines a woman’s human dignity[[6]](#footnote-6) A number of jurisdictions such as India,[[7]](#footnote-7) Thailand[[8]](#footnote-8) and Cambodia[[9]](#footnote-9) have now moved to reverse their position on commercial surrogacy. Conversely, some jurisdictions such as the District of Columbia in the US have moved in the opposite direction. After many years of prohibiting surrogacy the state passed the Collaborative Reproduction Amendment Act in April 2017 recognising surrogacy (both genetic and gestational) and the enforceability of surrogacy contracts and payments.

International surrogacy rather than domestic surrogacy was chosen as the focus of this research because of the complex legal issues faced by commissioning couples traversing the laws in their home country in addition to the laws in the host country. International surrogacy is also more likely to involve relationships based on commerciality. It is difficult to establish the exact number of international surrogacy arrangements taking place each year involving UK commissioning couples. Recorded statistics have proved to be contradictory because they have different measures and include incomplete records.[[10]](#footnote-10) Official records relating to international surrogacy cases are held by three main agencies. The first, the Ministry of Justice, collects statistics relating to the number of parental orders applied for by couples. The second, the General Register Office, records parental orders received in order to amend birth certificates. The third, the Children and Family Court Advisory and Support Service (“Cafcass”), who provide Parental Order Reporters (“PORs) to write assessment reports for parental order cases record the number of surrogacy cases that they have been involved in. All these agencies are able to draw on the country of domicile for the surrogate to separate domestic from international surrogacy. However, the statistics only capture those couples who then go on to apply for a parental order. Those who do not meet the criteria under section 54 of the 2008 Act[[11]](#footnote-11) will not be able to apply for a parental order and would not therefore be included in the official statistics despite having undertaken a surrogacy arrangement.

A comparison of the statistics collected by Crawshaw and others[[12]](#footnote-12) and Horsey[[13]](#footnote-13) underscores the contradictions and the ability of the statistics to present a misleading and unreliable picture[[14]](#footnote-14). Horsey argues that this lack of clear reporting allows the perpetuation of surrogacy myths such as reports by surrogacy agencies that hundreds of couples per year travel overseas to enter into international surrogacy arrangements. The official records, whilst contradictory in terms of total numbers, still suggest that the numbers of international surrogacy arrangements involving UK couples is smaller in comparison to domestic surrogacy arrangements but that there has been a year on year rise since 2009. For example, the Cafcass figures reproduced by Horsey show that the number of identifiable international surrogacy cases in which they were involved rose from 1 case in the year 2008-2009 to 119 by the year 2014-2015.[[15]](#footnote-15) Cafcass separately reported in their own 2015 research report that the number of domestic and international surrogacy were fairly even in number by 2013-14 with 59.5% recorded as domestic surrogacy cases and 40.5% recorded as international surrogacy cases.[[16]](#footnote-16) However, by 2015 international surrogacy figures exceeded domestic surrogacy figures.[[17]](#footnote-17) In addition, international surrogacy worldwide is reported by the media as growing exponentially.[[18]](#footnote-18)

Whilst previous studies have examined the stories and experiences of surrogates or commissioning couples (or indeed both[[19]](#footnote-19)), none have focused on narratives constructed for the court process or purely on international surrogacy narratives. There is an existing research that examines parental order applications[[20]](#footnote-20) together with research examining the work of PORs[[21]](#footnote-21) but none of the research has involved actual court case files and similar research should be encouraged to assist policy-makers. Examining how and in what terms commissioning couples report their surrogacy experiences to the courts and what lessons (if any) the courts and legal professionals draw from the retelling of those ‘stories’ is in itself a topic worthy of examination.

**2. Methodological Approach**

Forensic linguistics involves an examination of linguistics as applied to legal language. It can go further than just language adopted by the judiciary and include language involved in the courtroom process itself including the speech of witnesses (this includes the parties). Gibbons[[22]](#footnote-22) argues that understanding the frame in which human interactions occurs also enables us to understand those human interactions. Hale and Gibbons[[23]](#footnote-23) note the importance of what they term the ‘primary reality,’ namely the courtroom and those present in the courtroom, and the ‘secondary reality’ which are the events and circumstances leading to the court action.

Forensic Linguistics was a useful tool for deconstructing the ‘secondary realities’ as experienced by the commissioning couples and reconstructed and reproduced through the witness statements. Gibbons describes secondary realities as “what should be and what should not be”[[24]](#footnote-24) as determined by the legal frameworks prescribing behaviour. Gibbons[[25]](#footnote-25) argues that there is a tension in the secondary realities played out in the primary reality of the courtroom and this is between different versions of the same event that are presented to the court. It is in the primary reality that these different versions are examined and one version is accepted and acknowledged. Gibbons[[26]](#footnote-26) notes that language in a legal setting often adopts a tone of formality appropriate to these legal relationships. As such the ‘tenor’ of the data in the study was noted as it moved between interpersonal, contextual, regulatory and a simple account.

The court case files consisted of fragmented and edited accounts[[27]](#footnote-27) in the sense that they were constructed to provide information most useful to the court and the legal process. However, all narratives in the form of stories can involve some kind of edit or concealment including those given in interviews or even ‘at the time’ statements made to ethnographers. Bruner[[28]](#footnote-28) argues that notwithstanding the known limitations of narratives, an analysis of how the narratives have been constructed is itself a story worth telling through examination of the content. Bruner further argues that stories told (even through edit) can reveal some reflection on the part of the ‘story-teller’.

Examination of language was not just confined to the use of legal language but included how participants in the courtroom made sense of their secondary realities through the use of metaphors.[[29]](#footnote-29) This is a method of language expression which Kress[[30]](#footnote-30) argues is a potent means to identify an idea or emotion within its relationship context to an object or action rather than in isolation. This figurative way of speaking or writing can be revealing through the relationship juxtaposition of the idea or emotion with the object or action.

2.2 The Data

The Ministry of Justice granted the author permission to collect data from 32[[31]](#footnote-31) international surrogacy case files from five courts in England and Wales. These files were chosen by Her Majesty’s Courts and Tribunals Service (“HMCTS”) based on an inclusion criteria provided by the author.[[32]](#footnote-32) The criteria were that case files should relate to applications for parental orders made by commissioning couples in the High Court or Principal Registry in England and Wales after 6th April 2009, that being the date the Human Fertilisation and Embryology Act 2008 (“the 2008 Act”) came into effect. The cut-off date for the data was January 2014 (the date a privileged access order was granted to the author by the Ministry of Justice). As the research focused on the law and procedure for parental orders this necessarily limited the sample to couples.[[33]](#footnote-33)

The case files produced by HMCTS comprised witness statements from 16 homosexual couples and 16 heterosexual couples[[34]](#footnote-34) with accompanying parental order reports prepared by PORs from Cafcass. All couples applied for and were awarded a parental order. The mean age of the male applicants was 43 as compared to 44 being the mean age for the female applicants in the sample. The majority of the applicants were either professionals[[35]](#footnote-35) or senior managers[[36]](#footnote-36) by occupation with some stay at home partners.[[37]](#footnote-37) The remainder fell into lower occupational groups such as technicians and sales workers.[[38]](#footnote-38) India was the most popular destination for the surrogacy arrangements (50%, N=16) closely followed by the US (41%, N=13) with other destinations reported as Canada and Ukraine.

In addition 31 international court judgments from 2009 - 2016 were analysed alongside the case files.[[39]](#footnote-39) Court judgments and reports in particular will often involve inter-textual language[[40]](#footnote-40) that may cross a number of different perspectives of the social world. Mattila[[41]](#footnote-41) argues that English judgments are essentially judicial speeches that allow judges to append their personal ‘signature’ to law development through a stylistic approach to language and that judgments are ‘inductive-deductive’ in the sense that the decisions focus on precedents that contain the detail involving an interpretation of the facts based on logical reasoning but the decision is then applied to a different set of facts when the precedent is followed. He argues that by using precedents in an inductive way, new rules of law are then applied by the courts deductively to the existing facts of a case as well as subsequent cases.

**3. Setting the Scene – Constructing the Language**

International surrogacy hearings are primarily paper hearings with the court relying on written witness statements and other written evidence rather than hearing live oral evidence from witnesses.[[42]](#footnote-42) Thus the construction of the written accounts is important for emphasis and focus when relaying the couples’ experiences of international surrogacy to the courts.

Before turning to the use of language in a legal forum (forensic linguistics) it is helpful to first examine how the written evidence was constructed, particularly in relation to the witness statements, which contained the originating stories. The statements were found to have been constructed in a way similar to the six-stages of story-telling identified by Labov and Waletzky,[[43]](#footnote-43) namely ‘abstract’ (the beginning of the story), ‘orientation’ (the actors or events involved), ‘complicating action’ (what happened), ‘evaluation’ (the relevance of what happened), ‘resolution’[[44]](#footnote-44) (how matters were dealt with), and ‘coda’ (what it all means in the context of the reporting).

Different versions of the secondary reality were retold in the witness statements and POR reports produced for the primary reality of the courtroom. This was particularly true in terms of the different emphasis placed by the PORs on reporting the commissioning couples’ experiences as compared to the couples’ own accounts (this is discussed further in section 6).

Many of the witness statements were joint witness statements but some files contained statements from both members of the commissioning couple. They also drafted their statements using the active voice where they put themselves at the centre of the action. This contrasted with the reports of, for example, the PORs, which were written in a passive voice where the subjects (commissioning couple or surrogate) are described as being acted upon rather than doing the action (see further discussion in sections 4 and 5).

In terms of the tenor of the data there was a marked difference to be found in the written accounts of the PORs and those of the commissioning couple. As one might expect, the degree of formality was much higher in parental order reports than in the written witness statements, particularly where those witness statements had been written by couples acting as litigants in person. For those few couples who adopted a tenor of formality this meant that the self-revealing nature of the language was hidden (this is discussed further in section 5).

PORs predominantly adopted a style of reporting the commissioning couples’ experiences that was biographical in nature but where in some instances the POR would also cast their own identity in to the commissioning couples’ stories through their own choice of words (this is discussed further in section 6).

Whilst commissioning couples and the judiciary used metaphors to express emotions or warnings, metaphors were not used by PORs or lawyers who instead adopted a regulatory style of reporting. The judicial use of cautionary metaphors to impart warnings was sensory in nature and this is discussed in section 7. In contrast to the judicial cautionary messages the commissioning couples’ use of metaphors served to reframe international surrogacy as mutualistic and collaborative and this is discussed further in section 5.

**4. The Lawyers’ Frame**

Less than half of the couples in the sample were legally represented (34%, N=11). Most of the witness statements were therefore prepared by the couples themselves who acted as litigants in person. Those witness statements prepared by lawyers followed the procedural formalities expected for the drafting of such documents.[[45]](#footnote-45) This was, as one might expect, in stark contrast to the 15 statements prepared by the applicant commissioning couples which did not follow the procedural requirements. For example, many of them contained un-numbered paragraphs and did not end with a statement of truth.[[46]](#footnote-46)

The story is told by the lawyers in a sequential way and through a cognitive process that has been pre-constructed during interviews with the client (the couples). As Camiss[[47]](#footnote-47) notes, lawyers’ reproduction of narratives in court focuses on details that are relevant to the case and in order to do so they listen to narratives with a particular purpose in mind for the reproduction. However, the cognitive process of construction is one belonging to the lawyer whilst the actual events are those as narrated through the voice of the applicant (s) but with the lawyer’s own choice of words. The lawyer-constructed witness statements would usually start with the ‘abstract’ setting out the reason for the story and this might be as simple as ‘I make this statement in support of…’ setting out that it is in support of a parental order application under section 54 of the 2008 Act.[[48]](#footnote-48)

Labov[[49]](#footnote-49) notes that stories are usually narrated pre-construction through ‘a recursive process’[[50]](#footnote-50) because there may be events preceding the main event that need to be reported first for explanatory purposes. Therefore the six stages of story-telling do not necessarily follow a hierarchical order when recursive pre-constructions are involved. Labov notes that the nature of ‘recursive pre-constructions’ are that they are not repeated in the telling of the main event although they explain the event itself. It is still essentially part of the ‘orientation’ because it sets the scene for the reader but it starts backwards rather than forwards. By following a recursive process in the story-telling this moves the story on to true ‘orientation’ once more and then ‘complicating action’, ‘evaluation’ and so on. This allows the story to re-start in the normal sequence of the six stages so that it does become progressive. However, this time the detail is embedded in the narration including key dates, time, place and responses.

The progressive parts of the narratives focused on the event itself. It was notable that the progressive elements of the story were much more disjointed when prepared by the applicants as opposed to the lawyer.

The court can therefore receive information in a disjointed and incomplete way from witness statements drafted by applicants. So for example, if we take file 21 which was drafted by a lawyer, the recursive pre-construction would be as follows:

Recursive Pre-construction

*From the outset of our relationship both of us wanted to have children...*

Orientation

*We settled on the idea of surrogacy….We were therefore introduced to the (name of fertility clinic) in (area) in (year) by our (country) surrogacy agency and also put in touch with an egg donor via a separate agency.*

Complicating action

*Following (name of child)’s birth we remained in (country) as there were some issues with the visa.*

(File 21, joint applicants).

The desire to have children explains the subsequent decisions taken but that desire itself is not explored further in the story. Instead the process of becoming a parent is the hook upon which the progressive stages of the story-telling are built. It is necessary to explain motivations before moving the story on to action and this was the style adopted in many of the commissioning couples’ own accounts. A similar recursive pre-construction can be found for example in file 1, which is drafted by an applicant:

*I wanted children to fill the gap that my Mom will leave in my life. It was important to me that they had at least met my Mom,*

(File 1, first applicant)

This juxtaposition of fertility and mortality is not explored further but is the recursive pre-construction upon which the rest of the story is built. However, in contrast the next stages are disjointed and cannot be said to be progressive:

Orientation

[W]*hich is why we decided to overlap*.

Coda

*I have a lot of love to give, and have travelled and want to teach them that there is a big world out there.*

*Complicating action*

 *From Blogs on the internet we thought we would be in (country) for a maximum of 3 months…We realised that (name of applicant 2) and the children could be there for many months.*

(File 1, first applicant).

Whilst the narrative moves from recursive to disjointed progressive the applicant does not explain what is meant by ‘overlap’ but the listener is left to presume that it relates to the decision to have children whilst the applicant’s

 mother was still alive. Rather than explaining the main event in terms of explaining how the ‘overlap’ was achieved the applicant moves straight on to explain his capability to give love and to teach the children about the world.

**5. The Commissioning Couples’ Frame**

Almost 50% of the witness statements were joint witness statements (the joint voice of the couple). There was use of the first person ‘we’ throughout the joint statements and very rarely would the narrative split to recall an individual rather than a shared experience. The use of ‘we’ was used to express joint emotion, for example, ‘we considered this quite unreasonable’ or to apportion joint blame, for example, ‘we acknowledge this sum exceeds expenses reasonably incurred by the surrogate over the course of her pregnancy.’ This meant the court (and indeed the author) was not able to distinguish between any differing experiences of the applicants that might have existed.

Even when single witness statements were filed there was a tendency to present a united front through language. For example, the commissioning mothers’ through their sole witness statements, were careful to include their partner’s emotions as combined with their own, choosing sentences such as, *‘we were unable to birth our own child*’ or ‘*word (sic) could not describe how happy we were*’ or ‘*we decided to proceed with surrogacy*’. This twinning aspect of the witness statements was also present in the sole statements of the commissioning fathers (regardless of sexual orientation) and signified an intention to take a united approach in the proceedings.

The style and tenor of the narratives would change when applicants filed multiple statements. For example, both files 19 and 16 included joint statements for the applicants that used language in the third person in one statement (to address themselves as ‘applicants’ or more formally by their surnames) but also included joint statements written in the first person using ‘we’. It was as if the commissioning couples were uncertain as to the level of formality to use for the court. These witness statements were prepared by the applicants rather than lawyers, which would explain the change in style and format.

Some of the commissioning mothers’ witness statements contained their own emotive responses such as:

*In the days to come I refused to see anyone and was sinking into depression. Then one day I logged onto the internet and joined a website call (sic) ‘(name of website)’ I read many stories on their (sic) and I began to cry. For the first time I was grateful I was able to feel morning sickness, see the ultrasound pictures of my daughter and feel her kick.*

 (File 20, statement of commissioning mother).

This commissioning mother writes in the first person to emphasise the impact her miscarriage had on her. However, for some commissioning mothers, even emotional moments were treated with formality and simple reporting:

*We have been attempting to procreate over this period of time in the natural process; but all our attempt failed. After this, we tried various Assisted Reproductive Technology procedures for six times, attempting to procreate. I also suffered miscarriage during 2002 year. I could not produce eggs thereafter. All medical procedures for fertility following this was (sic) carried out by using donor eggs which were genetically unrelated.*

(File 15, statement of applicant mother).

Even allowing for the fact that English may not have been the first language for this commissioning mother the reporting style is very matter of fact. This may signal that some applicants acting as litigants in person adopted formalised language to fit the formality of the legal proceedings.

Whilst formality of language was seen by some of the couples as a necessary part of preparing a witness statement, most of the couples’ witness statements did not follow the section 54 criteria of the 2008 Act. Thus couples viewed the purpose of their witness statements as conveying to the courts the impact of their infertility (medical or social), the circumstances surrounding the surrogacy arrangements and why they were deserving as parents. These were recounted either with or without formality. The formal language adopted arguably failed to convey to the reader the full emotional impact of the surrogacy process. In turn, the court judgments (discussed in section 6) were themselves emotive in places and attempted to relay the full emotional impact of the surrogacy journey on the commissioning couples involved by repeating their stories rather than merely observing whether or not the section 54 criteria had been met.

The absence of information that touched on the section 54 criteria led to court directions for further witness statements to be filed so that evidence supporting the criteria could be obtained from the commissioning couples. This inevitably increased the length of proceedings. Few of the witness statements followed the section 54 criteria and provided information on all aspects such as domicile,[[51]](#footnote-51) consent of the surrogate to the making of a parental order application[[52]](#footnote-52) or explaining that only reasonably incurred money or other benefits have been given or received by the applicants.[[53]](#footnote-53) This meant that couples were often required to file supplementary witness statements to deal with these issues or a Children’s Solicitor would be appointed by the court to make further enquiries of clinics about the issue of payments or the surrogate’s consent. One method of simplifying the process would be to provide pro forma witness statements that followed the section 54 criteria and made it clear to applicants the nature and level of the information that would be required from them before the process begins.

The complicating action in the stories focused on concerns for the wellbeing of the surrogate and the element of commerciality. Exploitation of the surrogate was recognised as a potential risk but most couples felt they could control the outcome by selecting surrogacy agencies and clinics with ethical business practices and a proven track regard of putting the surrogate’s wellbeing first:

*We decided to proceed with surrogacy in India because of economic and altruistic reasons as we were assured by (name of clinic) that the surrogate women would be very well looked after by the (name of clinic) and would be given excellent healthcare throughout the pregnancy.”*

(File 4, applicant 2)

This commissioning mother uses the word ‘altruistic’ despite the fact that the arrangement was a commercial one and this underlines the fact that for this couple the motivations (selflessness and concern for others) were viewed as altruistic and capable of existing within a surrogacy arrangement regardless of the commercial nature of the relationship through payments.

The commissioning couples largely framed the stories of their journey as one where they made choices in relation to selection of surrogacy agencies, clinics and surrogates (sometimes with advice from third parties). None of the statements in the sample were constructed in a way to suggest lack of choice by the commissioning couples during the process of selecting the clinic and surrogate. In this respect they voiced actions and choices suggestive of personal autonomy. However, many of the statements expressed frustration at a lack of control over payments. All payments were made to the clinics and couples felt that these payments sometimes increased beyond their original expectations or they were unable to monitor if the surrogate received her share of the payments For example:

*We had no specific say in how the money was spent. We got the breakdown from the lawyer Mr (name) after he paid the fees.*

*(File 4, second applicant)*

*The clinic asked for additional money at every opportunity through the process but once involved, the applicants felt bound to agree to the demands of the clinic.*

(File 1, POR).

However, once the selection was made they were also dependent on the surrogate exercising her choice in their favour. This did not always occur, for example there were reports of surrogates withdrawing from the agreement on discovering the sexual orientation of the commissioning couple.

The sixth stage of Labov and Waletzky’s story-telling process known as ‘Coda’ was most evident in the commissioning couples’ witness statements when describing their feelings on becoming parents. The Coda is the reflective stage that brings together the events, complications, actions and resolutions to make sense of and give meaning to the journey the commissioning couple had completed. The Coda in the witness statements very much centred on birthing a child through partnership with another (whether this be a surrogate, egg donor or even the clinic). For those arrangements involving a surrogate, the commissioning couple viewed the partnership as one where they were providing financial benefits to the surrogate to improve her life in exchange for the benefit to the couple of a parenting solution. For example:

*I felt that we had gained something precious in life with regard to the twins but we had helped someone in the slums to make life a little comfortable.*

(File 2, applicant 1)

*The selection process was a two way matter and it was made clear to me that the surrogate had to be happy with both (applicant 2) and I as we were with her”.*

(File 26, Applicant 2)

The focus moved swiftly away from any complicating actions to one where the commissioning couple reported their feelings on becoming parents and this was expressed using words such as ‘joy’, ‘happiness’ and ‘gratitude’. The children were reported as having an invigorating quality on the couple and their relationship.

Metaphors were also found in the commissioning couples’ witness statements to express feelings of happiness and enthrallment with the birth of the child as well as their new status as parents. Metaphors referring to the child as a ‘gift’[[54]](#footnote-54) were used as well as non-metaphorical concepts that Lakoff and Johnson define as ‘spatial orientations’[[55]](#footnote-55) and are important because they emerge directly from experience. The files included spatial orientations such as:

*Time seemed to stand still at that moment and we were completely oblivious to our surroundings.*

(File 2, second applicant).

Spatial orientations were a way for couples to express how at the point of the birth of the child their emotions, thoughts, actions and focus were completely taken over by the event. It was also used to express how poignant the moment was for many of the couples.

Parentage as a concept was metaphorically expressed. Witness statements included metaphorical themes for example, parent as educator in that commissioning couples saw their parental role as imparting knowledge:

*I have a lot of love to give, and have travelled and want to teach them that there is a big world out there.*

(File 1, first applicant)

Parent as therapist was also used denoting the caregiver role infused with powers to bestow happiness:

*We love him with all our hearts and will do everything in our power to raise him to be happy and complete.*

 (File 5, joint applicants)

Metaphors therefore served to heighten the emotional reporting of events by couples and were commonly used to discuss their relationship with the child.

Metaphors were also used as a means to distinguish identity. For example couples spoke of how when disclosing the child’s origins they would explain the surrogates role as ‘Tummy Mummy’ or ‘Incubator.’ Couples also self-labelled themselves as parents through their actions and this was used as a means to convey to the court that they considered they had already acquired the right of parentage through their actions rather than through legal title.

Homosexual commissioning couples also developed self-labels to distinguish each claim to fatherhood such as ‘Popa’ and ‘Papa.’ This self-labelling enabled couples to reclaim entitlement to parentage through the reporting process before the question of parentage had been fully determined by the court.

These self-labelling codes barely concealed the true meaning; that courts were faced with a finished or completed family and that the courts were merely being asked to process the family in to societal existence through a rubber-stamping exercise.

**6. The Parental Order Reporters’ Frame**

The PORs are an important second voice of the commissioning couple in the courtroom. This is because the POR reports carry significant weight and influence with the courts and the recommendations of a POR are rarely if ever disregarded by the court. Reports present an opportunity to use written words to convey interpersonal meaning, signals and opinions (including to the court).

PORs have access to guidance such as the as the Parenting Daily Hassles Scale[[56]](#footnote-56) and the Cafcass Adoption and Surrogacy Handbook.[[57]](#footnote-57) The reports were written against a prescribed welfare checklist[[58]](#footnote-58) and the reports included sub-paragraphs relating to such matters as the background to the parental order application (the surrogacy arrangement), the nature of the investigations undertaken and the enquiries made by the POR. Any observations relating to the children who were the subject of the parental order application were also noted. Family composition and support networks were also of interest to the PORs. The reports ended with recommendations to the court about the grant of a parental order. Most reports contained numbered paragraphs and some included exhibits such as the surrogacy contract.

Crawshaw and others[[59]](#footnote-59) in their 2013 study of the work of PORs undertook telephone interviews with 16 PORs. They noted that there was a lack of detailed guidance for PORs about parental order applications and that reliance on the PORs’ own intuition was a necessary part of understanding parental order work.

The evidence from the case files suggested that the PORs adopted a style of reporting that was both biographical in nature concentrating on the ‘orientation’ (the actors or events) as well as recasting their own identity on to the story through their reaction and choice of words. Deborah Tannen argues that ‘“reported speech” is not reported at all but is creatively constructed by a current speaker in a current situation’.[[60]](#footnote-60) This, Tannen argues, is because taking information in one situation and then reproducing that information in a different situation involves a fundamental shift in the nature of the communication and yet the actual truth of the reporting is often not challenged. Dialogue which recounts action or drama can be especially problematic she argues. Similarly, narratives may contain reported speech that in turn has been ‘creatively constructed’ and so may not be true to their original construction.[[61]](#footnote-61)

All the POR reports were silent as to the order in which the ‘speakers’ (the commissioning couple) were invited to report their experiences and in some circumstances the speakers were given a ‘joint voice’ similar to some of the witness statements. As such this presented their experiences as shared although in reality the experiences may have been felt at different levels. The reports were used to construct the applicant’s ‘voice’.[[62]](#footnote-62) However, they often did so in a way that represented a simple reporting of the state of affairs that would be expected from the report of a court-appointed official or expert who has to remain impartial and so understandably did not always capture the emotions or passion within the voices that they were reporting.

The formality of reporting in the POR reports contrasted with the emotive statements found in the commissioning couples’ witness statements. For example, one can compare the difference in emotional content found in file 23 between the commissioning mother’s account and the POR’s account of how a decision was reached to use surrogacy as a form of fertility treatment:

*(Name of applicant father) and I have always very much wanted to expand our family and over the course of 8 years from the age of 33 we attempted IVF treatment in the hope that I would become pregnant. I have had approximately 18 cycles of IVF over the course of 8 years. I became pregnant on 3 separate occasions and all 3 times had miscarriages. The physical and emotional strain of this became more and more difficult to bear. The constant expectation and disappointment with the highs and lows of the entire IVF process caused unbearable strain and stress for me and for us.*

(File 23, Commissioning mother’s statement).

When reported by the parental order reporter this becomes:

*They wanted to have another child and again tried the IVF route and when their last attempt, at a fertility clinic in (name of country), failed it was suggested to them that they try to have a child through surrogacy and they were recommended to a clinic in the (name of jurisdiction).*

(File 23, POR).

Some reports did contain language that signified the POR’s own sympathy and affiliation with the commissioning couples’ circumstances and this tended to be when describing their parenting role:

*(Name of the twins*) *have all the love, care and attention, baby clothes, equipment, toys etc. that they could need in a comfortable and well equipped home. The clothes (sic) are an obvious delight to their parents.*

(File 3, POR).

There was a different focus placed by PORs and commissioning couples on what they considered to be important to relay to the courts. If for example one considers file 6, on the question of disclosure the POR that she was ‘impressed’ by the commissioning couple’s reflections on how to disclose to the child their origins:

*I have discussed this question with the applicants and was impressed by how much thought and preparation they had already done with (surrogate mother) on these issues and intend to do with the twins.*

(File 6, POR).

This can be compared to the joint statement of the commissioning couple where they do not mention their intention to disclose origins to the child in their witness statement but instead use language to emphasise and enforce their legal claim to the child:

*(Surrogate mother) and (surrogate mother’s husband) do not have any legal rights over either (surrogate child 1) or (surrogate child 2) in (name of jurisdiction). We refer to the pre-birth order made on (date)…by virtue of which they have no legal rights or obligations under (name of jurisdiction) law in respect of the children. (Name of surrogate mother) and (name of surrogate mother’s husband) consented with full knowledge and understanding of the legal implications of the pre-birth order being made in (name of jurisdiction). Indeed the court will note from the children’s birth certificate at pages 5 to 6 of the exhibit that we are each named as the children’s mother and father respectively.*

(File 6, joint statement of applicants).

Therefore the issue of disclosure is not prioritised in the couple’s own reporting back to the court. The emphasis placed by this commissioning couple on entitlement suggests that disclosure of origins to the child was not part of their story for the court and was given less prominence in the retelling of past and future events.

The difference in approaches may be explained by the commissioning couples understanding of the role and purpose of the legal proceedings (being a process to settle the issue of legal parentage) as opposed to the parental reporter’s understanding of their role (to ensure the welfare of the child is met). In addition some of the witness statements were written before receipt of the parental order reports and therefore there did not always provide an opportunity to respond to the issue of disclosure once raised by the POR. None of the commissioning couples appear to have taken issue with the question of disclosure when raised by the POR during interview. However, there was a difference to be found between those couples who had already given the matter some thought and responded enthusiastically to the suggestion (71%, n = 15) and those who said that they would give the matter serious thought (29%, n = 6).[[63]](#footnote-63) For example, in one file the POR writes:

*Their (sic) intended parents recognise that the knowledge of the children should be a developing process rather than being told the information in a prepared session.*

(File 29, POR)

Yet in this same file one of the commissioning couple seems ambiguous about future intentions to disclose and writes:

*How will I tell them I wonder? Tell them what? They will one day know that they were lucky enough to have two Daddies, they’ll also know pretty much what its like to have a Mummy. We’ll tell them about the wonderful people who have helped look after them; grannies and granddads and uncles and aunts and great uncles and aunts and even a very enthusiastic great granddad.*

(File 29, first applicant).

There appears to be an almost defiant position adopted that the children will find female role models within the immediate and extended family and the implication was that there was not therefore a need for the child to know the surrogate. This particular file related to a surrogacy arrangement in a non-western country .

Whilst the PORs often gave their final view on the question of legal parentage, there were some matters that the PORs were careful to leave to the courts but were able to signal their own feelings of concern through signposting. For example, in file 29, the POR was clearly concerned that there was missing documentation relating to the nature and terms of the surrogacy arrangement. Instead of directly stating this they couched their concerns in careful terms to the judge as if imparting a non-verbal marker:

*The applicants were able to arrange British passports for all three children and the family returned to their home in England on (date). For some reason the (sic) there is no reference to baby (name of surrogate child 2) on the copies of the flight documentation. I was recently advised that this was because she was in the care of her (nationality) grandmother.*

The use of the words ‘*for some reason*’ suggests a declared confusion on the part of the POR as to why there is not written explanation given for the missing documents. The use of the words ‘*I was recently advised*’ as opposed to for example, ‘*I have been able to establish*’ also signals that the confirmation received is not conclusive.

The PORs followed a pattern of using quotation marks when assigning speech to the commissioning couple or using written markers such as ‘*I have been told/informed*’ or ‘*the applicants were very clea*r’ or ‘*the applicants describe/spoke of*.’ However, sometimes this would also be more vaguely expressed as ‘*I understand*.’ At other times it would be unclear whether the adjectives chosen belonged to the POR or the commissioning couple. For example, in file 28 the POR clearly ascribes words to the commissioning couple:

*The applicants had a room at the hospital next door to (name of surrogate) who they described as a “brilliant surrogate”.*

(File 28, POR).

But when describing the same couple’s experience of researching surrogacy agencies the POR writes:

*The applicants also looked into (name of surrogacy agency)’s (sic) in the UK but they heard a couple of bad stories about this agency.*

(File 28, POR).

The adjective ‘bad’ is not ascribed to the commissioning couple through the use of quotation marks but is reported back as part of their account but could in fact be the POR’s own choice of words. This is an example of reported speech that could perhaps reflect the listener’s interpretation rather than the actual words spoken by the storyteller

Crawshaw and others[[64]](#footnote-64) note that PORs perceived role constraints that prevented them affecting process or outcome. Purewal and others[[65]](#footnote-65) argue that as the recommendations made in POR reports are acted upon by the courts in the vast majority of cases PORs are capable of affecting family formation. In fact, the witness statements of the commissioning couples became influential in affecting outcome and even judicial policy and this is discussed below.

**7. The Judiciary’s Frame**

In the case of judgments, forensic linguistics is also a useful tool for looking at the judiciary’s own thought processes as well as how the judiciary assesses and evaluates international surrogacy. Maule and Schmid[[66]](#footnote-66) argue that there is a need for family practitioners to collect and analyse court decisions relating to child and family policies to help bridge what they call the ‘ecosystem’ (the legal system) and the ‘microsystem’ (the family). Through the use of metaphors and the process of statutory interpretation and analogous reasoning it was possible to chart judicial attitudes to international surrogacy.

All the judgments were High Court judgments since at the time of the research no international surrogacy cases has been reported at appeal level.[[67]](#footnote-67) Each case brought a new set of issues for determination. Many cases[[68]](#footnote-68) quoted Mr Justice Hedley’s decisions in *X and Y (Foreign Surrogacy)*[[69]](#footnote-69) and *Re S*[[70]](#footnote-70)as a basis for deciding how to exercise discretionary powers and measure the reasonableness of payments and some reported cases also included metaphors as a means to frame international surrogacy.

The judiciary often employed metaphors such as the ‘policing’ metaphor. This was used to signify the gatekeeper role of the court in terms of preventing commercial surrogacy agreements by scrutinising payments. For example, in the case of *In the Matter of X and Y (Children)*[[71]](#footnote-71) Sir Nicholas Wall refers to the speech by Hedley J in *Re L*[[72]](#footnote-72):

[T]he court should continue carefully to scrutinise applications for authorisation under Section 54 (8) with a view to policing the public policy matters identified in Re S (Parental Order [2009] EWHC 2977 (fam).[[73]](#footnote-73)

The secrecy and stigma surrounding international surrogacy have also been subject to a metaphor by Mr Justice Baker which also helped to convey sympathy for the surrogate:

A surrogate mother is not merely a cipher. She plays the most important role in bringing the child into the world. She is a ‘”natural parent” of the child.[[74]](#footnote-74)

‘Cipher’ is used to denote the secrecy surrounding surrogacy arrangements and in particular to signal the need to discuss or recognise the surrogate’s role.

The metaphor of surrogacy as a free market or trade dictated by supply and demand has been echoed in judgments.[[75]](#footnote-75) For example in *Re P-M[[76]](#footnote-76)* Mrs Justice Theis stated ‘the reality is there is a legal commercial framework, which is driven by supply and demand.’[[77]](#footnote-77) This is an example of analogous reasoning by the court; payments and commerciality within international surrogacy are used here to denote similarity with economic principles of trade. The courts also used analogous reasoning by drawing comparisons and similarities between identity and family in a number of cases[[78]](#footnote-78) in order to reach the conclusion that the child’s welfare is met through family identity. For example, in *Re X (A Child)*[[79]](#footnote-79) Sir James Munby argues that a parental order is the ‘optimum legal and psychological solution’[[80]](#footnote-80) for the child rather than adoption because only this will secure the child’s identity within the family unit.

Non-metaphors were also used to convey messages, for example, spatial orientations such as:

The message needs to go out loud and clear to encourage parental order applications to be made in respect of children born as a result of international surrogacy, and for them to be made promptly.[[81]](#footnote-81)

‘Loud’ and ‘clear’ are also used to send out a warning and to underline the need for the message to be heard. These metaphors and non-metaphors also served another purpose and became what can be described as a kind of sensory metaphor to affect others and to emphasise and highlight the message that follows it. Sensory metaphors were used to warn commissioning couples of the dangers and complexities of international surrogacy. These were messages to avoid a practice, which could be harmful, and where physical sensations were invoked by analogy.

Another example of a sensory metaphor can be seen in one of the most quoted passages of an international surrogacy judgment taken from the case of *X and Y,[[82]](#footnote-82)* which in turn is taken from the work of Blyth.[[83]](#footnote-83) In this case Hedley J described parenthood in these terms: ‘the path to parenthood has been less a journey along a primrose path, more a trek through a thorn forest’.[[84]](#footnote-84) The choice of the analogy between a ‘primrose path’ which is itself an idiom used to convey a pleasurable and easy life, with a ‘thorn forest’ serves to underline how harmful and opaque international surrogacy can be. Other sensory metaphors have included ‘legal minefield’[[85]](#footnote-85) and ‘pitfalls’[[86]](#footnote-86) and have been used by the judiciary to describe the legal implications of international surrogacy arrangements that go wrong.

Similarly Mrs Justice Theis expressed her sympathy for the commissioning couples in *Re G and M[[87]](#footnote-87)* by stating that ‘the applicants were clearly caught between a rock and a hard place’.[[88]](#footnote-88) This adage is used to denote being in a difficult situation or making a choice been two difficult situations and again uses sensory images. Thus the metaphors serve to highlight the intractability of international surrogacy as well as to illuminate judicial sympathies to those wishing to become parents using this difficult route.

As well as using metaphors to emphasise the legal complexities of international surrogacy, the judiciary also used words such as ‘once again’ at the beginning of the reported judgments[[89]](#footnote-89) to signal their exasperation that cases continued to come before them with the messages that they had dispatched seemingly unheeded. Reported judgments continued nevertheless to be dispatched to provide yet another ‘example’[[90]](#footnote-90) or ‘cautionary tale’[[91]](#footnote-91) with the court noting in the case of *CC v DD*[[92]](#footnote-92) that the child would ‘if nothing else leave his mark long term in the legal textbooks that consider this area of law’.[[93]](#footnote-93)

The judicial warnings have also included cautionary messages about issues relating to domicile,[[94]](#footnote-94) lack of proper legal advice provided to commissioning couples,[[95]](#footnote-95)lack of awareness by surrogacy agencies or clinics in the host country of the legal requirements in the UK,[[96]](#footnote-96) lack of knowledge by family professionals of the laws on surrogacy[[97]](#footnote-97) and lack of legal knowledge by the parties themselves.[[98]](#footnote-98) These reported cases have acted to help family professionals such as lawyers, judges and PORs gain a greater understanding of the level of advice and support that needs to be provided to commissioning couples.

However, this judicial mood music, although composed for those involved in surrogacy to listen and move too, has been less effective in reaching the ears of the commissioning couples themselves as the post 2008 cases demonstrate. For example in the case of *JP v LP, SP and CP[[99]](#footnote-99)* the court urged all commissioning couples thinking of entering international surrogacy arrangements to seek legal advice. Later cases have however shown that couples continue to make the journey abroad without a full understanding of the legal implications.[[100]](#footnote-100) In addition clinics continue to fail to secure the surrogate’s consent despite the early warnings given in *D and L (Surrogacy)*[[101]](#footnote-101) as later cases have shown.[[102]](#footnote-102) In the case of *A and B and C and D*[[103]](#footnote-103)the commissioning couple asked the court to publish the judgment to educate others. The couple stated in their written statements:

[W]e were unaware of any public information that was available to let us know the consequences under UK law of entering into an international surrogacy arrangement. We were unaware that UK law would not necessarily recognise an order made in another jurisdiction’.[[104]](#footnote-104)

There was some evidence of the judicial mood music being heard by commissioning couples such as the case of *AB and DE* [[105]](#footnote-105) where the commissioning couple took legal advice after becoming aware of the complications which resulted in the earlier widely reported case of *X and Y*.[[106]](#footnote-106)

By 2013, the use of sensory metaphors that urged caution in earlier cases had given way to a much more resigned acceptance of international surrogacy as a practice, suggesting that the reported experiences of couples was affecting the judicial approach to the practice. For example, in *J v G*[[107]](#footnote-107) the concern expressed in earlier cases about couples entering international surrogacy arrangements (a pre-action warning) shifted to a concern that couples should be encouraged to apply for a parental order after completing an international surrogacy arrangement (a post-action warning). Mrs Justice Theis message was a follows:

I would like to add a few general observations. Those who embark on this type of surrogacy arrangement are to be encouraged to apply for parental orders. There has been a noticeable increase in such applications being made, which is to be welcomed.

Later judgments[[108]](#footnote-108) tended to end more with a focus on the need for an order for the child’s life-long welfare needs and to keep the new family unit together rather than to publicly chastise those couples who chose international surrogacy as a route or merely to point out the hazards of international surrogacy. Later cases[[109]](#footnote-109) were also careful to distinguish surrogacy from adoption with adoption orders referred to in *D & G and ED and DD and A & B*[[110]](#footnote-110) as ‘a square peg for a round hole’.[[111]](#footnote-111)

6.1 Judicial Policy-Making Through Statutory Interpretation

The shift in judicial attitudes can best be illustrated by the move by members of the judiciary to challenge the current wording of section 54 of the 2008 Act. In order to do so the courts first had to dismantle the conjunction ‘if’ used in section 54 (1) of the Act.[[112]](#footnote-112) This section provides that a parental order may be made ‘if’ certain conditions are met. The conjunction ‘if’ in section 54 (1) would linguistically be constructed as involving a condition to be met before further action could be taken and therefore would have to be read together with other sections of the Act such as 54 (3) which is itself constructed as imposing a condition and therefore ‘if’ also had to be downgraded in relevance. Drawing on the case of *Howard v Boddington*,[[113]](#footnote-113) Sir James Munby decided the word ‘if’ was of a directory nature rather than a mandatory nature,[[114]](#footnote-114) as distinguished[[115]](#footnote-115) and clarified[[116]](#footnote-116) in other cases. The court therefore adopted a practice of ‘reading out’ which involves omitting words from statute.

Section 54 (1) – (8) read together with the sub-sections comprises ten main conditions. As currently drafted section 54 makes all the ten conditions obligatory save two. Only the conditions relating to the consent of the surrogate[[117]](#footnote-117) and payment of reasonable expenses,[[118]](#footnote-118)gives the court a discretion if the condition is not complied with. In relation to the surrogate’s consent, the court can set aside the requirement for consent where the surrogate cannot be found or is incapable of giving agreement and this is provided for in the Family Procedure Rules.[[119]](#footnote-119)

Although judicial discretion has not been written into the remaining eight conditions, so far the court has dismantled the obligatory nature of at least four[[120]](#footnote-120) of the remaining eight conditions by allowing applications to proceed and succeed despite non-compliance. This circumvention of the provisions of section 54 has been achieved through the use of a combination of human rights considerations, artful statutory interpretation and logical and lexical semantics.[[121]](#footnote-121) The conditions relating to the definition of ‘applicants’ in section 54 (1),[[122]](#footnote-122) the enduring nature of a relationship in section 54 (2) (c),[[123]](#footnote-123) the meaning of ‘home’ for the purposes of deciding whether or not the child is living with the applicant under section 54 (4) (a),[[124]](#footnote-124) and the time limit for making an application under section 54 (6)[[125]](#footnote-125) have all been challenged. The court therefore wanted to achieve its desired result without the limitations of the language of the statute.

Statutory interpretation often involves linguistic elements to assist the court in either adhering to or departing from the original language of statute. However, the method can be used to justify a given outcome as can be seen by comparing the different decisions reached in the cases of *Re X (A Child) (Surrogacy: Time Limit)[[126]](#footnote-126)* and *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order),[[127]](#footnote-127)* both decisions of Sir James Munby, the President of the Family Division of the High Court.

In the case of *Re X (A Child) (Surrogacy: Time Limit)[[128]](#footnote-128)* the court had to decide the meaning of the verb ‘must’ in section 54 (3) of the 2008 Act.[[129]](#footnote-129) This section requires a parental order application to be made no later than six months after the birth of the child. The court used statutory interpretation to extend the time limit for making an application from six months to approximately seventeen months. The child in this case was born on 15th December 2011 but an application for a parental order was not made until 6th July 2013. This extension was achieved by reading down the ordinary meaning of the word ‘must’.

The court was unable to find any parliamentary debates on the rationale behind section 54 (3). Considerations were focused on the child’s identity being dependent upon the legal relationship with its parents. Referring to the ‘lifelong’ requirement to treat the welfare of the child as paramount the court argued that it must have been Parliament’s intention for the courts to look to the future when deciding on matters affecting the child.[[130]](#footnote-130) Thus family identity as a concept was capable of deposing key words in written law.

Whilst Sir James Munby stated: ‘I intend to lay down no principle beyond that which appears from the authorities. Every case will, to a greater or lesser degree, be fact specific,’[[131]](#footnote-131) his approach was followed in the later cases of *AB v CD (Surrogacy-Time Limit and Consent)],*[[132]](#footnote-132) *D & G v ED & DD and A & B*,[[133]](#footnote-133) *Re A and B (No.2 Parental Order)*,[[134]](#footnote-134) *A and B v C and D*[[135]](#footnote-135) and *KB and RJ v RT.[[136]](#footnote-136)*

Sir James Munby’s decision was also used to justify reading down a different statutory provision namely section 54 (4) (a) relating to the meaning of ‘home’ in the cases of *Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports)*[[137]](#footnote-137) and *Re A and B (No.2 Parental Order)*[[138]](#footnote-138) where the applicants were found to have their ‘home’ with the child even though they were not living with the child at the time of the application. Reading down (rather than reading out) involves choosing a particular meaning for words in the statute to ensure compliance. However, this had the effect of giving ‘home’ a vague meaning and it was interpreted as being a condition to be applied at the time of the making of the parental order rather than at the time of the making of the application[[139]](#footnote-139) and that the making of a parental order activated the right to family life, one aspect of Article 8.[[140]](#footnote-140)

In *DM and LK*[[141]](#footnote-141) the practice of reading down was also used to interpret ‘enduring relationship’ in section 54 (2) (c) as one including a relationship where the parties only lived together part-time. This was again achieved by reference to Article 8.[[142]](#footnote-142) In the case of *A v P*[[143]](#footnote-143) the meaning of ‘applicant’ in section 54 (1)[[144]](#footnote-144) was redefined. The applicant-commissioning father in this case died of liver cancer after an application for a parental order was made but before the final decision of the court. The court had to determine whether the cause of action could survive the applicant commissioning father’s death. The court decided that whilst in matrimonial cases a claim might be extinguished by death, a parental order was of a declaratory nature and concerned a child who could also be considered to be an applicant. This is a surprising conclusion given the language structure of the section. It presumes that the people making the application are doing so for the child and the use of the words ‘as the child of the applicants’ suggests the child and the applicants cannot be one and the same person. The court took into account the ‘transformative’ nature of section 54 of the 2008 Act and found that ‘the effect of not making an order will be an interference with that family life in that the factual relationship will not be recognised by law’.[[145]](#footnote-145)

The court therefore imposed a rights based argument again based on family identity to justify moving away from the ordinary language of the statute. In particular the court was concerned that the child should have the ‘social and emotional benefits of recognition’ of a legal relationship with the commissioning couple, which was important to the child’s identity and would serve to protect that identity in accordance with the United Nations Convention on the Rights of the Child 1989.[[146]](#footnote-146) Therefore the rights based argument was also infused with arguments relating to certainty around the identity and wellbeing of the child.

The lack of application of linguistics to statutory interpretation in the case of Re X *(A Child) (Surrogacy: Time Limit)[[147]](#footnote-147)and A v P*[[148]](#footnote-148)can be contrasted with the case of *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order),* also heard by Sir James Munby.*[[149]](#footnote-149)* This was an application for a parental order by a single father who would not be eligible to apply under section 54 of the 2008 Act because section 54 (2) only includes couples.

Whilst Sir James Munby could have taken the same approach that he had taken in Re X *(A Child) (Surrogacy: Time Limit)[[150]](#footnote-150)* and read down the provisions of section 54 (2) as ‘directory’ and therefore not capable of causing the whole proceedings to fail if there was non-compliance with the condition of couple-hood, he was precluded from doing so because this time Parliament’s intention was clearly recorded.[[151]](#footnote-151)

Whilst the court accepted that section 3 of the Human Rights Act 1998[[152]](#footnote-152) gave the court a right to consider whether the language of a statute was inconsistent with the European Convention on Human Rights 1950, section 3 was itself limited in use because of the use of the word ‘possible’. Section 3 reads: ‘So far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with Convention rights.’[[153]](#footnote-153) Sir James Munby, quoting authorities such as *Ghaidan v Godin-Mendoza,[[154]](#footnote-154)* held that section 3 could not be used to interpret the language of the 2008 Act so as to adopt a meaning that was inconsistent with ‘a “fundamental feature”, a ‘cardinal” or ‘essential” principle of the legislation.’[[155]](#footnote-155) However, he was careful to preserve and justify the opposite approach to reading down cases taken in Re *X (A Child) (Surrogacy: Time Limit)*[[156]](#footnote-156) and *A v P*[[157]](#footnote-157) by specifically stating at paragraph 40 of the judgment that it was still permissible to read down sections 54 (3)[[158]](#footnote-158) and section 54 (4).[[159]](#footnote-159) Those sections were not therefore considered ‘essential’ or ‘fundamental’ to the legislation on surrogacy.

Despite succumbing to the rigidity of the language of section 54, it is clear that Sir James Munby in *Re Z[[160]](#footnote-160)* felt uncomfortable interpreting the law in a purely lexical semantic way for this case by considering the meaning of section 54 (3) and its relationship to the meaning of language used in the parliamentary debates. This is shown by the final paragraph of the judgment, which is essentially a call for the applicant’s lawyers to make a further application before him purely on the question of the incompatibility of section 54 with Articles 8, 12 and 14 of the European Convention on Human Rights.[[161]](#footnote-161) The matter thus came before Sir James Munby once again as *Re Z (A Child) (No.2)[[162]](#footnote-162)*at which time the court was prepared to make a declaration that section 54 (2) was incompatible with the European Convention on Human Rights.[[163]](#footnote-163)

Adopting a rights based approach has moved the courts one step further towards dismantling section 54 of the 2008 Act[[164]](#footnote-164) altogether. The key cases of *Re X (A Child) (Surrogacy: Time Limit),[[165]](#footnote-165) A v P,[[166]](#footnote-166) Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* and *Re Z (A Child) (No.2)[[167]](#footnote-167) and DM and LK [[168]](#footnote-168)* demonstrate a normative approach to statutory interpretation that is perhaps affected by the sympathies of key members of the judiciary towards international surrogacy despite the recognised risks that it exposes the parties to. Such cases also highlight how the reported experiences of commissioning couples have perhaps caused or contributed to a shift in messaging from warnings about international surrogacy to an acceptance of the importance of legally connecting an already finished family to ensure identity for the child.

Thus collaboration in language between the actors (the commissioning couple) and the expert system (the judiciary and the PORs) appears to have helped to reframe international surrogacy as an acceptable method of family formation.

**Conclusion**

This study suggests that language became a way to affect change by permeating judicial attitudes to international surrogacy through the use of emotive metaphors and other emotive signifiers. It is argued that this in turn led to a change in judicial policy carved through a redefinition of section 54 of the 2008 Act. The transformative language of the commissioning couples’ accounts acted as a conduit to affect the parental order process by experiential osmosis. The judiciary responded with an orient-focused approach to the 2008 Act and key parts of section 54 were re-interpreted by the judiciary in a responsive approach to decision-making. This in turn was driven not just by the welfare of the child but also by a genuine concern for family formation and family unification to achieve family identity for the child.

The witness statements of commissioning couples played an important role as a window through which the judiciary could view the reality of the practice of international surrogacy. Through their stories new issues arrived for resolution and a family-focused approach enabled the courts to justify by-passing some of the perceived harshness of section 54 of the 2008 Act with its notional boundaries to the acquisition of parentage title for commissioning couples. This was achieved through the use of statutory interpretation applying both linguistic and non-linguistic approaches as befitted the outcome the courts wanted to achieve. Therefore, it is suggested that as well as being a means to legal parenthood, parental order applications also became a means to impart new information about non-traditional parentage processes, legal identities and kinships to the judiciary. This knowledge was then reformulated by the judiciary into a risk versus rights discourse intended to be disseminated to lay participants and experts alike. The sensory metaphors gave way to a new outlook on the identity of a child, one that was inextricably linked to their settled family unit.

1. This article is based on the findings of the author’s PhD thesis completed in September 2017 [↑](#footnote-ref-1)
2. In order to reflect the role that contracts play in the surrogacy process and to emphasis the requirements of the Human Fertilisation and Embryology Act 2008, s.54, the term ‘commissioning couple’ is used by the author throughout this article. However, several terms are in use and some of the parental order reporters are quoted as using the term ‘intended parents.’ [↑](#footnote-ref-2)
3. Surrogacy Arrangements Act 1985, s 1A. [↑](#footnote-ref-3)
4. See Human Fertilisation and Embryology (Parental Orders) Regulation 2010, s 2 and Adoption and Children Act 2002, s 1 (4). [↑](#footnote-ref-4)
5. Human Fertilisation and Embryology Act 2008, s 54 (8). See cases such as Re L (A Minor) [2010] EWHC 3146 (fam), In the Matter of X and Y (Children) [2011] EWHC 3147 (fam), A, A v P, P, B [2011] EWHC 1738 (fam), Re: IJ (A Child) [2011] EWHC 921, D and L (Surrogacy) [2012] EWHC 2631 (fam), A & B v SA [2013] EWHC 426 (fam), J v G [2013] All ER (D) 36 (Jun), AB v DE [2013] EWHC 2413 (fam), Re P-M [2013] EWHC 2328 (fam), Re C [2013] EWHC 2408 (fam), Re W [2013] EWHC 3570 (fam), Re WT (Surrogacy)[2014] EWHC 1303 (fam), Re G and M [2014] EWHC 1561 (fam), CC v DD [2014] 1307 (fam), RE X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135, , AB v CD (Surrogacy – Time Limit and Consent) [2015] EWFC 12, R and S v T (Surrogacy Service, Consent and Payments) [2015] EWFC 22, Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports) [2015] EWFC 90, D & G v ED & DD and A & B [2015] EWHC 911 (fam), Re X (Foreign Surrogacy – Child’s Name) [2016 EWHC 1068 (fam) and KB and RJ v RT [2016] EWHC 760 (fam) [↑](#footnote-ref-5)
6. European Parliament, Committee on Foreign Affairs, Report on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union’s Policy on the Matter (Plenary Sitting, A8-0344/2015, 2015) Resolution 114. [↑](#footnote-ref-6)
7. The right to reproductive freedom in India was upheld in the case of BKParthsarathi vs Govt. of AP (1999) (5) ALT715 and commercial surrogacy in India was first recognised in the Supreme Court decision Baby Manji Yamada v Union of India (2008) 13 SCC 158. However, India has now taken steps to ban commercial surrogacy under the Surrogacy (Regulation) Bill 2016 and allow only altruistic surrogacy by same-sex married couples who are Indian nationals. [↑](#footnote-ref-7)
8. In the aftermath of the media attention surrounding the ‘Baby Gammy’ case where an Australian couple were alleged to have rejected a child with Down’s Syndrome who was part of a twin birth following a surrogacy contract with a Thai surrogate Thailand banned Surrogacy in 2014 under its Thailand Civil and Commercial Code. [↑](#footnote-ref-8)
9. Cambodia banned commercial surrogacy in October 2016. [↑](#footnote-ref-9)
10. See the differing statistics provided to the authors of research into surrogacy arrangements including international surrogacy: M Crawshaw, E Blyth, and O Van Den Akker, ‘The Changing Profile of Surrogacy in the UK: Implications for National and International Policy and Practice’ (2012) 43 (3) Journal of Social Welfare and Family Law 267 and K Horsey, *Surrogacy in the UK: Myth Busting and Reform, Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (Surrogacy UK 2015), 13 [↑](#footnote-ref-10)
11. Human Fertilisation and Embryology Act 2008, s 54. [↑](#footnote-ref-11)
12. M Crawshaw, E Blyth, and O Van Den Akker, ‘The Changing Profile of Surrogacy in the UK: Implications for National and International Policy and Practice’ (2012) 43 (3) Journal of Social Welfare and Family Law 267. Note that these figures do not include the years 2012 and 2013. [↑](#footnote-ref-12)
13. K Horsey, *Surrogacy in the UK: Myth Busting and Reform, Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (Surrogacy UK 2015), 13. [↑](#footnote-ref-13)
14. For example, the General Register Office statistics as reported by M Crawshaw, E

Blyth, and O Van Den Akker in their article ‘The Changing Profile of Surrogacy in the UK: Implications for National and International Policy and Practice’ (2012) 43 (3) Journal of Social Welfare and Family Law 267, show that in 2011 there were 17 reported international surrogacy cases. However, the Ministry of Justice figures reports only 6 files for international surrogacy in 2011 as reported by K Horsey, *Surrogacy in the UK: Myth Busting and Reform, Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (Surrogacy UK 2015), 14 Table 2.1.1. See also ‘Cafcass Study of Parental Order Applications Made in 2013/14’ (Cafcass 2015) for confirmation that there exists some incorrect recording of children cases as parental order cases between 2013-2014. [↑](#footnote-ref-14)
15. K Horsey, *Surrogacy in the UK: Myth Busting and Reform, Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (Surrogacy UK 2015), Table 2.1.1 and Table 2.1.2, 14. [↑](#footnote-ref-15)
16. ‘Cafcass Study of Parental Order Applications Made in 2013/14’ (Cafcass 2015), 15. [↑](#footnote-ref-16)
17. See Cafcass published response to a Freedom of Information Request <https://www.cafcass.gov.uk/about-cafcass/transparency-information/freedom-of-information/2015-disclosure-log/accessed> 10 May 2017. [↑](#footnote-ref-17)
18. See for example, The Economist ‘As Demand for Surrogacy Soars, More Countries are Trying to Ban it’13 May 2017<<https://www.economist.com/news/international/21721926-many-feminists-and-religious-leaders-regard-it-exploitation-demand-surrogacy>> accessed on 16th April 2018. See also J Doward, The Guardian, ‘Childless UK Couples Forced Abroad to Find Surrogates’ 20 February 2016 <https://www.theguardian.com/lifeandstyle/2016/feb/20/childless-uk-couples-forced-abroad-surrogatesaccessed> 16th April 2018. [↑](#footnote-ref-18)
19. See for example, E Blyth, ‘I wanted to be interesting. I wanted to be able to say “I’ve done something interesting in my life”: Interviews with surrogate mothers in Britain’ (1994) 12 Journal of Reproductive and Infant Psychology 189, CH Kleinpeter, and MM Hohman, Surrogate Motherhood: Personality Traits and Satisfaction with Service Providers’ (2000) 87 Psychological Reports, 957, O Van Den Akker, ‘Surrogate Motherhood: A critical perspective’ (2007) 13 Human Reproduction Update 53, A Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother Worker’ (2010) 35 Signs 4, 969, S Golombok, J Readings, L Blake, P Casey, A Marks, V Jadva, ‘Families created through surrogacy: mother-child relationships and children’s psychological adjustment at age 7’ (2011) 47 (6) Developmental Psychology*,*  1579, V Jadva,, L Blake, P Casey and S Golombok, ‘Surrogacy Families 10 Years On: relationship with the surrogate, decisions over disclosure and the children’s understanding of their surrogacy origin’ (2012) 27 Human Reproduction 3008, S Imrie and V Jadva, ‘Surrogacy Law: a Call for Change?’ (2013) 5 Bionews 716, E Teman, *Birthing a Mother*: *The Surrogate Body and the Pregnant Self*, (University of California Press 2010) and L Blake, N Carone, E Raffanello, J Slutsky, AA Ehrhardt, and S Golombok, ‘Gay Fathers’ Motivations for and Feelings about Surrogacy as a Path to Parenthood’ (2017) 32 (4) Human Reproduction, 860. [↑](#footnote-ref-19)
20. See for example, British Medical Association, *Changing Conceptions of Motherhood* (BMA publications 1996), 8, M Crawshaw, E Blyth and O Van Den Akker, ‘The Changing Profile of Surrogacy in the UK – Implications for National and International Policy and Practice’ (2012) 43 (3) Journal of Social Welfare and Family Law*,* 267. [↑](#footnote-ref-20)
21. See for example, S Purewal, M Crawshaw and O Van Den Akker, Completing the surrogate motherhood process: Parental order reporters’ attitudes towards surrogacy arrangements, role ambiguity and role conflict’ (2012) 15 (2) Human Fertility 94, M Crawshaw, S Purewal and O Van Den Akker, Working at the Margins: The Views and Experiences of Court Social Workers on Parental Orders Work in Surrogacy Arrangements (2013) 43 British Journal of Social Work, 1225. [↑](#footnote-ref-21)
22. John Gibbons, *Forensic Linguistics: An Introduction to Language in the Justice System* (First published 2003, Blackwell Publishing 2005). [↑](#footnote-ref-22)
23. S Hale and J Gibbons, ‘Varying Realities Patterned Changes in the Interpreter’s Representation of Courtroom and External Realities’ (1999) 20 (2) Applied Linguistics, 57. [↑](#footnote-ref-23)
24. Gibbons (n 22), 147. [↑](#footnote-ref-24)
25. Ibid 150. [↑](#footnote-ref-25)
26. Gibbons (n 22) 10. [↑](#footnote-ref-26)
27. 17 of the files contained both witness statements and parental order reports, 7 of the files contained only witness statements and 6 of the files contained only parental order reports. Files were accessed on specific pre-arranged dates and were to be accessed on an ‘as is’ basis unless there was a complete absence of data that met the author’s criteria [↑](#footnote-ref-27)
28. J Bruner *Making Stories* (Harvard University Press 2003). [↑](#footnote-ref-28)
29. Applying a word of phrase to an object or action figuratively. See the work of George Lakoff and Mark Johnson, *Metaphors We Live By* (First published 1980, The University of Chicago Press 2003). [↑](#footnote-ref-29)
30. Gunther Kress, *Linguistic Processes in Sociocultural Practice* (Second edition, Oxford University Press 1989), 70. [↑](#footnote-ref-30)
31. The number of files was arrived at by HMCTS after conducting a search of their case management system ‘FamilyMan’for those cases involving parental order applications in the High Court or Principal Registry for the period 6th April 2009 to the date of the grant of the author’s Privileged Access Agreement (January 2014). [↑](#footnote-ref-31)
32. It was not possible for the author to trawl through case files and select her own sample as this was not permitted under the terms of the Privileged Access Agreement as it would have been disruptive to court time and business. [↑](#footnote-ref-32)
33. Whilst at the time of this article Parliament has agreed to consult on the amendment of the Human Fertilisation and Embryology Act 2008 to include single people following the decision in Re Z (A Child) (No.2) [2016] EWHC 1191 (fam) this amendment was not in force at the time of the research. [↑](#footnote-ref-33)
34. The inclusion of files was arrived at by HMCTS in consultation with the Ministry of Justice Data Access Panel and it is unknown to the author whether the equal inclusion of files by sexual orientation was accidental or by design. [↑](#footnote-ref-34)
35. 47% of individuals came from this group [↑](#footnote-ref-35)
36. 24% of individuals were from this higher occupational group. [↑](#footnote-ref-36)
37. Approximately 3% of individuals declared themselves as ‘homemakers’ or ‘carers’. [↑](#footnote-ref-37)
38. Approximately 24% of individuals. One file did not contain any information on the couple’s profession. [↑](#footnote-ref-38)
39. Cases were identified using the search term ‘surrogacy’ in legal databases such as Westlaw UK, Lawtel, Lexis Nexis and Family Law Online. The author then selected those cases that met the inclusion criteria for the research. Some of the court judgments related to the case files to which the author was granted access but as not all cases are reported it was not possible to match all case files to the selected court judgments to achieve true triangulation. [↑](#footnote-ref-39)
40. Containing reference to other legal decisions or legal textbooks. [↑](#footnote-ref-40)
41. HES Mattila, *Comparative Legal Linguistics: Language in Law, Latin and Modern Lingua Francas* (Ashgate 2013) [↑](#footnote-ref-41)
42. See Family Procedure Rules 2010 (as amended) Part 13 r 13 and r 14 although oral evidence may be given. In private correspondence to the author the lead family judge Mrs Justice Theis indicated that it was generally unusual for oral testimony to be given in parental order final hearings. [↑](#footnote-ref-42)
43. W Labov and J Waletzky, ‘Narrative Analysis’ in J Helm (ed) Essays on the Verbal and Visual Arts’ (University of Washington Press 1967), 19. This is an approach most closely associated with Narrative Research. [↑](#footnote-ref-43)
44. This is sometimes referred to as ‘the result’. [↑](#footnote-ref-44)
45. FPR 2010, Part 17 and Part 22. [↑](#footnote-ref-45)
46. Ibid, Part 22. [↑](#footnote-ref-46)
47. S Camiss, “He Goes Off and I Think he Took the Child”: Narrative Reproduction in the Courtroom’ (2006) Kings Law Journal 71. [↑](#footnote-ref-47)
48. HFEA 2008, s 54. [↑](#footnote-ref-48)
49. W Labov, ‘Narrative Pre-Construction’ (2006) 16 (1) Narrative Enquiry 37. [↑](#footnote-ref-49)
50. Ibid 38. [↑](#footnote-ref-50)
51. HFEA 2008, s 54 (4) (b). [↑](#footnote-ref-51)
52. HFEA 2008, s 54 (6). [↑](#footnote-ref-52)
53. HFEA 2008, s 54 (8). [↑](#footnote-ref-53)
54. See Mauss’ gift theory in Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies* (First published 1950, Routledge 2002). [↑](#footnote-ref-54)
55. Lakoff and Johnson (n29) 14. [↑](#footnote-ref-55)
56. Department of Health’s Parenting Daily Hassles Scale measures the impact of 20 daily pressures on a carer which is designed to test an individual’s experience of being a parent and is used by Cafcass. [↑](#footnote-ref-56)
57. Launched in 2014 and available at <http://www.gmfcf.org/uploads/5/5/4/0/55401763/adoption_and_surrogacy_handbook_final_for_launch_08_01_14.pdf> accessed 16th April 2018. [↑](#footnote-ref-57)
58. Adoption and Children Act 2002, s 1 (4). [↑](#footnote-ref-58)
59. M Crawshaw, S Purewal and O Van Den Akker, ‘Working at the Margins: The Views and Experiences of Court Social Workers on Parental Orders Work in Surrogacy Arrangements’(2013) 43 British Journal of Social Work, 1225. [↑](#footnote-ref-59)
60. Deborah Tannen, *Talking Voices: Repetition, Dialogue, and Imagery in Conversational Discourse* (First published 1989, Cambridge University Press 2007) 107. [↑](#footnote-ref-60)
61. Ibid 105. [↑](#footnote-ref-61)
62. See MM Bakhtin, *Dialogic Imagination: Four Essays by MM Bakhtin* (University of Texas Press 1982). [↑](#footnote-ref-62)
63. 4 out of the 25 files containing POR reports contained insufficient to ascertain whether disclosure was discussed. [↑](#footnote-ref-63)
64. M Crawshaw, S Purewal and O Van Den Akker, ‘Working at the Margins: The Views and Experiences of Court Social Workers on Parental Orders Work in Surrogacy Arrangements’(2013) 43 British Journal of Social Work, 1239. [↑](#footnote-ref-64)
65. S Purewal, M Crawshaw and O Van Den Akker, ‘Completing the Motherhood Process: Parental Order Reporters’ Attitudes Towards Surrogacy Arrangements, Role Ambiguity and Role Conflict’ (2012) 15 (2) Human Fertility, 94. [↑](#footnote-ref-65)
66. LS Maule and K Schmid, ‘Assisted Reproduction and the Courts: The Case of California’ (2006) 27 (4) Journal of Family Issues 464. [↑](#footnote-ref-66)
67. Although one reported domestic surrogacy case has reached the Court of Appeal. See Re M (a child) [2017] EWCA Civ 228. [↑](#footnote-ref-67)
68. Eg Re K (Minors: Foreign Surrogacy) [2010] EWHC 1180, Re L (a minor) [2010] EWHC 3146, In the Matter of X and Y (Children) [2011] EWHC 3147, Re IJ [2011] EWHC 921 (fam) and A v P, P, B [2011] EWHC 1738. [↑](#footnote-ref-68)
69. X and Y [2008] EWHC 3030 (fam). [↑](#footnote-ref-69)
70. Re S (Parental Order) [2009] EWHC 2977. [↑](#footnote-ref-70)
71. X and Y (Children) [2011] (n 67). [↑](#footnote-ref-71)
72. Re L (a minor) [2010] EWHC 3146. [↑](#footnote-ref-72)
73. X and Y (Children) (n 67), [36]. [↑](#footnote-ref-73)
74. D and L [2012] EWHC 2631 (fam), [25]. [↑](#footnote-ref-74)
75. Eg JP v LP JP v LP, SP and CP [2014] EWHC 595 (Fam). [↑](#footnote-ref-75)
76. Re P-M (Parental Order: Payments to Surrogacy Agency) [2013] EWHC 2328 (fam). [↑](#footnote-ref-76)
77. Ibid [19]. [↑](#footnote-ref-77)
78. Eg A v P (n 67), [28], J v G [2013] EWHC 1432 (fam), [27], AB and DE [2013] EWHC 2413, (fam), [34], D & G v ED & DD and A & B [2015] EWHC 911, [61], Re A and B (No.2) EWHC 2080, [76], AB v CD [2015] EWFC 12, [71] and Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135, [54 - 61]. [↑](#footnote-ref-78)
79. Ibid Re X (A Child). [↑](#footnote-ref-79)
80. Re X (A Child) (n 77), [54]. [↑](#footnote-ref-80)
81. Per Mrs Justice Theis in J v G (n78), [30]. [↑](#footnote-ref-81)
82. X and Y (n 78). [↑](#footnote-ref-82)
83. E Blyth, ‘Not a Primrose Path’: Commissioning parents’ experience of Surrogacy Arrangements in Britain’ (1995) Journal of Reproductive Infant Psychology 13, 189. [↑](#footnote-ref-83)
84. X and Y (n 78), [2]. [↑](#footnote-ref-84)
85. Re G and M [2014] EWHC 1561, [1]. [↑](#footnote-ref-85)
86. Re S (n 70), [27]. [↑](#footnote-ref-86)
87. Re G and M (n 85). [↑](#footnote-ref-87)
88. Re G and M (n 85), [21]. [↑](#footnote-ref-88)
89. Eg Z, B v C [2011] EWHC 3181, [1], AB v CD (n 77), [1], Re A and B (No.2) (n 78), [1] and Re X (Foreign Surrogacy – Child’s Name) [2016] EWHC 1068, [5]. [↑](#footnote-ref-89)
90. Eg Re D (A Child) [2014] EWHC 2121, [1], Re G and M (n 85), [1] and R and S v T EWFC 12 , [2], [↑](#footnote-ref-90)
91. Eg Re WT (Surrogacy) [2014] EWHC 1303 (fam). [↑](#footnote-ref-91)
92. CC v DD [2014] 1307 (fam). [↑](#footnote-ref-92)
93. ibid, [1]. [↑](#footnote-ref-93)
94. See for example, Z, B v C, Cafcass Legal as Advocate to the Court [2011] EWHC 3181 (fam) A & B v SA [2013] EWHC 426 (fam) Re G (Surrogacy: Foreign Domicile) [2008] 1 FLR 1047, CC v DD [2014] EWHC 1307 (fam). [↑](#footnote-ref-94)
95. See for example, Re G and M (n 85). [↑](#footnote-ref-95)
96. See for example, Re IJ (A Child) [2011] (n 68), Re WT (Surrogacy) [2014] EWHC 1303, Re D (A Child) [2014] EWHC 2121. [↑](#footnote-ref-96)
97. See for example, Mr. G and Mrs. G [2012] EWHC 1979 (fam) JP, v LP, SP and CP [2014] EWHC 595 (fam). [↑](#footnote-ref-97)
98. See for example, A & B v SA [2013] EWHC 426 (fam), Re W [2013] EWHC 3570 (fam). [↑](#footnote-ref-98)
99. JP v LP, SP and CP [2014] EWHC 595 [↑](#footnote-ref-99)
100. See for example, Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order) [2015] EWFC 73. [↑](#footnote-ref-100)
101. D and L (Surrogacy) [2012] EWHC 2631 (fam). [↑](#footnote-ref-101)
102. See for example R and S v T (Surrogacy: Service, Consent and Payments) [2015] EWFC 22. [↑](#footnote-ref-102)
103. A and B and CX and D [2016] EWFC 42. [↑](#footnote-ref-103)
104. Ibid, [9]. [↑](#footnote-ref-104)
105. AB and DE [2013] EWHC 2413 (fam). [↑](#footnote-ref-105)
106. X and Y (Foreign Surrogacy) (n 68). [↑](#footnote-ref-106)
107. J v G (n 78), [30]. [↑](#footnote-ref-107)
108. Eg AB and DE [2013] EWHC 2413, Re P-M (n 76), Re X (A Child) (n 78), Re Z (Foreign Surrogacy [2015] EWFC 90, AB v CD Surrogacy – Time Limit and Consent) [2015] EWFC 12, Re A and B (No.2) (Parental Order) [2015] EWHC 2080, KB and RJ KB and RJ v RT [2016] EWHC 760 (fam), DM and LK [2016] EWHC 270 (fam). [↑](#footnote-ref-108)
109. Eg CC v DD [2014] EWHC 1307, AB v CD [2015] EWFC 12, D & G (n 78). [↑](#footnote-ref-109)
110. D & G (n 78). [↑](#footnote-ref-110)
111. ibid, [68]. [↑](#footnote-ref-111)
112. HFEA, s 54 (1). [↑](#footnote-ref-112)
113. Howard v Boddington (1877) 2 PD 203. [↑](#footnote-ref-113)
114. ibid [↑](#footnote-ref-114)
115. Eg London & Clydeside Estates Ltd v Aberdeen District Council [1980] 1 WLR 182, Wang v Commissioner of Inland Revenue [1994] 1 WLR 1286 and R v Soneji and Another [2005] UKHL 49. [↑](#footnote-ref-115)
116. Ibid [189] (Lord Hailsham). [↑](#footnote-ref-116)
117. HFEA 2008, s 54 (6). [↑](#footnote-ref-117)
118. HFEA 2008, s 54 (8). [↑](#footnote-ref-118)
119. FPR 2010, Part 13 rule 10 and HFEA 2008, s 54 (7). [↑](#footnote-ref-119)
120. These relate to HFEA 2008, s 54 (2), s 54 (2)

(c), s 54 (3) and s 54 (a). [↑](#footnote-ref-120)
121. Logical semantics is the study of linguistics in the context of the logical and sensible assumptions about meaning whilst lexical semantics is the analysis of the meaning of language using its relationship to other words. [↑](#footnote-ref-121)
122. See A v P (n 68). [↑](#footnote-ref-122)
123. See DM and LK [2016] EWHC 270 (fam). [↑](#footnote-ref-123)
124. See Re Z (Foreign Surrogacy) (n 108). [↑](#footnote-ref-124)
125. See Re X (A Child) (n 78). [↑](#footnote-ref-125)
126. Ibid. [↑](#footnote-ref-126)
127. Re Z (Foreign Surrogacy) (n 108). [↑](#footnote-ref-127)
128. Re X (A Child) (n 78). [↑](#footnote-ref-128)
129. HFEA 2008, s 54 (3). [↑](#footnote-ref-129)
130. Re X (A Child) (n 78), [55]. [↑](#footnote-ref-130)
131. Ibid, [65]. [↑](#footnote-ref-131)
132. AB v CD (n 78). [↑](#footnote-ref-132)
133. D and G (n 78). [↑](#footnote-ref-133)
134. EWHC 2080 (fam). [↑](#footnote-ref-134)
135. A and B (No.2 Parental Order) [2015] EWHC 2080. [↑](#footnote-ref-135)
136. KB and RJ v RT [2016] EWHC 760. [↑](#footnote-ref-136)
137. Re Z (Foreign Surrogacy) (n 108). [↑](#footnote-ref-137)
138. [2015] EWHC 2080 (fam). [↑](#footnote-ref-138)
139. See Re Z (Foreign Surrogacy) (n 108), [94]. [↑](#footnote-ref-139)
140. ECHR 1950, Article 8. [↑](#footnote-ref-140)
141. DM and LK [2016] EWHC 270 (fam). [↑](#footnote-ref-141)
142. ECHR 1950, Article 8. [↑](#footnote-ref-142)
143. A v P (n 57). [↑](#footnote-ref-143)
144. HFEA 2008, s 54 (1). [↑](#footnote-ref-144)
145. Ibid, [24]. [↑](#footnote-ref-145)
146. A v P (n 68), [26 – 27]. [↑](#footnote-ref-146)
147. Re X (a child) (n 78). [↑](#footnote-ref-147)
148. A v P (n 68). [↑](#footnote-ref-148)
149. Z (a child) [2015] EWFC 73. [↑](#footnote-ref-149)
150. Re X (A Child) (n 78). [↑](#footnote-ref-150)
151. Human Fertilisation and Embryology Bill HC Deb 12 June 2008, col 248. This amendment was tabled by Dr. John Pugh on behalf of Dr. Evan Harris. [↑](#footnote-ref-151)
152. Human Rights Act 1998, s 3. [↑](#footnote-ref-152)
153. Ibid. [↑](#footnote-ref-153)
154. [2004] UKHL 30. [↑](#footnote-ref-154)
155. Re Z (A Child) (n 108), [37]. [↑](#footnote-ref-155)
156. Re X (n 78). [↑](#footnote-ref-156)
157. A v P (n 68). [↑](#footnote-ref-157)
158. HFEA 2008, s 54 (3). This section relates to the six-month time limit to apply for a parental order. [↑](#footnote-ref-158)
159. HFEA 2008, s 54 (4). This is the requirement that the child’s home must be with the applicants. [↑](#footnote-ref-159)
160. Re Z (a child) (n 108). [↑](#footnote-ref-160)
161. ECHR 1950, Articles 8, 12 and 14. [↑](#footnote-ref-161)
162. Re Z (no.2) [2016] EWHC 1191 (fam). [↑](#footnote-ref-162)
163. ECHR 1950. The court held that there was incompatibility with Article 14 when taken in conjunction with Article 8. [↑](#footnote-ref-163)
164. HFEA 2008, s 54. [↑](#footnote-ref-164)
165. Re X (A Child) (n 77). [↑](#footnote-ref-165)
166. A v P (n 56). [↑](#footnote-ref-166)
167. DM and LK (n 112). [↑](#footnote-ref-167)
168. Re Z (n 107) and Re Z (no.2) (n 161). [↑](#footnote-ref-168)