



Neutral Citation Number: [2020] EWHC 2141 (Fam)

Case No: WV19P00188

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/08/2020

Before :

MR JUSTICE KEEHAN

Between :

A

Applicant

- and -

B

1st Respondent

-and-

C

(A Child acting through his Children's Guardian)

2nd Respondent

-and-

A Local Authority

Intervenor

Re C (A Child: Parental Order & Child
Arrangements Order)

Mr T Wilson (instructed by **Wilson Browne**) for the **Applicant**
Mr T Harrill (instructed by **Brendan Fleming**) for the **1st Respondent**
Mr T Bowe (instructed by **Glaisyers**) for the **2nd Respondent**
Dr C Proudman (instructed by **Local Authority**) for the **Intervenor**

Hearing dates: 22nd - 24th July

Judgment Approved

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

The Hon Mr Justice Keehan:

Introduction

1. This judgment should be read with the judgment that I formally handed down on 17th April 2020. The fact-finding hearing concluded on 23rd January. I reserved judgment. The parties invited me not to hand down my judgment until shortly before the welfare hearing which was listed to commence on 22nd April. Accordingly, the draft judgment, subject to editorial corrections, was sent to counsel and the parties' solicitors on 6th April 2020 with permission to disclose the same to their lay clients.
2. I am concerned with one child, C, who is 2 years of age. C was born as a result of a surrogacy arrangement made in X Country. His biological father is the Applicant, A ('the father'). The surrogate mother is D and his emotional, psychological, and social mother is the First Respondent, B ('the mother'). Currently, C lives with his father and spends time with his mother, albeit not yet overnight.
3. At the first welfare hearing, in circumstances which I shall set out later in this judgment, the mother applied to re-open the findings of fact made by the court after the hearing in January 2020. At an interlocutory hearing on 13th July 2020 I refused the application but permitted the mother to seek limited findings of fact against the father at this adjourned welfare hearing.
4. I have five applications before me:
 - i) the parties' joint application for a parental order dated 12th July 2018;
 - ii) the mother's application for a non-molestation order against the Applicant dated 15th March 2019;
 - iii) the father's application for a child arrangements order dated 22nd March 2019;
 - iv) the guardian's application for the instruction of an expert, Dr. Pettle, dated 20th April 2020; and
 - v) the findings of fact sought by the mother against the father.
5. The positions of the parties at this welfare hearing were as follows:
 - i) all parties were agreed that I should make a parental order in favour of the parents in respect of C;
 - ii) the father opposed the making of a non-molestation order against him as sought by the mother;
 - iii) the father sought a child arrangements order that C live with him and spend time with his mother on a visiting basis and the mother sought like orders in her favour. The guardian supported the father's application;
 - iv) if a live with order was made in his favour, the father sought orders restricting the mother's exercise of her parental responsibility. The guardian supported this restriction;

- v) the guardian sought permission to instruct an expert, Dr Pettle, to advise on whether and how C should be informed of his twin half siblings; whether and, if so, how they should meet each other and how their relationship should be enabled to develop. Ultimately, all other parties supported this application;
 - vi) the mother sought findings of fact against the father that she had been the subject of financial, coercive, controlling abuse by the father during their relationship. The father denied the same; and
 - vii) the father sought to have the local authority discharged as an intervenor to these proceedings: no other party objected.
6. Initially, the father had invited the court to make final orders and to conclude these proceedings. After a period of reflection, and on the basis that the court was minded to give permission for the instruction of Dr. Pettle, he accepted that only interim orders should be made at this time.
7. In consequence of a second X Country surrogacy agreement twins were born, P and Q. Their biological father is the Applicant ('the father'). They have a different surrogate mother from C. Their emotional, psychological, and social mother is the First Respondent ('the mother'). The mother intends to make an application to adopt these children. The mother returned to this jurisdiction with the twins. They live with the mother. They have not yet had contact with C or with the father.

Relevant Findings of Fact made in the Judgment of 17th April

8. I made the following findings of fact:
- i) I was not satisfied that the father had signed the second surrogacy agreement and I found he did not;
 - ii) The mother had serially lied in her evidence. I found no innocent explanation for these lies. She was, I found, a wholly unreliable witness who would tell lies with alacrity to achieve her objectives;
 - iii) On 5th March 2019 the mother, for the first time, told the father of the second surrogacy. The father was shocked and surprised. Plainly his adverse reaction was not one the mother wanted to hear. She alleged he had threatened her on the afternoon and evening of 5th March which led her to contact the police;
 - iv) It was not a case of happenchance or mere coincidence that the report to the police was made the day after she had told the father of the second surrogacy. Further, she stopped all contact between the father and C for three months;
 - v) I did not believe the mother's account of the father threatening her on 5th March. I considered it most likely, and found, that the father's adverse reaction to the news of the second surrogacy so incensed and angered the mother that she sought to punish the father and/or exact revenge by:
 - a) making a false allegation to the police that the father had assaulted her on 3rd February 2019; and

- b) stopping all contact between C and his father, for no good or child focussed reason whatsoever.
- vi) The mother deliberately concealed the second surrogacy from the father until 5th March 2019 when it was far too late for him to do anything about it – the surrogate mother’s pregnancy being so far advanced;
- vii) The father did not consent to the extension of the period of storage of his genetic material by the surrogacy agency in X Country;
- viii) The father did not consent to the second surrogacy arrangement; and
- ix) The father was a measured, reliable and credible witness. I found that he had not assaulted the mother nor subjected her to domestic abuse as she alleged or at all.

Background

- 9. The full history of the family is set out in the fact-finding judgment. The principal events in the life of these parents and of the children is set out below.
 - 10. The mother is a British Asian who was born in the UK. The father was born in the Indian Subcontinent and came to this country in December 2008.
 - 11. The parents met and were married in 2009.
 - 12. They decided to start a family but, very sadly, the mother suffered seven consecutive miscarriages. The miscarriages invariably occurred around the beginning of the second trimester.
 - 13. In early 2017, the parents decided to pursue a surrogacy arrangement in the hope of having a child. On 24th March 2017, the mother contacted a surrogacy agency in X Country.
 - 14. This contact culminated in the parents entering into an agreement with the surrogacy agency in X Country on 26th April 2017. The parents signed a written surrogacy agreement with the proposed surrogate mother on 30th June 2017 in X Country.
 - 15. On 4th August 2017 the mother sent an email to the director of the X Country surrogacy agency, E. She requested the agency to store the father’s unused genetic material until December 2017. The relevant part of the email said:
 - “can we store the [father’s] sperm for 5 months for now, hopefully by then we can see what we have from this [course] of treatment now”
- The mother forwarded a copy of this email to the father.
- 16. On 5th August 2017 the embryo, created using the father’s genetic material and an egg from a donor, was implanted into the surrogate mother, D. The pregnancy was confirmed by an ultrasound scan performed on 7th September 2017.

17. In October/November 2017 the mother alleged she had discovered the father was having an affair with a colleague at work.
18. On 21st November 2017, the mother sent an email to E enquiring about using the remaining stored embryos for a second surrogacy. It is of note that the mother did not forward this email to the father.
19. On 7th December 2017 the mother and father signed a power of attorney which authorised the surrogacy agency to sign documents on their behalf. The father asserted that he was told by the mother that the purpose of the power of attorney was to assist with the registration of the expected child's birth and in obtaining a passport for C.
20. In 2018 C was born in the X Country.
21. Both parents arrived in X Country and C was placed in their care. All three remained living in X Country until 7th July when C travelled with his parents to the United Kingdom.
22. On 24th April 2018 the agreement with the agency for a second surrogacy was purportedly signed by the father. The father denied ever signing an agreement for a second surrogacy and I so found.
23. On 13th June 2018 the mother forwarded an email to the father attaching a DNA report in respect of C. Further on 26th June the mother forwarded to the father an email containing a summary of the surrogacy arrangements which led to the birth of C.
24. On 12th July 2018 the parents made their application for a parental order.
25. On 23rd July 2018 A Local Authority ('the local authority') received a MARAC referral.
26. On 23rd July 2018 the mother had left the family home with C. The following day she had transferred £60,000.00 from the parents' joint account to her own bank account. In light of the disappearance of the mother and C, and being unable to find C's passport, the father contacted the police.
27. By 22nd August 2018 the local authority had completed an assessment and closed the referral. It was noted that:
 - i) the mother had returned home with C; and
 - ii) had told the social worker that she felt safe.
28. In her evidence the mother accepted she had made no reference to the social worker about the second surrogacy arrangement.
29. The Parental Order Reporting Officer, JG, made three visits to the family in September and October 2018. On no occasion did the mother mention or make any reference to a second surrogacy arrangement.

30. On 23rd October 2018, 22nd January 2019 and 5th March 2019, the parents attended before HHJ Dowding at directions hearings in respect of the application for a parental order in respect of C. The mother said nothing to the judge about a second surrogacy arrangement.
31. On 25th October 2018 a second surrogacy agreement was signed by the proposed surrogate mother and the agency's lawyer signed the agreement on behalf of the parents using the 7th December 2017 power of attorney.
32. On 10th December 2018 the embryo was implanted into the second surrogate mother. A pregnancy was confirmed by blood test on 22nd December. E emailed the mother with this news on 26th December. I noted, once more, that this email was not forwarded to the father.
33. The mother alleged that the father physically assaulted her on 3rd February 2019. The mother and her sister had asserted that the mother spoke to her sister about the alleged assault on the following day, 4th February.
34. On 5th February 2019 a social worker visited the family. There was no mention made of the second surrogacy nor of the father's alleged assault two days before.
35. After a court hearing on 5th March the father asserted that for the very first time the mother told him about the second surrogacy and told him that if he did not take responsibility for the twins, then the marriage would be over. The same day the father telephoned the surrogacy agency in X Country to ask about the purported second surrogacy arrangement.
36. On 6th March 2019 the mother reported the father to the police in respect of the alleged assault on 3rd February. Thereafter she changed the door locks at the family home to prevent the father gaining entry.
37. After this date there was no contact between C and the father until June 2019 when, at a hearing before me, it was agreed contact would commence at a local contact centre supervised by the local authority. The father's contact was extended, albeit still supervised, by my order of 25th July 2019. His contact with C moved to unsupervised by my order of 7th October. The father then moved to have C for overnight contact by my order of 14th November 2019.
38. On 15th March 2019 the mother made a without notice application for a non-molestation order which was granted by a deputy district judge on 18th March.
39. In 2019, the twins were born as a result of the second surrogacy. They remained living in X Country with the mother or alternate carers until they arrived in this jurisdiction with the mother in 2020. The mother originally planned to divide her time between caring for C and travelling to X Country to care for the twins on, roughly, a two-weekly cycle. The mother was not able to maintain this regularity of visits.
40. C has been in the sole care of his father since 3rd April 2020 and has enjoyed weekly contact with his mother.

The Litigation History Since the Fact-Finding Hearing

41. The first welfare hearing commenced on 22nd April 2020. During the course of the father's cross-examination by counsel then acting for the mother (for the avoidance of any doubt, not Mr. Harrill) the father was asked whether he had visited the mother at one of her brothers' home the day after the conclusion of the fact-finding hearing on 24th January. The father accepted that he had but denied he had taken flowers for the mother, or that he had entered the house, or that he had had a meal with the mother's family and spent several hours with the mother and members of the maternal family.
42. After a short while counsel for the mother said she had a matter of law to raise with the court. It transpired that the father's visit to the family home on 24th January had been recorded on CCTV cameras installed at the brother's home.
43. I propose to say no more in this judgment about the circumstances in which this recording was disclosed to and then made available to the court and to the parties. Some of the parties to these proceedings have made wasted costs applications against the mother and legal professionals instructed in this matter which I have yet to determine. I do not wish to make any further comment or observation on this issue which may have the potential to prejudice the case of any party or of any other individual in respect of these wasted costs applications.
44. At the hearing on 6th May 2020, I gave permission for transcripts of the CCTV recordings to be obtained and for them then to be translated into English.
45. At the first hearing of the mother's application to re-open the findings of fact on 8th June 2020, I was met with an application by the mother to obtain a further transcript of the CCTV and further translations of the same into English because of various deficits identified in the first transcription and/or translation of the same. The mother's application was supported by the guardian and by the local authority. I very reluctantly acceded to the same.
46. I eventually heard the mother's application to re-open the findings of fact on 13th July 2020. I dismissed the application and indicated I would give my reasons for so doing in this judgment: my reasons follow. I gave the mother permission to seek findings against the father of financial, coercive, controlling abuse during their relationship and I gave permission for the guardian and the local authority to explore these issues at this welfare hearing.

The Law

Parental Order Application

47. The statutory criteria for the making of a parental order on the application of two people are set out in s.54 of the Human Fertilisation and Embryology Act 2008 ('the 2008 Act') which provides that:

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

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

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

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

(2) The applicants must be—

(a) husband and wife,

(b) civil partners of each other, or

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

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

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

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

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

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

(6) The court must be satisfied that both—

(a) the woman who carried the child, and

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

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

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

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

(a) the making of the order,

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

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

(d) the making of arrangements with a view to the making of the order,

unless authorised by the court.

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

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

(b) in relation to Scotland, "the court" means the Court of Session or the sheriff court of the sheriffdom within which the child is, and

(c) in relation to Northern Ireland, "the court" means the High Court or any county court within whose division the child is.

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

48. The factual matrix of this case, therefore, presents a legal issue in respect of the application for a parental order made by the parents because, arguably, at the time of the making of a parental order the child's home will not be with the parents because they are separated (s.54(4)(a)).

49. In the case of *Re A (Surrogacy: s.54 Criteria)* [2020] EWHC 1426 the court considered the circumstances in which it was appropriate to read down the statutory criteria of the 2008 Act in order to meet the Convention rights of the parents and/or the child. I have had regard to paragraphs 19 to 53 of the judgment.

50. Further, in the case *Re X* [2020] EWFC 39 Theis J made the following observations, at paragraphs 94 & 95:

“[94] The consequences of not making a parental order in this case is that there is no legal relationship between X and her biological father; X is denied the social and emotional benefits

of recognition of that relationship; X may be financially disadvantaged if there is not legal recognition as the child of her biological father; X does not have a legal reality that matches the day-to-day reality; X is further disadvantaged by the death of her biological father.

(9) The only order that will confer joint and equal parenthood on Mr and Mrs Y is a parental order. Only that order will ensure X's security and identity in a lifelong way respecting both her Article 8 and 14 rights.

[95] It is clear that reading down the provisions in s 54 (1), (2) (a), (4) (a) and (5) in this case to permit the parental order to be made would not be incompatible with the 'underlying thrust of the legislation being construed' and the words sought to be implied 'go with the grain of the legislation'. The HFEA sought to provide a comprehensive legal framework for those undertaking assisted conception, with the aim of securing the rights of any child born as a result. That policy and legislative aim remains intact if the order sought in this case is made.”

51. In her judgment Theis J succinctly but comprehensively set out
- i) the reasons why a court may ‘read down’ the statutory criteria of s.54;
 - ii) the justification for doing so; and
 - iii) the adverse consequences for the child and for the applicants if the court did not make a parental order.
52. I respectfully agree.

Application to Re-Open Findings of Fact

53. The well-established approach to an application to re-open findings of fact was most recently considered by the Court of Appeal in the case of *Re E (Children: Reopening of Findings of Fact)* [2020] 1 FLR 162 where Peter Jackson LJ giving the judgment of the court said at paragraphs 28-29, 45 & 48-50 as follows:

“[28] The starting-point is an appreciation of the status of findings of fact in children cases. There is no strict rule of issue estoppel. However, a decision to allow past findings to be relitigated must be a reasoned one. *Re B (Children Act Proceedings: Issue Estoppel)* [1997] Fam 117 concerned the status of findings of fact made in proceedings concerning other children. It is an influential decision and deserves full citation. Hale J said this at 128:

"It seems to me that the weight of Court of Appeal authority is against the existence of any strict rule of issue estoppel which is binding upon any of the parties in children's cases. At the

same time, the court undoubtedly has a discretion as to how the enquiry before it is to be conducted. This means that it may on occasions decline to allow a full hearing of the evidence on certain matters even if the strict rules of issue estoppel would not cover them. Although some might consider this approach to be a typical example of the lack of rigour which some critics discern in the family jurisdiction, it seems to me to encompass both the flexibility which is essential in children's cases and the increased control exercised by the court rather than the parties which is already a feature of the court's more inquisitorial role in children's cases (and beginning to gain ground in other litigation as shown in the Woolf Report on Access to Justice).

Hence if the applicant in one set of proceedings wishes to rely on findings made in previous proceedings in order to prove a case, the court will have to consider how this should be done. Frequently, although such findings are not necessarily accepted by the party concerned, that party will accept that a challenge to them in later proceedings will be futile. The court may then simply rely upon the findings made earlier. Sometimes, the party concerned or some other party will wish to challenge them. In such an event, it seems to me, the court may wish to be made aware, not only of the findings themselves, but also of the evidence upon which they were based. It is then for the court to decide whether or not to allow any issue of fact to be tried afresh. There are no doubt many factors to be borne in mind, among them the following.

(1) The court will wish to balance the underlying considerations of public policy, (a) that there is a public interest in an end to litigation – the resources of the court and everyone involved in these proceedings are already severely stretched and should not be employed in deciding the same matter twice unless there is good reason to do so; (b) that any delay in determining the outcome of the case is likely to be prejudicial to the welfare of the individual child; but (c) that the welfare of any child is unlikely to be served by relying upon determinations of fact which turn out to have been erroneous; and (d) the court's discretion, like the rules of issue estoppel, as pointed out by Lord Upjohn in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 AC 853, 947, "must be applied so as to work justice and not injustice."

(2) The court may well wish to consider the importance of the previous findings in the context of the current proceedings. If they are so important that they are bound to affect the outcome one way or another, the court may be more willing to consider a rehearing than if they are of lesser or peripheral significance.

(3) Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will

result in any different finding from that in the earlier trial. By this I mean something more than the mere fact that different judges might on occasions reach different conclusion upon the same evidence. No doubt we would all be reluctant to allow a matter to be relitigated on that basis alone. The court will want to know (a) whether the previous findings were the result of a full hearing in which the person concerned took part and the evidence was tested in the usual way; (b) if so, whether there is any ground upon which the accuracy of the previous finding could have been attacked at the time, and why therefore there was no appeal at the time; and (c) whether there is any new evidence or information casting doubt upon the accuracy of the original findings."

[29] This analysis, which has been followed ever since, again points up the need for a principled flexibility in cases concerning children. As was noted by McFarlane J in *Re W (Care Proceedings)* [2010] 1 FLR 1176 at 1183, it shows that when deciding whether findings made in other proceedings should be reopened, the court will "above all" be influenced by the question of whether there is any reason to think that a rehearing of the issue will result in a different finding.

[45] I would therefore respectfully differ from the provisional view expressed in *Re G* and hold that the family court has the statutory power to review its own decisions and that challenges to findings of fact on the basis of further evidence do not have to be by way of appeal only. I would further suggest that, other things being equal, an application to the trial court is likely to be a more suitable course than an appeal. The trial court is likely to be in a better position than this court to assess the true significance of the further evidence, its advantage being all the greater if the findings are relatively recent, and if the matter can be considered by the judge who made them, as should always be the case if possible. Another reason for preferring an application to an appeal is that it is likely to be dealt with more quickly and at less expense. There will, however, be circumstances in which a return to the trial court will not be appropriate. That will certainly be the case where the applicant is alleging an error by the trial judge, regardless of the further evidence. Judges cannot hear appeals from themselves. There may be other situations, which it would not be possible or helpful to try to list, in which an appeal would be more appropriate than an application, but otherwise, an application should be the first port of call.

[48] The test to be applied to applications for reopening has been established in a series of cases: *Birmingham City Council v H* (No. 1) [2005] EWHC 2885 (Fam) (Charles J);

Birmingham City Council v H (No. 2) [2006] EWHC 3062 (Fam) (McFarlane J); and Re ZZ [2014] EWFC 9 (Sir James Munby P).

[49] These decisions establish that there are three stages. Firstly, the court considers whether it will permit any reconsideration of the earlier finding. If it is willing to do so, the second stage determines the extent of the investigations and evidence that will be considered, while the third stage is the hearing of the review itself.

[50] In relation to the first stage, these decisions affirm the approach set out in Re B (see para. 28 above). That approach is now well understood and there is no reason to change it. A court faced with an application to reopen a previous finding of fact should approach matters in this way:

(1) It should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality in litigation on the one hand and soundly-based welfare decisions on the other.

(2) It should weigh up all relevant matters. These will include: the need to put scarce resources to good use; the effect of delay on the child; the importance of establishing the truth; the nature and significance of the findings themselves; and the quality and relevance of the further evidence.

(3) "Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial." There must be solid grounds for believing that the earlier findings require revisiting."

Fact Finding

54. Where a party invites the court to make findings of fact they bear the burden of proof.

55. The burden of proof is the balance of probabilities: *Re B* [2008] UKHL 35.

Welfare

56. My paramount consideration is the welfare best interests of C: s.1(1) Children Act 1989 ('the 1989 Act').

57. I have taken account of the factors set out in the welfare checklist of s.1(3) of the 1989 Act.

58. Where there is a tension between the Article 8 rights of a parent, on the one hand, and the Article 8 rights of the child, on the other, the rights of the child prevail: *Yousef v. The Netherlands* [2003] 1 FLR 210.

Application for a Parental Order

59. The parents both deeply love C.
60. The legal issue is whether the provision of s.54(4)(a) of the 2008 Act is satisfied on the facts of this case when at the time of the making of the order the parents are separated and live in two separate households? It is agreed by all parties that all the other criteria of s.54 are satisfied in this case.
61. In the case of *A & B (No.2 – Parental Order)* [2015] EWHC 2080 (Fam) Theis J. observed:
- “If de facto family life is established, which it is submitted it is on the facts of this case, then there is a positive obligation to construe statutes in a way as to enable them to comply with the Convention [The European Convention on Human Rights].”
62. More recently in the case of *AB (Foreign Surrogacy – Children Out of the Jurisdiction)* [2019] EWFC 22 Theis J. said at paragraph 43 of her judgment:
- “I am quite satisfied taking a broad and purposeful interpretation of the term "home with", this requirement is satisfied. In any event s.3 of the Human Rights Act 1998 makes clear that primary legislation should be read in a way that is compatible with Convention rights. The children and the applicants' Art.8 rights are clearly engaged in their case, their Art.8 rights point towards the court seeking to be in a position to secure the children's legal position with the applicants, so that they may be able to enjoy family life together.”
63. I respectfully agree.
64. In the past C has lived with his mother and/or lived with his father. They provide him with all of his care needs and make all of the important decisions in his life. He now lives with his father but very regularly spends time every week with his mother. There can be no question that de facto family life is established on the facts of this case. I must read the provisions of s.54(4)(a) in a way that is compatible with the child's, the mother's and the father's Convention rights.
65. The parents are separated and, perhaps inevitably, there are difficulties in their relationship. They do not always agree on the care arrangements for C. These matters:
- i) do not undermine the fact that he is cared for by the two of them; and
 - ii) must be seen in the context of the transformative effect of a parental order by which his emotional, psychological, and social mother will become his legal mother.

The making of a parental order will bring inestimable benefits to C throughout the whole of his life.

66. The term ‘home’ must be given a wide and purposive interpretation. The authorities make clear that the term is not and should not be restricted to cases where the applicants live together under the same roof. It is the plain intention of the parents that C will be cared for by both of them, albeit not necessarily, and not at present, on the basis of an equal shared care arrangement. Giving a wide and purposive interpretation of the word ‘home’, I am satisfied that C has his ‘home’ with the father and the mother.

Application to Re-open the Findings of Fact

67. The application to re-open the findings of fact invited the court to re-consider:
- i) the father’s knowledge of, consent to and participation in the second surrogacy arrangement and the finding that the mother had deliberately concealed this arrangement from him and had procured the continued preservation of his genetic material;
 - ii) the father’s assault of the mother on 3rd February 2019 and of his abusive and controlling behaviour of her in the family home; and
 - iii) the father’s reliability as a witness of fact and thus, by extension, the mother’s reliability.
68. In support of this application the mother sought to rely on;
- i) the new transcripts and translation of the CCTV recordings of the events of 24th January 2020;
 - ii) the evidence in the statements of the maternal grandmother, G and the maternal uncle, H;
 - iii) the evidence of the notary public, LD; and
 - iv) an email of 1st December 2017 from LD to the mother in respect of the second surrogacy.
69. In the course of his evidence at the fact-finding hearing in January 2020 the father gave impassioned and, I find, entirely sincere evidence that the only two women he had ever loved in his life were his mother and the mother. Accordingly, it came as no surprise to me that the day after the conclusion of the fact-finding hearing the father sought to effect a reconciliation with the mother.
70. This led me to two clear conclusions:
- i) first, that I should treat what the father had said in the recorded conversations of the evening of the 24th January, with an eye to its context, with real caution and circumspection; and
 - ii) second, given that the father is a very private and singular individual who, for personal and, no doubt, cultural reasons, does not want the details of his family life to be widely known, he was immensely disappointed that his attempts to effect a reconciliation so swiftly proved to be unsuccessful.

71. He readily accepted in his subsequent statement and in his oral evidence that he had lied to the court in his evidence on 22nd April when he had denied taking flowers for the mother, entering the house, having a meal with the maternal family and spending a number of hours with them on 24th January. He said he deeply regretted lying to the court and explained that he had only done so because of his shame that he had failed to reconcile with the mother. He said he did not want the world to know of his failure. A witness lying to the court can never be condoned, but:
- i) I accept the father's explanation; and
 - ii) I find that it does not undermine or negate my previous overall finding as to the father's credibility.
72. Moreover, if the evidence of the recordings of the events of 24th January had been disclosed to the court and to the other parties prior to the father commencing his evidence on 22nd April, I am in no doubt that the father would not have lied to the court.
73. The father was criticised for some of his comments made during the meeting on 24th January for appearing to dissuade the mother from co-operating with professionals in this matter. I bear in mind the matters I have referred to in the paragraph above and I note, that whatever the father may have said in this meeting, he has never failed to co-operate with the social workers nor with the children's guardian.
74. The statements of the maternal grandmother and of the maternal uncle do not, in my judgment, materially assist the mother's case to re-open the fact-finding hearing. Neither make an assertion that the father admitted assaulting the mother on 3rd February 2019 nor that he admitted to having any knowledge of the second surrogacy arrangement. Indeed, in the maternal grandmother's statement she recorded the father's repeated denials of any such knowledge.
75. In her statement of 14th April 2020 the mother asserted, before any transcripts and translations of the CCTV of 24th January was available, that in the course of the father's visit to the mother's brother's home the father had admitted assaulting her on 3rd February 2019. By her next statement, after the initial transcripts and translation were available, this had been watered down so that the court should infer from his lack of comment or denials that he had admitted the assault. In her oral evidence the mother could not give any coherent or cogent explanation for the discrepancy between her two statements.
76. The statement of LD did not advance the mother's case in any material aspect at all.
77. The email from LD of 1st December 2017 was said to be relevant because in its subject title it referred to the second surrogacy and counsel then representing the mother had failed to draw the court's attention to this fact. The difficulty with this submission is that it could not be established that LD, as opposed to the mother, had introduced this subject heading into the email exchange between them and, moreover, there was no evidence that the father had been copied into and/or had had this email forwarded to him.

78. In the premises, I was satisfied that the application to re-open the fact-finding judgment was totally without any merit whatsoever and I dismissed the same.
79. The guardian and the local authority were exercised by some of the father's comments made during the recorded meeting on 24th January and the mother wished to seek a finding of financial, coercive and controlling behaviour by the father on the basis of some aspects of transcripts and translations of the CCTV recordings. I accordingly allowed, with some reluctance, for the same to be pursued at this second welfare hearing.

The Evidence

80. The mother's oral evidence in support of her assertion that the father had exercised financial, coercive and controlling behaviour over her was long and discursive. It may be summarised as follows:
- i) during the time the father was completing his professional training and/or gaining qualifications to further his career in this country, the mother supported him financially from her earnings and/or her savings;
 - ii) there was no assertion that the father had demanded or required her to do so;
 - iii) it was agreed between the parents that the mother would fund his training costs;
 - iv) the father, once qualified and working, had repaid a considerable amount of these sums, albeit not all, to the mother; and
 - v) the father was a careful controller of the family budget, which is entirely in keeping with the father's somewhat pedantic and meticulous approach to life.
81. The mother asserted that the father required her to account for every penny she spent.
82. In contrast to this assertion I note that:
- i) the mother's income was paid into an account or accounts in her sole name;
 - ii) the father's (more considerable) income was paid into the parties' joint account;
 - iii) the mother was readily able to and did withdraw £60,000 from the joint account to fund the second surrogacy;
 - iv) at the meeting on 24th January 2020 the father offered and then, the following day, did pay £10,000 to fund, at least in part, the mother's legal costs of these proceedings; and
 - v) when the issue of the obtaining of the transcription and translation of the recordings of the 24th January 2020 was raised, the father, during the course of a case management hearing, readily offered to pay for the same.

83. The mother said she accepted the findings made by the court in my judgment of 17th April 2020.
84. The mother explained why C should live with her and the twins. As an interim measure, prior to the introduction of C to the twins, she proposed that C should move from living with his father to living with her maternal family members until such time as he had been introduced to the twins. When he had been introduced to them, then he should move to live with her and the twins.
85. The mother appeared not to exhibit any understanding of the impact of these proposed arrangements upon C.
86. The father plainly still loves the mother.
87. He has struggled and continues to struggle with his view of and relationship to the twins. He repeatedly referred to them as the ‘innocent children’. I do not refer to his ‘struggle’ in any way critically. His genetic material was used without his knowledge or consent to produce two children. How would anyone react to this set of circumstances?
88. Human relationships are unbelievably complex and difficult to understand even by those most intimately involved. The father still loves the mother despite her actions in arranging a second surrogacy using his genetic material without his knowledge or consent. He deeply loves their son, C, and he spoke of the many positive qualities of the mother as a mother to C.
89. He also spoke of his need for time and space to deal with the fact that he now has two other children who are his biological children and he is their father. This I entirely understand.
90. At the conclusion of counsel’s closing submissions the father indicated he wished to speak. I agreed he could do so. He made an impassioned and emotional speech on behalf of himself and on behalf of the mother to thank the social work professionals, the lawyers and the court for all they had done to assist the parents with their disputes and issues. I considered it to be an entirely genuine and sincere speech. It plainly moved the mother to tears in its latter stages. I did not consider it to have been as some device to alter the court’s decision. It was plainly a heartfelt peroration.
91. It left me with a clear sense that, with time and space, the father may well, perhaps is likely, to come to accept the twins as his children, to wish to engage in a relationship with them, to love them and to want his beloved son, C, to know and love his half siblings.
92. The social worker accepted in the course of cross-examination by Mr Wilson, counsel for the father, that she had omitted a number of significant factors and features of the case, most notably my findings of fact, from her assessments and/or statements in this case. Accordingly, I do not place any great weight on her views and opinions.
93. In contrast the guardian has, in my judgment, a clear and incisive appreciation of the respective qualities and personalities of the father and of the mother and of the welfare needs of C. Therefore, I accord considerable weight to her views and

recommendations about the outcome which will best meet the welfare best interests of C.

94. The guardian did not consider this to be a finely balanced case. She was clear in recommending that C should live with his father and, at this stage, having visiting contact with his mother.
95. She explained why she sought the instruction of Dr. Pettle to advise the court on whether and, if so, the circumstances in which C should be told about his half-sister and half-brother, be introduced to them and how best this relationship could best be enabled to flourish. I agree.

Analysis

96. The mother asserted that she accepted my findings of fact made in my judgment of 17th April 2020. What she has accepted is that the court made those findings of fact but she still maintained that:
- i) the father assaulted her on 3rd February 2019, when I had found he did not, and
 - ii) the father knew all about the second surrogacy and had consented to it, when I had found he did not know and he had not consented.
97. In the same vein as her oral evidence during the fact-finding hearing, she almost continuously criticised the father and spoke of him in negative terms. At the outset of her evidence, for example, she claimed the father had ‘doctored’ an email in relation to his employment. There was not a jot of evidence to support this malicious and baseless allegation.
98. When challenged by Mr. Wilson about her relentless criticism of the father, she claimed she had moved on and that she wanted to move forward with the father in C’s best interest. Aside from these assertions, in no other aspect of her evidence did the mother demonstrate that she had changed at all or that she wished to move forward with the father.
99. For the avoidance of any doubt I do not accept that:
- i) this loving and devoted father ever made any threat to harm C, whether in anger and/or to antagonise the mother; or
 - ii) on 30th April 2020 he made threats to the mother in relation to her not being a biological parent of C.

In making these allegations the mother was, once again, lying.

100. The mother was completely unable to accept the harm she had caused C, not least, by pursuing a second surrogacy in X Country. This took her away from C for prolonged periods of time whilst she was in X Country looking after the twins. This second ‘undisclosed’ surrogacy has caused an immensely complex set of family relationships which will have to be explained to C and the twins.

101. The father is an intensely private man (see paragraph 69(i) above). He can be somewhat pedantic in his evidence and gave immensely detailed answers. He still loves the mother. He is plainly utterly devoted to C and gains a huge amount of joy from the child.
102. He has always co-operated with the professionals in this case and he has always listened to the court. He had wanted these proceedings to conclude at this hearing. He invited the court to make a live with child arrangements order in his favour and for the mother to have regular visiting contact with C. He also invited me to place a restriction on the mother's exercise of her parental responsibility. When I explained that I was minded to give permission for Dr. Pettle to be instructed in these proceedings to advise the court about the way forward for C and the twins, the father agreed.
103. I found there is no cogent or reliable evidence upon which I could conclude that the father is a flight risk and might abduct C.
104. The father's relationship with the maternal family is sadly not an easy one. There is no evidence that he has spoken of them critically in the presence of C. He has repeatedly told me of the importance he attaches to the mother's role in C's life. The guardian confirmed that she had never heard the father speak about the mother in negative terms.
105. I accept the mother has the ability to meet C's physical needs. On the basis, however, of the totality of the mother's evidence, I am satisfied that if he lived with his mother, the prospects of C enjoying or of being allowed to enjoy a relationship with his father are very poor.
106. On the other hand, I am entirely satisfied that if C continued to live with his father, he would be enabled and encouraged to have a loving, positive and beneficial relationship with his mother. Accordingly, I am satisfied and find that it is in C's welfare best interests to live with his father.
107. On the basis that these proceedings will be adjourned to await Dr. Pettle's report, the mother's contact will continue to take place once per week for four hours in the father's home town and once per week by indirect means. The mother's contact will move to Friday morning so as to better fit in with C's established routine. I will review the level of contact in the light of Dr. Pettle's advice and recommendations and I will consider whether I should accede to the father's request to place restrictions on the exercise of the mother's parental responsibility.
108. The issue of C living separately from his half siblings has not been relied on by any party. In the very unusual circumstances of this case, this was the appropriate course to adopt. C does not yet know of the existence of the twins and it has yet to be decided whether and how a relationship between them will be introduced.

Conclusions

109. I am wholly satisfied that it is in the welfare best interest of C that I made a parental order in favour of the mother and of the father.

110. I make none of the findings of fact sought by the mother against the father.
111. I am satisfied that it is in the welfare best interests of C that I make a child arrangements order that he live with his father and that he spends time with his mother, limited for the present to:
- i) weekly visits on a Friday between 9.30am and 1.30pm; and
 - ii) weekly indirect contact by skype or other remote platforms.
112. I give permission for Dr. Pettle to be instructed to advise the court on whether and, if so:
- i) how C should learn of the existence of his two half siblings;
 - ii) how he should be introduced to them; and
 - iii) how their relationship should be enabled to be developed.
113. I agree the time has now come to discharge the local authority as intervenors to these proceedings with my grateful thanks to the authority and to the social workers, who have been involved in this case, for the assistance they have rendered to the parents and to the court.
114. Whilst I well understand the father's initial desire for the proceedings to be concluded with final orders, I do not consider it to be in the interests of C to do so whilst I await the report of Dr. Pettle. Therefore, given there will be a hearing later this year, I propose to defer deciding the issue of whether I should restrict the exercise of the mother's parental responsibility, as sought by the father, to that hearing.
115. It was submitted on behalf of the mother that she had accepted the findings of fact which I made in the judgment of 17th April 2020 and that she wished to move forward with the father in the care of C. She now has the opportunity to demonstrate this resolve over the course of the intervening months before this matter returns to court when, hopefully, final orders will be made.