International Surrogacy Forum 2019

The Way Forward – General Discussion – Sir James Munby

I have always thought the mark of a good conference is that it teaches you how little you know and leaves you at the end much better informed; and on that basis, this conference has been the most spectacular success. I think our gratitude is owed to Jens, and the others who organized it, and to this amazing panoply of speakers and panellists we have been listening to over the last two days. My comments are brief, they are impressionistic. I apologize for the fact that they come from a lawyer, and even worse than that an English lawyer; so forgive my perhaps parochial view of life.

What I want to do is simply pick out some trends as they seemed to me, and some ideas, which seem to me to have emerged from the last two days. One is that, increasingly, there seems to be a general recognition that surrogacy is something which is *there* as a legitimate means of forming a family. But, of course, there is a very long way to go; and the two demonstrations of that are the Mennesson family, who spoke so powerfully yesterday, and the Spanish/Ukraine issue which has just been articulated. I will come back to the international problems.

One message which seemed to come through is that the earlier a state legislated, the more out of date that legislation is. There are in effect two demonstrations of that: the fascinating historical survey we were given of the USA position was immensely illuminating; and the work which the Law Commissions in this country are doing very much goes to make the same point. Our legislation in this country is elderly by any standards. It only works because of the judicial ingenuity which goes into making rules which are not fit for purpose actually work. So legislation is the way forward. Anything to do with reproduction nowadays, anything to do with surrogacy nowadays, marches forward at an incredibly fast pace; legislation may become out of date very quickly – reflecting both changes in science and changes in social attitudes. So the process of updating and keeping legislation up to date I suspect is an ongoing process which will not come to an end for a very long time.

Now, we had in terms of the programme, a very interesting conceptual distinction between four different approaches; and that analysis I think is very useful as a tool for understanding. One of the impressions I have got is that, in relation to the tolerant approach, the free-market approach, and the regulatory approach, they are in fact converging fairly rapidly; and although the American approach was placarded as the free market approach, I hope I will not offend our trans-Atlantic colleagues by saying that in fact the emphasis of what we were listening to was very much on regulation. And the impression I have is that wherever we have started from, we are increasingly moving towards a process and an approach which one might describe as regulatory.

Now, that leaves on one side the prohibitive approach, which I venture to suggest, it might be thought, is becoming increasingly anachronistic.

What is very troubling about the prohibitive approach is the very simple fact of life, that when one comes to matters like having a family, people will want to have families; and if they cannot have the family they want by staying within their own state, they will go abroad to find it. The consequence of prohibition, whatever it is that you are prohibiting, is that people go to find what they are looking for. And the consequence of that, very well-illustrated from different perspectives both by the Mennesson family case, and by the interesting discussion that we have just been listing to about the Spanish-created problems which our friend suggests are unfairly focussing on Ukraine (and I think he suggests it is a Spanish problem not a Ukrainian problem) but whatever it be, what those cases demonstrate is that the consequence of the prohibitive approach is to focus attention on what I call the rule of recognition. What in state A, whose people go to state B to have their child, is the rule of private international law which determines whether or not administrative or judicial processes in state B do or do not have recognition. And in essence, we heard very interesting material from France, where because of the French domestic approach to this, the focus of the private international law issue was in applying the French concept of the birth certificate in the case where there was a foreign birth certificate.

It is a very real problem, not least in this country (in England and Wales) where our rule of recognition is such, and very long established, that no foreign determination in a surrogacy case, whether it arises by operation of foreign law, or by operation of some foreign administrative process, or indeed some foreign judicial process, is recognised in England and Wales. And that is why we have the problem, which has been referred to more than once, of the limbo between the child coming back stateless, parentless in English law, and the point at which the parental order is made, if indeed the parental order is ever made.

Now, that is a very big problem. What is the way forward? Well, the impression I have is, as I say, that increasingly the view is, unless you are a prohibitionist, one wants to move to some system of regulation. One question which arises, and it is very neatly encapsulated in the comparison between what we were told about what goes on in the Republic of South Africa and on the other hand the UK Law Commissions' proposals, is the question of whether the process should take place before conception, or after the birth? As I understand it, in the Republic of South Africa it is a pre-birth process, and as you were told yesterday, the pathway being proposed by the English and Scottish Law Commissions is again for a pre-birth process. In contrast of course, the current English position is a post-birth process, which is the very thing which creates the limbo and all the other problems. So that one big question seems to me to be, if one is going to move to the regulatory position, does one adopt as a matter of principle a pre-birth process, or an ex post facto process? I have the impression from listening to the various contributions and papers that the consensus seems to be moving towards a pre-birth rather than a post-birth process.

Now that, it might be thought, is probably right for two quite distinct reasons. One is that you can only have, I suspect, real protections if there is an effective process of regulation pre-conception. And the reason for that, as we have discovered in this country and Lucy [Theis] hinted

at it just a few minutes ago, is that if you have a post-birth process and the judge is presented, if it is a judicial process, ex post facto with a live child who is living with X and Y, if you do not make the order, then the consequence in a jurisdiction like ours is that the child remains parentless and maybe stateless in a complete legal limbo. Therefore, whatever attention you pay to welfare, however carefully the welfare reports are put together, however much you try and focus on the best interests of the child, I suspect, and this seems to accord with a lot of discussion we have heard over the last two days, that the best protection for the best interests of the child is by a pre-conception rather than a post-birth process.

Now, another question which arises, and I am identifying issues rather than necessarily providing the answers, is should the process, whether pre-conception or post-birth, be a judicial process or an administrative process? There we have the interesting contrast between the South African model, which is unequivocally a judicial process, and on the other hand we have the proposals of the United Kingdom Law Commissions for a process which is not judicial and which one might describe as being administrative. Now which is better? That is not a matter I am going to hazard an answer to, although it may surprise you to hear that I have often thought, even as a judge, there are many things better left to mechanisms which are not judicial. But it does seem to me to be an important question, and it is one on which the Law Commissions have come to a very clear view. It is interesting to have the contrast, and that is one of the great advantages of these conferences: one discovers what is going on elsewhere.

Now, given the problems, in particular the private international law recognition problems, in relation to international surrogacy arrangements, what is the way forward? Well, one approach I suppose is model laws, and if one is going to have model laws, they have got to deal with two separate issues, it seems to me: What should the domestic law be? What should the minimum requirements within the domestic law state be? But even more critically, if one is going to have model laws, one needs model laws dealing with the rules of recognition, the private international law rules governing the consequences of trans-national/international surrogacy. And the more I listen to what we heard about the Hague Conference approach and the comments, it does seem to me that, probably, that is our best chance of moving forward and getting workable rules, at least in relation to the recognition issue. I suspect that given the different views held in different countries about the goodness or the badness, the appropriateness or inappropriateness of surrogacy – views which are often affected by cultural, religious, social, historical things – it is going to be difficult to establish any kind of international consensus on the substantive content of domestic law unless it is, as has been suggested, to establish minimum requirements of an appropriate regime. It may be that the single most important way forward is to encourage the Hague machinery to move as fast as possible. That is not a criticism of them, these things take time, and we were delicately hinted at that the pace of the activity of the Hague expert group is determined by what governments do. But given that the Mennesson family case and the Spanish thing which we have just been hearing about are so fundamental in terms of the human consequences for the people involved, it does seem to me that what as a lawyer I call the rule of recognition, the private international law rules, are those which most urgently need our attention, and which may soonest get us where we need to get to.

It was profoundly moving listening to the members of the Mennesson family yesterday, as indeed it was listening to the other presentations by women who have been actually involved in the process, to realise and bringing home to us the human realities of all this. When one just pauses to think, we heard hints of it this morning in the presentation of the research from India, we have heard it in the last few minutes in terms of the Spanish families who are trapped in Ukraine and Georgia and elsewhere because of the actions of their own government it appears, the human misery must be immense. Although, of course, as family lawyers we all think that the interests of the child are paramount, you cannot have a happy child if you have miserable parents. And one cannot ignore the, dare I say, inhumanity of a system of international non-regulation which permits what earlier was described as a Wild West if the consequences of this are that, to take up the example you have just heard about, there are Spanish families trapped in Ukraine and not so far as I can understand the responsibility of Ukraine, directly.

Now, just two final observations. It is easy to analyse this in legal terms, particularly if you are a lawyer. But two big issues which have been hinted at from time to time over the last couple of days but which perhaps because they are so distressing to think about are the elephants in the room are first of all, looking at it from one point of view, the risks of exploitation of surrogate mothers. We have all known in our professional careers of the most shocking exploitation in the context of international adoption of mothers in financially deprived circumstances, mothers in what conventionally are called third world/developing countries, who have been the victims of exploitation; and it would be idle to imagine that that is not going on even as we speak in the context of international surrogacy. It was a very interesting and illuminating analysis we had this morning of the research which we were given a preview of in relation to the surrogate mothers in Gujarat.

Well, that is one side of the issue. The other side of the issue which was touched upon yesterday – and this goes to the question, What should the regulatory mechanisms be? What should the protections be? – is that because regulatory systems, particularly if they involve judicial proceedings, cost money, any system of that sort is privileging the wealthy over the less wealthy.

So behind all the legal analysis, behind many of the issues we have been talking about, there are two issues, which reflect wealth on the one hand or deprivation on the other hand, which one cannot help feeling do have a significant role to play. So, we need to think about that, and the cost of regulatory systems, particularly if they involve judicial proceedings, are perhaps matters to be taken into account when one considers what kind of system one wants for the future. If you want a regulatory system, How pervasive? How expensive?

The American systems we have heard described are immensely impressive. They are, to use a well-worn English analogy, the absolute Rolls Royce approach. But when one hears that, for example, part of an American regulatory process is that the intended parents are expected to foot the bill for all the services being provided to the surrogate mother, some of them on a regular basis, it does raise very starkly the issue – I have no idea what the answer is – that it is a system which as the price to be paid for achieving the right solution in one direction is actual creating a privilege for the wealthy which is denied to the less wealthy.

Now those are just a few random thoughts. I would like to think that in three or four years' time, Jens, you can organise another conference on this topic where there will be fewer storm clouds and where we will have a tremendous report from the Hague conference, but who knows! But for the moment I must shut up, you all want your lunch. Thank you all very much for coming here. I hope you have all enjoyed it as much as I have, and a tremendous vote of thanks, Jens, to you and your team, the speakers, and not forgetting the foot soldiers if I can call them that, who have been so helpful to us, pointing us in the direction to go and so on and so forth.

Thank you all very much indeed. I have gone away much better informed, I hope a little wiser. You probably knew it all already, but anyway there we are. Many, many thanks to all of you.