THE SUPREME COURT

Record No: S:AP:IE:2022:000014

BETWEEN:

A, B and C
(A MINOR SUING BY HIS NEXT FRIEND, A)

APPLICANTS/RESPONDENTS

And

MINISTER FOR FOREIGN AFFAIRS AND TRADE

RESPONDENT/APPELLANT

And

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

SUBMISSIONS ON BEHALF OF THE AMICUS

Introduction

1. The focus of the *Amicus Curiae* ('the Commission') in this appeal is on whether the State has a duty, having regard to its obligations under Articles 40.1, 40.3.1, 41 and 42A of the Constitution, to ensure that a child born through a surrogacy arrangement can avail of the Irish citizenship of their non-genetic parent.

2. The Commission believes that there is such constitutional duty, derived from the right to equality before the law in Article 40.1, the right to protection of personal rights in Article 40.3, the rights of the family in Article 41 and the rights of the child in Article 42A.

3. Properly construed in accordance with the double construction rule, it is necessary to interpret s.7 of the 1956 Act so as to include in the definition of 'parent' a non-biological parent who is recognised in law as the parent of a child born through a surrogacy arrangement.

4. The Commission submits that the words of s.7 of the 1956 Act are sufficiently ambiguous that a more expansive process of interpretation is necessary and appropriate.

5. In the event the section cannot be so read, its validity is in question. In any case, the failure of the State to provide for a pathway to birthright citizenship for such surrogate children is unlawful.

Regulation of surrogacy

6. There is no international consensus on how to regulate surrogacy, but there is consensus on the need for regulation. In the preface to the *Principles for the protection of the Rights of the Child born Through Surrogacy* (the "Verona Principles", February 2021), it is noted:-

> *"Regardless of their stance on surrogacy, be it prohibitive or permissive, States must urgently create safeguards to ensure the fundamental rights of children born through surrogacy arrangements. Leaving the matter unregulated clearly entails serious risks for all parties involved and, in particular, children themselves."*

7. In the ECtHR's '*Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother'* (P16-2018-001, 10 April 2019) the Court referred to a survey of 43 Council of Europe Member States, which established that surrogacy arrangements were permitted in nine States and tolerated in a further ten. In half of the other 24 States, which either expressly or implicitly prohibited surrogacy, adoption by the intending parents was possible.

8. Despite the apparent prohibition on surrogacy in some States, the ECtHR has held that Article 8 ECHR requires State Parties to provide for the possibility of recognition of parent-child relationships arising from surrogacy; at a minimum, in all cases involving a genetic link between the child and at least of one of the intended parents.

9. The Government commissioned a report on surrogacy and donor-assisted human reproduction by the Special Rapporteur on Child Protection, Professor Conor O'Mahony: *A Review of Children's Rights and Best Interests in the Context of Donor Assisted Human Reproduction and Surrogacy in Irish Law* (December 2020).

10. Professor O'Mahony noted that the general trend of international law was towards heightened regulation rather than outright prohibition of commercial surrogacy. Addressing the question of whether it was more desirable to prohibit or to regulate, he continued, at p.7:

> *'In answering this question, international human rights law, as subscribed to by Ireland, points decisively towards regulation rather than prohibition. In her most recent thematic report on surrogacy to the UN General Assembly in 2019, the UN Special Rapporteur stated:*
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> > *"In light of the global demand for surrogacy, even the most domestically prohibitive States must deal with the consequences of surrogacy arrangements, and it is therefore in the best interests of children to ensure that there is a clear decision-making framework in place to provide clarity and certainty."*
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> *As a party to both the Convention on the Rights of the Child (CRC) and the ECHR, Ireland is legally obliged to comply with at least this minimum obligation. It should be*

noted that the ECHR decisions have led to courts in prohibitionist States such as France and Germany adapting their jurisprudence to allow for a pathway to parentage for intending parents engaged in international surrogacy arrangements. Therefore, since blanket prohibition is not an option, the focus must shift from whether regulation should be pursued to what form of regulation is optimal from a children's rights perspective. In this regard, it is worth noting that Ireland's failure to regulate surrogacy to date has had negative consequences for Irish families who have engaged in both domestic and international surrogacy arrangements. Children and parents have been left in vulnerable legal positions for lengthy periods of time due to the failure of the Oireachtas to legislate to address their status.'

11. In a 2017 study by *Families Through Surrogacy* involving 90 countries, Ireland was found to have the second-highest rate of surrogacy arrangements.[1]

Absence of Irish legislation

12. Despite its relative prevalence, surrogacy remains entirely unregulated in Irish law, a fact noted by this Court in *M.R. v An t-Ard Chláraitheoir* [2014] 3 IR 533. Murray J (as he then was) said at para. 147 that: *"Although there is no law either authorising or regulating surrogacy in any form, it is not unlawful, as such".*

13. It is not acceptable for the State to leave a large number of families and children in a legal limbo. The absence of legal regulation is in itself failure by the State to have due regard for the rights of individuals, a failure made all the more egregious by reason of the known need for same. The absence causes significant difficulty to those seeking to use surrogacy, including married heterosexual couples with problems conceiving a child of their own, and married same-sex couples.

14. *M.R.* related to an application to register a genetic mother on a birth certificate, following a domestic surrogacy arrangement. Seven members of the Supreme Court expressed concern at the failure by the State to legislate in this area. McMenamin J. noted that the need for legislation had been clear since the mid 1990s, when the problems had been highlighted by academics and by family law practitioners.

15. O'Donnell J. (as he then was) commented that the State had *'shamefully'* failed to legislate in respect of surrogacy. He continued:

'[211] It is surely most clearly and profoundly wrong from the point of children born through an unregulated process into a world where their status may be determined by happenstance, and where simple events such as registration for schools, attendance at a doctor, consent to medical treatment, acquisition of a passport and even joining sports teams may involve complications, embarrassment and the necessity for prior

[1] The report is referenced in "Irish surrogacy rates are world's highest", The Times, 7th October 2018 accessible at https://www.thetimes.co.uk/article/irish-surrogacy-rates-are-worlds-second-highest-pg2krhw50

consultation with lawyers resulting in necessarily inconclusive advice. This court in clear and forceful terms drew attention to the absence of regulation in its decision in Roche v. Roche [2009] IESC 82, [2010] 2 I.R. 321. The need for legislation is even more urgent today.'

16. O'Donnell J, having acknowledged that the maxim *mater semper certa est* applied in the context of birth registration, said that:

> *"[243] ... From a human point of view it is completely wrong that a system, having failed to regulate in any way the process of assisted reproduction, and which accordingly permits children to be born, nevertheless fails to provide any system which acknowledges the existence of a genetic mother not merely for the purpose of registration, but also in the realities of life including not just important financial issues such as inheritance and taxation, but also the many important details of family and personal life which the Constitution recognises as vital to the human person. Very different issues would arise in such circumstances."*

17. During the *M.R.* case, this Court was informed that the Department of Justice had published the draft heads of a general scheme of a Children and Family Relationships Bill 2014, of which Part 5 purported to make provision for surrogacy arrangements. As enacted, the Children and Family Relationships Act 2015 contained no law on surrogacy.

18. No legislation has been enacted in the intervening eight years. The failure by the State to regulate the practice of surrogacy in a timely manner has led to mounting problems of interpretation of existing legislation, as the facts of this case demonstrate.

19. The general scheme of the Assisted Human Reproduction Bill 2017 has been published. This Bill focuses on the regulation of domestic surrogacy arrangements and on donor-assisted human reproduction. It does not address the issue of international surrogacy, save to propose that it would be prohibited. However, as noted by McMenamin J. in *M.R.*:-

> *"[582] ... These questions should not be put "on hold". Some of the issues which arose in this case will, in some other guise, arise again soon. Science does not stand still, especially in exploring the frontiers of human existence by use of assisted human reproduction."*

20. The Commission also notes that the *Oireachtas Joint Committee on International Surrogacy* has been established to consider and make recommendations on measures to address issues arising from international surrogacy. The Joint Committee has been meeting recently and engaged in public consultations.

Respondents are a Constitutionally Protected Family

21. The first and second named Respondents are a married couple. Their family is founded on this valid marriage. They have a right and obligation to cohabit and to mutually support each other. They have the right to make decisions for their family.

22. Together with their children, they constitute a family within the meaning of Article 41. Their family is a fundamental unit group of society and is a moral institution possessing inalienable and imprescriptible rights. The State is obliged to protect this family in its constitution and authority.

23. In *Gorry v Minister for Justice* [2017] IECA 282, both Finlay-Geoghegan and Hogan JJ. held that the guarantee to protect its constitution is in the sense of the composition of the family. The authority of the family is to make joint decisions concerning their family, and spousal autonomy is a core constitutional value.

24. They enjoy the right to marital privacy, a right founded in both Article 40.3 and Article 41.

25. In *Zappone v Revenue Commissioners* [2008] 2 IR 417 the High Court (Dunne J.) held, in the context of a claim of discrimination as between the recognition of partnership heterosexual and same sex couples, that the State was entitled to adopt a cautious approach to changing the capacity to marry until such time as the state of knowledge tested the welfare of children reared in same sex families was more advanced.

26. That has been superseded by the terms of the thirty-fourth Amendment of the Constitution, now Article 40.4.

27. As a married couple, the first and second Respondents have a right to exercise spousal autonomy and to determine the composition of their family.

28. Married couples, be they heterosexual or same sex, have the right to found a family, which is necessarily a right to found a family of their own. This is obviously not an absolute right, see *Murray v Ireland* [1985] IR 532. As with heterosexual couples who have difficulties conceiving, a same-sex couple require will assistance to do so.

29. Nonetheless, concomitant with the terms of Article 40.4, coupled with the equality guarantee in Article 40.1, the first and second named Respondents as a married couple have a right to pursue having children, subject only to the strict necessity of public policy and the welfare of children.

30. As regards public policy, given the rights engaged, any basis for restricting the right to found a family of their own must be strictly construed. Given that the first and second Respondents are the parents of the children in the *lex loci* of their mutual domicile, the substantially incontestable harm test cited in *H.A.A. v S.A.A.* [2017] 1 IR 372 may be appropriate:-

"[45] However, the authors of Dicey, Morris & Collins state clearly that the doctrine of public policy must, when applied in the field of the conflict of laws, be kept within proper limits since otherwise 'the whole basis of the system is liable to be frustrated.' It should be invoked only 'in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds' (citing Fender v. St John-Mildmay [1938] A.C. 1)."

31. In that case, the Supreme Court held at para.114 that all persons are to be considered as equal before the law pertaining to marriage, which is a partnership based on equality of rights, mutual commitments and mutual respect.

32. As regards the welfare of children that is to be applied on a case-by-case basis. There is no issue as to the welfare of the third Respondent at issue herein.

The Constitution requires protection of the right and dignity of children born through surrogacy and of their families

33. A distinction must be drawn between the right of the State to regulate or even prohibit aspects of the practice of surrogacy, the duty of the State to respect and vindicate the personal and familial rights of the persons and the duty to protect the best interests of the child.

34. The question of whether there is a constitutional duty on the State to ensure recognition of the familial surrogate relationship, in the various ways in which it falls to be properly recognised, has not been definitively addressed, in particular since the enactment of Article 40.4. In this regard, *obiter* comments made by several of the members of the Supreme Court in *M.R. v. An tArd Chláraitheoir* presaged the subsequent finding in the ECtHR case of *Mennesson,* that pursuant to the ECHR, states are obliged to ensure appropriate recognition of the parent-child relationship in the context of surrogacy.

35. The value of dignity referred to in the Preamble is a key value underlying the protection of the person; see *Simpson v the Governor of Mountjoy Prison* [2020] 1 ILRM 81.

36. Pursuant to Article 42A of the Constitution, the State affirms *'the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights'*.

37. All children are entitled to the protection of their rights and welfare regardless of the circumstances of their birth.

38. A child born through surrogacy is as entitled as any other child to the recognition and protection of their familial relationships. Such relationship are '*at the highest level of our legal order*' (per McKechnie J. in *M.R.* at para.393). These protections can be seen as an aspect of the child's dignity, their personal rights and their family rights or rights *qua* child.

39. This protection must be real and effective and relate to the child's actual lawfully-recognised parents. There is a right to have one's identity correctly recognised by the State; see *Habte v Minister for Justice* [2020] IECA 22.

40. A failure to recognise the parent-child relationship in the context of surrogacy is liable to adversely impact '*the many important details of family and personal life which the Constitution recognises as vital to the human person'.* (per O'Donnell J. in *M.R.*) This adverse impact includes a denial of citizenship. It is notable that O'Donnell J. in *M.R.* referred to the potential difficulty that could arise for a child born through surrogacy in the context of *'an application for a passport'* and how this could lead to complications, uncertainty and embarrassment.

41. The Commission submits that a denial to a child of the citizenship of their parent may adversely affect their life prospects and well-being in a number of ways: including the creation of a two-tier status within the family, whereby some children are Irish and thereby EU citizens and the other child is not.

42. In this instance, the surrogate child is being denied Irish citizenship and European Union citizenship, which is a real prejudice. A denial to a surrogate child of the citizenship of the non-genetic parent also has a stigmatizing effect and undermines the bonds between them. Such a state of affairs would clearly not be in the best interests of the child, to the extent that there is no obvious basis on which a denial of citizenship could be justifiable.

43. It is difficult to envisage a legitimate or proportionate basis on which the State could constitutionally introduce legislation seeking to draw a distinction in respect of children born through surrogacy, in the context of citizenship. While the Appellant has suggested that it was in fact the intention of the Oireachtas to deny citizenship to children of non-biological parents, it is hard to see how such a purpose would be constitutionally permissible, in light of the impact of that denial on such a child.

44. Interlinked with the requirement to treat human persons with dignity, is the requirement to treat persons equally. In this case the third named Respondent is entitled to equal treatment *inter alia* with his sibling.

45. While acknowledging the outcome of the *Gorry* case and the conclusion therein that the imprescriptible rights of the Family in Article 41.1.1° are limited in their content, a rule of law that would create a two-tier structure within a family in respect of citizenship could potentially harm the family in its 'constitution', in one important sense of that word (if not in the sense intended by Article 41). For example, if certain family members enjoyed a higher level of protection and rights than others as Irish and EU citizens, that state of affairs could have practical and psychological consequences not just for individual family members, but also for how they interact as a family unit.

46. This is to recognise that the duty to protect the family also engages Articles 40.1, 40.3 and 42A and not just Article 41.

47. The Appellant relies on s.16 of the 1956 Act, which provides for citizenship through naturalization, as an alternative option for a child born through surrogacy. An analogy may be drawn with the case of *Mennesson*, where the ECtHR held that adoption could be valid means of recognition of the parent-child relationship provided it was available in a speedy and certain way. The process of naturalization does not address a failure to provide for birthright citizenship. Naturalization is granted on a discretionary basis and it can be revoked in certain circumstances. Thus, it would not appear to be an adequate substitute for birthright citizenship as it is not a guaranteed route to recognition of the relationship and would lead to a disparity in the status of family members.

48. At the least, the third named Respondent is entitled to treatment akin to that of an adopted child, as his position is closely aligned (thought arguably better) to such child. However, unlike an adopted child, if the Appellant is otherwise correct in his appeal, there is no provision of the 1956 Act to provide for birthright citizenship to a surrogate child. Apart from any substantive unlawfulness, this is a failure to treat like children alike.

49. It appears that adoption is not available to the first and second Applicants given their status as parents of the third Applicant.

The meaning of 7(1) of the Irish Nationality and Citizenship Act 1956 Act is not so plain as to exclude the Trial Judge's preferred interpretation

50. Before considering the proper interpretation of s.7 of the 1956 Act, it may be of assistance to refer to the underlying principles to be applied in the interpretive process.

51. The Appellant relies in the first instance on an 'isolationist' approach to statutory interpretation. He asserts that the words of s.7 are so plain that no further analysis is required. The Appellant relies on the words 'citizen from birth' to contend that it is at the time of the child's birth that their citizenship status is determined and that the Irish citizen parent must be the parent at the time of birth.

52. The Commission acknowledges that this interpretation may, at first impression, seem the more obvious one.

53. However, further consideration of seemingly plain words by an interpreting court can reveal that a provision not only bears, but requires, an alternative interpretation. As noted by Walsh J in *East Donegal Cooperative v Attorney General*:

> *'until each part of the Act is examined in relation to the whole it would not be possible to say that any particular part of the Act was either clear or ambiguous'.*

54. An Act must be read as a whole; see *Bederev v. Ireland* [2016] 3 I.R. 1. In this instance the legislation is envisaged by Article 9 of the Constitution whereby the acquisition of nationality and citizenship is to be determined in accordance with law. Citizenship and nationality are fundamental features of a person's identity. Nationality is the expression of a genuine link to a country and is a fundamental status.

55. Moreover, at least two other interpretative criteria must be applied to the section: the presumption of constitutionality and the interpretive obligation contained in s.2 of the ECHR Act 2003. This Court must consider whether s.7 can be given a constitutionally-compliant and Convention-compliant interpretation.

56. The enactment must be read so as to comply with the requirements of the Constitution, in so far as this is possible. This permits a Court, where necessary, to give words and sentences a less obvious meaning, so as to dispel doubts about the constitutionality of the section.

57. *Dodd, Statutory Interpretation in Ireland* says as follows at [11-50]:

> *'The approach to whether a constitutional interpretation is 'reasonably open' can vary from case to case. In some cases, the court is willing to go quite some considerable lengths in deviating from the literal meaning in order to absolve the Oireachtas from an unconstitutional meaning. In others, emphasis is placed on the need for some ambiguity before a constitutional meaning can be said to be reasonably open. The extent to which the literal meaning can be deviated from, in order to render the provision constitutional, may involve a weighing up of the degree of linguistic malleability of a provision and the plainness of intention of the legislature, understood not only from the intention supplied by the presumption but also from other criteria such as the Act as a whole.*

58. Thus, it is not possible to apply a purely isolationist approach, such as that urged by the Appellant. That approach would not be consistent with how the Courts approach statutory interpretation, in practice. As noted by *Dodd*:

> *'[2.74] Any reading of cases that is taken to be endorsing a wholesale isolationist approach to interpretation must be treated with some caution. A court's adherence to the isolationist approach may vary on a case-by-case basis, depending on such factors as the degree of plainness or ambiguity of the provision in question and the criteria sought to be relied upon. The isolationist approach can, at least in some judgments, appear to be more a rhetorical conclusion of the judicial processing of a particular enactment, rather than a rule that constrains that interpretive process. Practitioners may be permitted to draw a court's attention to various interpretive criteria in order to support a particular interpretation and, to that end, raise a doubt as to the meaning of a provision that may appear plain on the face of it. A court may well be satisfied after consideration of such criteria that the first impression meaning is the correct one, either because it is plain and gives rise to no other meanings or is one of a number of*

meanings that best gives effect to the legislature's intention. It is only after hearing and/or reading submissions and considering interpretive criteria supporting an alternative interpretation that a court may conclude that the provision is plain and no interpretive criteria need, in fact, be considered.'

59. On behalf of the Commission, it is submitted that properly interpreted in context the definition of '*citizen from birth'*, s.7 is ambiguous and not so obviously clear as to foreclose on the meaning found by Barrett J, i.e. that '*citizen from birth'* meant that at the time of the birth of the child, the person who is their parent must have been an Irish citizen.

60. This is bolstered by a consideration of the purpose of the section pursuant to s.5 of the Interpretation Act 2005. Barrett J. correctly concluded that the purpose of the section was to prevent a situation where a person gains Irish citizenship and then seeks to assert that their own existing children have become Irish citizens too as a result.

61. It appears implausible that there was separate specific legislative purpose to limit the capacity to pass on citizenship to biological parents only. There would have been no reason to do provide for this. Outside of the context of adoption, there was no other category of potential non-biological parent in respect of whom it was necessary to ensure that they would not be capable of passing on citizenship to their children.

62. The existence of s.11, which provides citizenship through adoption, tends to support the conclusion that it was not the intention of the Oireachtas that only biological parents could pass on citizenship to their children. Section 11 is best seen as a *lex specialis*. It should not be read so as to fossilise the words of the 1956 Act to the date of enactment.

63. In 1956 surrogacy was not available and a non-biological parent (including one in a same-sex marital family) could not have been contemplated as a parent.

64. The Appellant suggests that the Courts cannot set out to reinterpret the section, so as to provide for radical social and scientific developments. The Interpretation Act 2005 allows for an 'updated construction' of a word such as 'parent' in the 1956 Act to take account of modern usage. While a word's essential meaning cannot be altered by application of an updated construction, the meaning can be updated to encompass modern developments that fall within the definition of the word.

65. This is particularly true where there are significant societal, scientific and legal developments from the date of enactment, and the absence of any updating legislation.

Recognition of UK Order

66. The Commission considers that there is relevance to the fact that the first Respondent is recognised as a parent in UK law, where the family is domiciled. The proper regulation of surrogacy in the UK means that the order by which the first Respondent was recognised as

a parent was obtained through a safe and reputable system, with independent judicial oversight.

67. The definition of parent may legitimately include a non-biological parent of a child born through surrogacy. It is also accepted that generally speaking, the Respondents' domicile ought to determine their status in Irish law, outside of the context of statutory interpretation.

68. A failure to recognise the first Respondent's parenthood is to create a limping parenthood, with another common law neighbouring State such that their parenthood is recognised in that State, but not in this State. Such a situation is an anathema to the best interest of a child.

69. Thus, there must be good reason for not recognising the UK parental order, akin to test of substantially incontestable harm as cited in *H.A.A. v S.A.A.* [2017] 1 IR 372.

70. It is accepted, notwithstanding the UK Order, that the interpretation of the 1956 Act is a matter for Irish courts.

Potential outcomes

71. The Commission submits that the Respondents are entitled to *mandamus* to compel the provision of a passport pursuant to s.7.

72. Such an outcome depends on the interpretation of s. 7 by the High Court being upheld. It is submitted that this is appropriate. It is submitted that this is compelled by the fundamental constitutional and ECHR rights engaged.

73. The primary issue to be resolved on this appeal is whether the word 'parent' in s.7 requires to be construed, consistent with the Constitution, as including a non-biological parent of a child born through surrogacy. If the Court concludes that the section would require to be so read, but cannot be so read, then it would follow that the section would be inconsistent with the requirements of the Constitution, notwithstanding the double construction test and the presumption of constitutionality.

74. The constitutional protections that arise in the context of surrogacy require an interpretation of s.7 of the 1956 Act that includes, as a 'parent', the non-biological parent of a child born through surrogacy. The interpretation urged by the Appellant would, at a minimum, lead to doubt over the constitutionality of the section and in fact, would render the section inconsistent with Articles 40.1, 40.3, 41 and 42A of the Constitution.

75. A declaration of unconstitutionality is not a relief that has been sought. It has not been considered by the High Court, nor has it been expressly addressed by the parties. Nonetheless, in its role as *amicus*, the Commission draws the Court's attention to the jurisprudence on the issue, in the event that it falls to be considered.

76. The question of whether a declaration of unconstitutionality can be made on appeal where it had not been raised in the High Court was considered by the Supreme Court in *Blenhien v Murphy* [2009] 1 I.R. 275, Denham J (as she then was) held as follows:

> *'Parties, including the Attorney General, have the right to have the issues argued fully in the High Court. Issues may be reargued on appeal to the Supreme Court. The Supreme Court is the final court of appeal in Ireland and most of its jurisdiction is appellate. To this there are a few exceptions. In exceptional circumstances the Supreme Court will consider issues of constitutional law which have not been argued in the High Court. The jurisprudence was explained by Finlay CJ in Attorney General (SPUC (Ireland) Ltd) v. Open Door Counselling Ltd (No. 2) [1994] 2 IR 333; [1994] 1 ILRM 256 at pp. 341–342/262, when he stated that the Supreme Court has:*
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> > *... consistently declined, otherwise than in the most exceptional circumstances, dictated by the necessity of justice, to consider an issue of constitutional law which, though arising in a case not yet determined by it, has not been fully argued and decided in the High Court.*
>
> *Applying this jurisprudence to the facts of this case, there are no exceptional circumstances to invoke the exception to the rule and I would refuse the application of the plaintiff.*
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> *The plaintiff also invoked Article 34.3.2° and submitted that it envisaged an issue of the validity of a law being raised for the first time in the Supreme Court. Certainly the word 'raised' could mean that the matter may be argued first in the Supreme Court. However, this may only be done in exceptional circumstances. The scheme of courts established under the Constitution envisages a High Court which has original jurisdiction including the question of the validity of any law. No court other than the High Court and the Supreme Court has jurisdiction to consider the validity of any law. Article 34.3.2° describes this special jurisdiction of the High and Supreme Courts. It does not envisage that cases will routinely raise the issue of the validity of any law for the first time in the Supreme Court. Indeed, the Constitution specifically protects the appellate position of the Supreme Court on cases which involve questions as to the validity of any law: Article 34.4.4°. Consequently, this submission by the plaintiff also must fail.*
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> *...*
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> *It is not usual for the Supreme Court to allow amendments to a notice of appeal so as to add a ground not argued in the High Court. In Movie News Ltd v. Galway County Council Supreme Court 1973 No. 65, 15 July 1973, Henchy J stated that the Supreme Court should not include additional grounds not argued before the High Court. He said that the Supreme Court:*
>
> > *... should not — except for exceptional reasons which do not exist in this case under the guise of an appeal, enter on the trial of a matter as of first instance*

and thereby deprive the party aggrieved with its decision of the constitutional right of appeal which he would have if that matter had been decided in the High Court.

I agree with this statement of the law and would apply it to this case. There being no exceptional reasons, the additional grounds of appeal, being matters not argued in the High Court, should not be permitted. Not only would the parties be deprived of a hearing in the High Court prior to an appeal but so too would the Attorney General.'

77. In *Blehein,* the Attorney General had not been a party in the High Court (the Defendants being the plaintiff's wife, two doctors and three gardai who had taken him to St John of Gods against his will). In this case, the parties have not changed, bar the addition of the *amicus*.

78. In *Fox v The Minister for Justice* [2021] IESC 61 this Court considered constitutional arguments, notwithstanding that no such arguments had been made in the High Court or Court of Appeal.

79. It must also be recognised that issues concerning surrogacy in the circumstances outlined herein are rarely before the Court.

80. It is submitted that insofar as s.7 cannot be read to cover the situation of a surrogate child, there is an unconstitutional gap in the legislation.

81. In such a circumstance, this Court has the jurisdiction to grant a relevant Declaration.

82. It is respectfully submitted that this Court ought to consider making a Declaration to the effect that by failing to provide for a legislative route to birthright citizenship to a child born following surrogacy, whose non-genetic parent is an Irish citizen the State has breached the rights of the third Respondent under Articles 40.1, 40.3, 41 and 42A of the Constitution.

83. This Court held in *Carmody v Minister for Justice* [2010] 1 IR 635 that where a party asserts that a law is both unconstitutional and should be the object of a declaration of incompatibility pursuant to s.5 of the European Convention of Human Rights Act 2003, the issue of constitutionality must be decided first, since the latter is not a remedy capable of resolving the dispute between the parties.

84. If the Court concludes that no constitutional remedies are available, then this Court ought to make a Declaration of incompatibility as between s.7 of the 1956 Act and Article 8 of the European Convention on Human Rights. For the avoidance of doubt, the Commission does not duplicate but agrees with the arguments of the Applicants concerning the ECHR as set out in their written submissions.

May 27th 2022

Word Count: 5,850

Mark Lynam BL
Conor Power SC